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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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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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

PMD BROKERAGE CORP. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 00-1163.
Decided December 19, 2000.

(Cite as 234 F.3d 48 (D.C. Cir. 2000)).

Rules of practice – Oral decision – Bench decision – Issuance – Service – Timeliness of appeal.

The United States Court of Appeals for the District of Columbia Circuit reversed the Judicial Officer's order denying late appeal to the Judicial Officer. The Judicial Officer found PMD Produce Brokerage Corporation (PMD) filed its appeal to the Judicial Officer of an administrative law judge's oral decision more than 35 days after the administrative law judge issued the decision. The Judicial Officer concluded that, under the Rules of Practice, the administrative law judge's oral decision had become effective and PMD's appeal was not timely filed. The Court found 7 C.F.R. §§ 1.142(c)(2) and 1.145(a) ambiguous because the Rules of Practice do not indicate that "issuance" of an oral decision under 7 C.F.R. § 1.142(c)(2) is considered "receiving service" for the purposes of appeal under 7 C.F.R. § 1.145(a). The Court granted PMD's petition because neither the Rules of Practice nor any other action by the Secretary provided fair notice to PMD that "issuance" of the administrative law judge's oral decision under 7 C.F.R. § 1.142(c) was "receiving service" for purposes of appeal to the Judicial Officer under 7 C.F.R. § 1.145(a).

United States Court of Appeals
District of Columbia Circuit

Before: **WILLIAMS**, **ROGERS** and **TATEL**, Circuit Judges.
Opinion for the Court filed by Circuit Judge **ROGERS**.
ROGERS, Circuit Judge:

PMD Produce Brokerage Corporation challenges the dismissal, as untimely, of its appeal of an administrative law judge's decision that it violated the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-s ("PACA").[1] PMD contends that the Secretary of Agriculture's Rules of Practice Governing Formal Adjudicatory Proceedings, *see* 7 C.F.R. §§ 1.142(c), 1.145(a) (2000), are ambiguous regarding

[1] *See In re PMD Brokerage Corp.,* PACA Docket No. D-99-0004 (Dep't of Agric. March 31, 2000); *In re PMD Brokerage Corp.,* PACA Docket No. D-99-0004, 2000 WL 202696 (Dep't of Agric. Feb. 18, 2000).

the time to appeal and, further, that it reasonably relied on statements of the Administrative Law Judge and the Hearing Clerk regarding the deadline for filing an administrative appeal. Because §§ 1.142(c) and 1.145(a) are ambiguous, as confirmed by contrary interpretations within the Department of Agriculture, we hold that the Secretary did not give fair notice of his interpretation of § 1.142(c)(2) as requiring an appeal to be filed within 30 days of issuance of an administrative law judge's oral decision. Accordingly, because the Secretary was arbitrary and capricious in dismissing PMD's appeal, we grant the petition.

I.

The Secretary, acting through the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, filed an administrative complaint on November 16, 1998, alleging that PMD had violated § 2(4) of PACA, 7 U.S.C. § 499b(4), by willfully failing repeatedly to make full payment promptly to 18 sellers of 633 lots of perishable agricultural commodities that it had purchased and received. On November 12, 1999, the Department filed a motion for a bench decision, a proposed findings of fact and conclusions of law, and a proposed order, in accordance with § 1.142(b) of the Secretary's Rules of Practice, 7 C.F.R. § 1.142(b).[2] After hearing testimony, the Administrative Law Judge orally announced his decision. The Judge found that PMD had violated PACA and recommended revocation of PMD's license as a dealer and merchant of perishable agricultural products under PACA, 7 U.S.C. §§ 499c, 499h(a). The Judge directed that his decision and order be published pursuant to the Rules of Practice and stated: "This decision will become final without further proceedings 35 days after service of this decision, unless [PMD] appeals this decision, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145)." The Judge thereafter excerpted his oral decision and filed the written excerpt on November 30, 1999.

By letter dated December 1, 1999 to PMD's counsel, the Hearing Clerk enclosed "a copy of the Bench Decision, issued . . . on November 30, 1999." The letter stated that "[e]ach party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer." The

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[2]Section 1.142(b) provides, in relevant part:

> Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof.

7 C.F.R. § 1.142(b) (2000).

letter also instructed PMD "to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal."

On January 7, 2000, PMD filed with the Department's Judicial Officer a petition seeking reversal of the Judge's decision, and, alternatively, a new hearing. Following receipt of the Department's response, the Judicial Officer denied PMD's appeal for lack of jurisdiction. The Judicial Officer, relying on §§ 1.142(c)(2) & (4) of the Rules of Practice, found that the Judge's oral decision was issued on November 17, 1999 and became effective 35 days thereafter, on December 22, 1999. Because PMD's appeal was not filed before the decision became effective, the Judicial Officer ruled that he lacked jurisdiction to hear the appeal, citing Department precedent under the Rules of Practice.[3] Because he lacked jurisdiction to hear PMD's appeal, the Judicial Officer issued an order that the Judge's oral decision of November 17, 1999 was the final administrative order. The Judicial Officer denied PMD's petition for reconsideration.

II.

On appeal, PMD contends that the Secretary's Rules of Practice, specifically §§ 1.142(c)(4) and 1.145(a), are internally inconsistent.[4] The ambiguity arises, PMD maintains, because the Rules of Practice do not indicate that "issuance" of an oral decision under §§ 1.142(c)(2) and (4) is to be considered "receiving service" under § 1.145(a). PMD points out that § 1.142(c)(4) provides that an oral decision becomes effective 35 days after issuance, while § 1.145(a) provides that a party has 30 days after "receiving service" of the Judge's decision to appeal. "Clearly," PMD contends, "receiving service of the Judge's decision is a form of notice of entry requirement, that requires serving a copy of the written decision on the parties before the time to appeal begins to run." In addition, PMD contends that it reasonably relied on the statements by the Judge and the Hearing Clerk that the Judge's opinion did not become effective until 35 days after service because they

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[3]The Judicial Officer noted that the Secretary's interpretation of his Rules of Practice, treating time limits as jurisdictional, is consistent with the judicial construction of Federal Rule of Appellate Procedure 4(a)(1) and 4(a)(5)(A) and the Administrative Orders Review Act, *see* 28 U.S.C. § 2344, as interpreted in *Illinois Central Gulf Railroad Co. v. ICC,* 720 F.2d 958, 960 (7th Cir. 1983). *See Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000); *Energy Probe v. United States Nuclear Regulatory Comm'n,* 872 F.2d 436, 437 (D.C. Cir. 1989); *see also Marine Mammal Conservancy, Inc. v. USDA,* 134 F.3d 409, 410-11 (D.C. Cir. 1998).

[4]Although PMD's brief refers to § 1.142(a)(4), there is no such subsection and it is obvious that PMD intends to refer to § 1.142(c)(4).

would not intentionally misinform a party about the time to appeal. The court reviews the Secretary's decision dismissing PMD's appeal to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

The Secretary states that he has consistently interpreted the Rules of Practice to divest the Judicial Officer of jurisdiction to hear an appeal of an administrative law judge's decision that has become effective. *See, e.g., In re Toscony Provision Co.,* 43 Agric. Dec. 1106, 1108-09 (Dep't of Agric. 1984) (order denying late appeal) and Department orders cited. Further, he states that PMD had actual notice from the Judge's oral ruling on November 17, 1999 that his decision would be final in 35 days unless an appeal was filed pursuant to § 1.145. Having failed to file an appeal before December 22, 1999, the Secretary maintains that PMD's contention that the court should disregard the jurisdictional nature of § 1.142(c)(4) is meritless. In other words, although not expressly stated in his Rules of Practice, the Secretary has interpreted "issuance" of an oral decision under § 1.142(c)(4) to mean "receiving service" for purposes of § 1.145(a).

The Secretary explains, in his brief on appeal, that the bench decision procedures of § 1.142 are designed to allow expedited proceedings in disciplinary cases where the violation is so patent that "the usual opportunity for the parties to submit written findings of fact and conclusions of law is unnecessary." Under these circumstances, the Secretary contends, "[n]o good reasons exist for delaying the imposition of the order of the [J]udge." Perhaps not. Indeed, on the basis of this rationale, the court could readily view the Secretary's interpretation of § 1.142(c)(4) as reasonable. *Cf. Veg-Mix, Inc. v. USDA,* 832 F.2d 601, 608-09 (D.C. Cir. 1987). The question before the court, however, is not whether the Secretary's interpretation of the Rules of Practice is reasonable, but whether the Secretary has given fair notice of his interpretation that "issuance" of an oral opinion pursuant to § 1.142(c)(2) is "receiving service" for purposes of taking an appeal under § 1.145(a). *See United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *Rollins Environmental Servs. (NJ) Inc. v. EPA,* 937 F.2d 649 (D.C. Cir. 1991); *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n,* 790 F.2d 154 (D.C. Cir. 1986).

The dismissal of PMD's appeal implicates the Secretary's obligation to give fair notice because the sanction of dismissal of its appeal petition as untimely forecloses relief from revocation of its license under PACA. In *Satellite Broadcasting Co. v. FCC,* 824 F.2d 1 (D.C. Cir. 1987), the court explained:

> Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule. The

> dismissal of an application, we have held, is a sufficiently grave sanction to trigger this duty to provide clear notice.

Id. at 3 (citations omitted). In that case, an applicant for FCC licenses had failed to file its application in the proper location. *See id*. at 2-3. The court observed that the rules, taken as a whole, were conflicting. *Id*. at 2. Thus, while an "agency's interpretation [of its own rule] is entitled to deference, [ ] if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation." *Id*. at 4. Because the FCC had not provided fair notice of its interpretation of the relevant rules, the court held that it had acted arbitrarily and capriciously in dismissing the license applications, and that the applicant was entitled to reinstatement of the applications *nunc pro tunc*. *See id*.

Similarly, in *General Electric Co. v. EPA,* 53 F.3d 1324 (D.C. Cir. 1995), the court deferred to the agency's reasonable interpretation of its rules but held that the agency could not fine a private party for failure to comply with a rule interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective." *Id*. at 1330. Most recently, in *Trinity Broadcasting of Florida, Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000), the court rejected the agency's contention that its regulation requiring an entity to be "minority-controlled," *id.* at 628, provided fair notice of its interpretation of the regulation as mandating that non-profit organizations demonstrate *de facto* minority control and not simply a majority-minority board. *See id*. at 625, 628-30. The court likewise rejected the agency's contentions that agency statements and other agency action provided fair notice of its interpretation. *See id*. at 628-31. Therefore, the court reversed the denial of an application for renewal of a broadcast license. *See Trinity Broadcasting*, 211 F.3d at 632.

Here, the question is whether the Secretary's rules gave PMD fair notice of the time within which it had to appeal the Judge's decision.[5] Two sections of the Secretary's Rules of Practice are implicated. Section 1.142, addressing when an Administrative Law Judge's decision becomes effective, provides in relevant part:

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[5]On appeal, the Secretary has abandoned the Judicial Officer's alternative position, in denying reconsideration, that PMD's appeal was untimely because it was filed 31 days after PMD was furnished a copy of the Bench Decision by the Hearing Clerk. PMD claims first, that it did not receive the Bench Decision until December 7, 1999, and second, that under agency precedent, the Judicial Officer can grant an extension of time "if an appeal [i]s inadvertently filed up to 4 days late, e.g., because of a delay in the mail system. . . ." *In re Scamcorp, Inc*., 55 Agric. Dec. 1395, 1996 WL 678862, at *6 (Dep't of Agric. Nov. 7, 1996); *see also id.* at *7.

> 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) (2000) (emphasis added).[6] Section 1.145, addressing appeals, provides in relevant part:

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

7 C.F.R. § 1.145(a) (2000) (emphasis added).

As the Secretary points out, §§ 1.142(c)(2) & (4) clearly describe when a Judge's opinion, whether oral or written, becomes effective. Similarly, § 1.145(a) clearly states there is a 30-day period within which to appeal the Judge's decision. But the triggering event under § 1.145(a) is "receiving service," and the Rules of Practice at no point state that "issuance" of an oral opinion under § 1.142(c)(2) is deemed "receiving service" for purposes of § 1.145(a). In other words, the Secretary's Rules of Practice are silent regarding whether "issuance" of an oral decision under § 1.142(c)(2) is "receiving service" for purposes of noting an appeal under § 1.145(a). Thus, PMD could not simply read the Rules of Practice and know that this was so. Nor would the purpose of expedition, which the Secretary asserts is the underlying rationale for the procedures in § 1.142(c), compel an interpretation of the regulations, much less give fair notice, that "issuance" is to be equated with "receiving service" under § 1.145(a). *Cf. Trinity Broadcasting,* 211 F.3d at 629-30.

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[6]Section 1.142 also provides:

> If the [Administrative Law Judge's] 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.

7 C.F.R. § 1.142(c)(2) (2000).

At oral argument, the Secretary agreed that the period after which an opinion becomes effective is different from the period in which a party may note an appeal.

Of course, the Secretary may utilize means other than the language of his Rules of Practice to give adequate notice of his interpretation. *See, e.g., General Elec.*, 53 F.3d at 1329. However, the Secretary points to no action, such as public statements or pre-enforcement efforts, that would have informed PMD of the Secretary's interpretation. Instead, the statements by the Judge and the Hearing Clerk demonstrate that the Rules of Practice were ambiguous regarding the time period for appealing an oral bench decision. *See id.* at 1330-32. Each statement erroneously referred to "service" as the event triggering the 30-day appeal period and, consequently, neither statement informed PMD that the appeal period had been triggered by the Judge's oral issuance of his opinion on November 17, 1999. Such statements, it could be argued, justify application of a "unique circumstances" exception. *Prudential-Bache Securities, Inc. v. Fitch,* 966 F.2d 981, 984-86 (5th Cir. 1992) (construing Fed. R. App. P. 4(a)); *cf. Moore v. South Carolina Labor Bd.,* 100 F.3d 162, 164 (D.C. Cir. 1996). Under the unique circumstances doctrine, "appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was mislead to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline." *Id.* at 163.

In denying PMD's petition for reconsideration, the Judicial Officer made three principal points. First, he noted that PMD had been furnished with a copy of the Secretary's Rules of Practice, which are also published in the Federal Register, and that PMD's reliance on the statement of the Hearing Clerk was "misplaced." Yet the Rules themselves were, at best, unclear on the critical point for PMD. The lack of clarity was exacerbated by the Judge's statement, which appeared to be consistent with the statement of the Hearing Clerk.

Second, the Judicial Officer emphasized that the only decision issued by the Judge was announced at the November 17, 1999 hearing. The written Bench Decision later received by PMD was merely an excerpt from the transcript of the earlier hearing. Hence, the Judicial Officer concluded that the reference to "this decision" in the Judge's Bench Decision furnished to PMD, as well as the references in the Hearing Clerk's December 1, 1999 letter, were all references to the oral decision issued on November 17, 1999. The Judicial Officer also recognized, however, that the references to the Judge's decision were "not without ambiguity." Further, the fact that the only decision in the case was the Judge's oral decision begs the question. The question is whether the Rules of Practice, or other action by the Secretary, provided fair notice of which event–"issuance" or "receiving service"–triggered the appeal time under § 1.145(a).

Third, the Judicial Officer found that the statements by the Judge and the Hearing Clerk that the decision would become effective 35 days after service, rather

than after issuance, were "error" because the only decision in the case was the oral decision issued on November 17, 1999. Acknowledging further that there was an ambiguity in the statements made to PMD by the Judge and the Hearing Clerk because both failed to distinguish between the November 17, 1999 oral decision and the written Bench Decision when informing PMD of the period to appeal, the Judicial Officer nevertheless appeared to conclude that a simple reading of the Rules of Practice sufficed to give fair notice to PMD. In that regard, for reasons already discussed, he erred. Moreover, any similarity between the Secretary's interpretation of § 1.145(a) as a jurisdictional bar and judicial construction of Federal Rule of Appellate Procedure 4 and the Administrative Orders Review Act, 28 U.S.C. § 2344, as presenting jurisdictional bars to untimely appeals, *see supra* n.3, does not address whether the Secretary provided fair notice of his interpretation of § 1.142(c).

Accordingly, because neither the Secretary's Rules of Practice nor any other action by the Secretary provided fair notice to PMD that "issuance" of the Judge's oral decision under § 1.142(c) was "receiving service" for purposes of noting an appeal under § 1.145(a), we grant the petition.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

EAST PRODUCE, INC. v. SEVEN SEAS TRADING CO., INC., a/t/a VALLEY VIEW FARMS.
PACA Docket No. R-97-0142.
Decision and Order filed August 14, 2000.

Jurisdiction.

The Department does not have jurisdiction to resolve the issue of an alleged "joint venture" agreement where the complaining party's cause of action accrued in 1992 and the party in question failed to pursue its cause of action until 1997, well beyond the nine month statute of limitation under the PACA. Respondent alleges in its counterclaim that it entered into a joint venture agreement with Complainant to provide consulting services in exchange for 2% of the 18% commission that Complainant was receiving in connection with a separate marketing agreement with a farmer in Mexico. The alleged oral contract covers the years from 1991-1996 and the Respondent did not request payment of its consulting fees until 1997, although Complainant was being paid its commission fees on a yearly basis under the marketing contract with the Mexican farmer.

Kimberly D. Hart, Presiding Officer.
John Watkins, Glendora, CA, for Complainant.
Wesley Chen, White Plains, NY, 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*.), hereinafter referred to as the Act. A timely informal complaint was filed in which Complainant seeks a reparation award against Respondent in the amount of $60,472.00 in connection with the sale of various fruits and vegetables, perishable agricultural commodities in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon Respondent, which filed an answer thereto, denying the allegations of the complaint and asserting a counterclaim. The counterclaim was served on Complainant. Complainant filed a timely reply to the Respondent's counterclaim.

Since the amount claimed as damages exceeds $30,000.00 and the Respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on November 3, 1998, in New York, New York and further testimony was taken by

telephone conference on November 9-10, 2000, due to the various scheduling conflicts before Kimberly D. Hart, Presiding Officer. The Complainant was represented by John F. Watkins, Esq. and Nolan E. Clark, Esq. of Watkins & Watkins located in Glendora, California and the Respondent was represented by Peter Meisels, Esq. of Serchuk & Zelermyer located in White Plains, New York.

After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law as well as briefs in support thereof and claims for fees and expenses. A deadline of April 6, 2000, was imposed for both parties. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department in accordance with the Rules of Practice and neither party elected to file objections to the opposing party's claim for fees and expenses within the time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)).

Findings of Fact

1. Complainant, Far East Produce, Inc., is a corporation whose mailing address is 1040 S. San Julian Street, Los Angeles, California 90015. Complainant is licensed under the Act.

2. Respondent, Seven Seas Trading Co., Inc. a/t/a Valley View Farms, is a corporation whose mailing address is 119 Christie Street, New York, New York 10002. At the time of the transactions alleged herein, Respondent was licensed under the Act.

3. Complainant, on or about February 29th and May 17, 1996, sold to Respondent, in the course of interstate commerce, thirty-six (36) lots of mixed fruits and vegetables, being perishable agricultural commodities, at the agreed contract price totaling $68,006.50. Complainant shipped the produce to Respondent on or about February 29th through May 17, 1996, in accordance with the oral contract and the produce was received and accepted by the Respondent upon arrival. Respondent remitted a partial payment in the amount of $7,534.50 to complainant, leaving a remaining balance due in the amount of $60,472.00. Respondent has failed to pay complainant the remaining amount due for its produce purchases. Complainant admits that it owes Respondent $2,223.00 for box charges in connection with other produce transactions to which it agrees to an offset to the amount owed by Respondent. Therefore, Respondent has failed to pay Complainant in the amount of $58,249 for its produce purchases after allowance of the offset in the amount of $2,223.00.

4. The informal complaint was filed on July 25, 1996, which is within nine months from when the cause of action accrued.

Conclusions

There are three major issues to be resolved in this decision. The **first** issue is whether Complainant has carried its burden of proving that Respondent owes it for produce purchases in the amount of $60,472.00. The **second** issue is whether Respondent is entitled to a further offset on any amounts found to be owing to Complainant for its produce purchases for alleged transportation costs that it incurred on behalf of Complainant and compensation for box charges. The **third** issue is whether the Department has jurisdiction over Respondent's counterclaim alleging that Complainant owes it approximately $250,000 in "consulting fees" in connection with the growing, marketing and sale of the Podesta Farm produce from 1991 to 1996, and if so, whether Respondent has carried the burden of proving its counterclaim. There was a great deal of testimony taken in relation to the issues in question and the presiding officer is charged with the responsibility of judging the credibility of the witnesses' testimony. The credibility of the witnesses will be a major factor in deciding on the issues as well as the weight accorded to the voluminous documentation introduced into evidence.

As the moving party, Complainant bears the burden of proving its case that Respondent owes it for produce purchases received and accepted in accordance with the contract terms. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The party with the burden of proof must meet the preponderance of evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). Complainant has submitted evidence documenting the produce transactions at issue including invoices and transportation documents that reflect the shipping of the pertinent produce to the Respondent (*see Exhibit no. 1 contained in the report of investigation*). Respondent, in its answer, generally denies Complainant's allegations but admits the "receipt of certain shipments of produce from Far East during the time period alleged (*see Respondent's answer to formal complaint*). The complaint does not specifically state the terms of contracting for the loads in question, however, the transportation documents do indicate that the respondent, as purchaser, was responsible for the freight charges associated with the shipping of said produce. "In an f.o.b. transaction, the buyer is responsible for paying freight . . . ." *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979). In addition, case law precedent dictates that ". . . the existence of f.o.b. terms are [sic] are assumed when the contract is silent as to the terms of delivery. *Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, 1225 (1983). See UCC § 2-503, Comment 5. See also J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 5-2, page 143 (1972). Based on the foregoing, we find that the produce transactions in question were subject to f.o.b. terms.

Complainant has submitted persuasive evidence to support its allegation that the produce was shipped to respondent on the various dates. In a f.o.b. transaction, the Regulations mandate that "the buyer assumes all risk of damage and delay in transit not caused by the seller". 7 C.F.R. § 46.43(i). There is no evidence to suggest that there were any problems encountered during the transportation of the produce in question. In addition, the Respondent is responsible for the produce in f.o.b. transactions even if it never receives the produce as long as the seller has not caused problems in the shipment of the produce such as lack of reasonable care in the selection of the transportation company or failing to give proper shipment instructions. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436 (1972); *Gilmer Packing v. D.L. Piazza Co.*, 21 Agric. Dec. 783 (1962). Therefore, Respondent is deemed to have received and accepted the produce in these f.o.b. transactions. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

Respondent has not alleged any breach of contract by the seller that would entitle it to damages but Respondent does allege that the agreed upon contract prices were incorrectly noted by Complainant on its invoices and were later modified by mutual agreement of the parties. The party who alleges a modification of the contract terms bears the burden of proving such allegation. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F.H. Hogue Produce v. Singer's Sons*, 33 Agric. Dec. 451 (1974). According to Respondent, three (3) of the thirty-six (36) produce transactions at issue were invoiced incorrectly by the complainant despite the fact that the parties had mutually agreed on different contract prices prior to shipment. Respondent contends that invoice #159798 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; invoice #160136 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; and invoice #160209 was incorrectly billed at $18 per box versus the agreed upon price of $15 per box (Tr. at 81-85). Respondent also contends that it contacted Complainant about the price discrepancies and the parties mutually agreed that the contract prices would be modified to $15.00 per box for each of the three invoice numbers (Tr. at 84-85). Respondent submitted its purchasing and receiving record for the three different shipments which reflect that the original price was quoted as $25 per box but was later changed to $15 per box for invoice #159798 (Rx-TT) by Respondent's employee. The purchase and receiving records for invoice #s 160136 and 160209 (Rx-RR & Rx-SS) indicate an original price of $15 per box versus the prices contained in Complainant's invoice for the same transactions.

Complainant's principals testified that its records do not reflect price modifications for any of the three relevant transactions and that, while Respondent did contact Complainant subsequent to shipment to request a change in the price, Complainant declined to grant the reduction because the proceeds from those transactions had already been reported to the farmer at the originally invoiced prices (Tr. at 23-30, 265-67). Complainant also submitted, as evidence, a copy of a letter, dated July 1996, sent to Respondent in response to its request for a price modification which basically mirrors the testimony provided at hearing (*Exhibit 1a in report of investigation*). Respondent has submitted no evidence to persuade us that the alleged price modifications were agreed to by the Complainant. In addition, we find Complainant's witnesses to be more credible in their testimony that the Respondent was billed correctly the first time and that it never agreed to any modification of the original contract prices for these three invoices. Therefore, we conclude that Respondent has not carried its burden of proving that the original contract prices were incorrectly reflected on the invoices or that the parties mutually agreed to a modification of the original contract prices for invoice numbers 159798, 160136 and 160209. We have previously concluded that the produce was accepted by the Respondent, that there was no evidence of breach of contract on Complainant's part and that there was no modification of the original contract terms. Therefore, Respondent is liable to Complainant for the full contract price of $68,006.50 for the thirty-six (36) lots of produce in question. Respondent has remitted a partial payment in the amount of $7,534.50, leaving a remaining balance due of $60,472.00.

Respondent has claimed several offsets to the amounts owed to Complainant for these produce purchases. It has been long held that "a party may offset losses from one produce transaction by deducting them from payment due on another." *McMillan Brokerage Co. v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950 (1973); *Pilgrim Fruit Co., Inc. v. Valda Wooten*, 28 Agric. Dec. 260 (1969). However, Respondent still has the burden of proving that it is due money from a produce related transaction in order to obtain an offset. Respondent's first offset claim relates to 2,340 boxes of snow peas delivered to Complainant on or about March 28, 1996, for which Complainant allegedly agreed to compensate the Respondent in the amount of $2,223.00 for the cost of the boxes. Respondent contends that Complainant failed to compensate it for the cost of the boxes as previously agreed by the parties. The issue was discussed at hearing and Complainant admits that it indeed owes Respondent the amount of $2,223.00 for the cost of the boxes and does not contest offsetting this amount from any sums found to be due to it on the produce transactions at issue. Therefore, we conclude that Complainant owes Respondent in the amount of $2,223.00 for boxes supplied

to Respondent and that this amount shall be offset against the $60,472.00 owed to Complainant for the produce transactions at issue.

The second offset claimed by the Respondent is for trucking fees amounting to approximately $8,344 allegedly owed by Complainant in connection with five different produce transactions shipped to it from the respondent's seller, Buena Vista Farms, on or about March 6th, 12th, 17th, 21st, and 27th, 1996 (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH). We note at the outset that the produce contained in these five shipments were not part of the produce transactions contained in the complaint. The produce transactions contained in second offset allegation originated from Respondent's shipper, Buena Vista Farms and not from the shipper of the produce contained in the complaint (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH).

Although a party is allowed to offset losses from one produce transaction from another, there is a jurisdictional requirement applicable to freight related claims. "This forum lack jurisdiction over the subject matter when there is only a transportation contract in issue, which contract is not related to a produce transaction which is in issue." *Maine Banana Corp. v. Walter Davis*, 32 Agric. Dec. 983 (1973); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884 (1956). Since the produce transactions at issue in Respondent's alleged freight offset are separate from the transactions at issue in the complaint, we cannot reach the question of whether the offset is proper and can be allowed. Therefore, Respondent cannot be allowed to offset the freight costs that it allegedly incurred on Complainant's behalf.

The third offset claimed by the Respondent is for alleged "consulting fees" due in conjunction with a contract between the parties by which Mr. Tan, respondent's president, would assist complainant in providing consulting services to Podesta Farm in exchange for a 2% of the 18% commission being paid to the complainant in connection with a separate marketing contract entered into between Complainant and Podesta Farm for the sale of perishable agricultural commodities grown on the Podesta Farm from 1991 to 1996.[1] According to Respondent, Complainant was party to a marketing contract with Podesta Farm to market all of its produce in exchange for an 18% commission from the sales generated from the produce. According to Respondent, its two percent (2%) "consulting fees" were to be paid by Complainant from the 18% commission paid to Complainant, in connection with its marketing contract with Podesta Farm, which was based on the total sales of

[1]Respondent originally asserted in its counterclaim that the alleged 2% commission to be paid to Mr. Tan was based on all of Complainant's total sales from 1991 to 1996 but modified the basis of its claim at hearing.

produce generated from the Podesta Farm. Respondent alleges that it entered into a oral contract with the Complainant in 1991 to provide "consulting services" such as advice on the type of commodities to plant, growing techniques, seed choices and other general subjects relating to the growing of produce on the Podesta Farm in order to increase the profitability of the marketing agreement between complainant and Podesta Farm.

Mr. Tan asserts that he made several trips to Mexico with Respondent's principals prior to the terms of the "consulting contract" being finalized and thereafter (Tr. at 10-31). Mr. Tan testified that he mainly dealt with Albert Wu regarding the "consulting contract" who was the person who suggested the use of Mr. Tan's services to Complainant's primary principals (Tr. at 24-25, 154, 162). Mr. Tan asserts that, pursuant to the "consulting contract", there was no specific provision as to when payment of the consulting fees would take place, although they were to be computed on a yearly basis. Respondent's Mr. Tan stated that payment of the consulting fees was never requested from Complainant during the years 1991-1996 because Respondent felt that it would be best to wait until the Podesta Farm operations became more profitable (Tr. at 73-74).

There were two checks, totaling approximately $5,000, issued to Mr. Tan individually from complainant in 1991, that were allegedly portions of commissions due Respondent from Complainant. Mr. Tan testified that the parties' business relationship deteriorated when Albert Wu was terminated by the Complainant in 1996 (Tr. at 72). The evidence at hearing established that Complainant's principals, Camilla and John Lim, terminated the employment of Albert Wu on April 15, 1996 (Cx-D). According to Mr. Tan, it was not until after Mr. Wu was terminated effective April 15, 1996 that he realized that Complainant had no intention of continuing the "consulting contract" or paying Respondent the commissions due from 1991-1996 pursuant to the contract.

Complainant denies that it entered into any kind of "consulting agreement" with Respondent or Mr. Tan, verbal or otherwise, for the provision of services in connection with the planting, harvesting and sale of vegetables from its marketing agreement with the Podesta Farm. Complainant admits that Mr. Tan accompanied Mr. Lim and Mr. Wu on several trips to the Podesta Farm in early 1991 when it was considering entering into an agreement with the owners of the Podesta Farm to market their produce (Tr. at 34-42). Complainant also does not deny that it entered into a contract with Podesta Farm to act as its marketing agent in exchange for an 18% commission which was to be based on the total proceeds generated from the sale of the Podesta Farm produce. However, Complainant does deny that it entered into a contract with Respondent by which it would pay Respondent 2% of its 18% commission for consulting services.

Mrs. Lim testified that the checks that were issued to Mr. Tan were not for

consulting services pursuant to the alleged "consulting contract" but rather money given to Mr. Tan by Mr. Wu for another reason while he was still employed with Complainant and had check signing authority. In support of its position that Respondent and Mr. Wu concocted the story of the alleged "consulting contract" after Mr. Wu was terminated, Complainant points to the fact that Respondent initially alleged, in its counterclaim, that it was to receive a two percent (2%) commission on all produce sales generated by Complainant from 1991 to 1996. However, Respondent, at hearing, changed its claim to the contract providing for Respondent to receive two percent (2%) commission for the produce sales generated from the Podesta Farm only (Tr. at 172-73). In addition, Mr. Wu created a sworn affidavit, at the behest of Mr. Tan, which basically mirrored Mr. Tan's original assertion of the two percent (2%) commission on all of Complainant's produce sales from 1991-1996 (Tr. at 249-51) (*Exhibit B as attached to Respondent's answer and counterclaim*). At hearing, Mr. Tan testified that its original assertion was merely a misstatement (Tr. at 172-73) and Mr. Wu testified that he was also initially mistaken in his affidavit regarding the manner in which the commission was to be computed (Tr. at 249-51).

There was a great deal of testimony provided and documents submitted, at hearing, in support of both parties' position. However, it is Respondent who bears the burden of proving first and foremost that the Secretary would have jurisdiction over the alleged "consulting contract" since Complainant challenges the Secretary's jurisdiction over this counterclaim. If jurisdiction can be established, Respondent must overcome its burden of proving the existence of verbal contract and there terms therein. There are four basic jurisdictional requirements under the Act: (1) the transaction must involve "perishable agricultural commodities" (7 U.S.C. § 499a(4)); (2) the transaction must involve "interstate or foreign commerce" (7 U.S.C. § 499a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. § 499f(a)); and (4) Respondent must be a licensee under the Act or operating subject to the licensing requirements of the Act (7 U.S.C. § 499d(a))." *Jebavy-Sorenson Orchard Company v. Lynn Foods Corporation*, 32 Agric. Dec. 529 (1973).

Respondent alleges that Mr. Tan entered into an agreement with Complainant whereby he was to provide consulting services, on behalf of Respondent, in the form of "expert advice" as to the best kind of seeds to plant to obtain optimal results and other issues surrounding the successful planting and harvesting of the oriental vegetables on the Podesta Farm. Mr. Tan testified that he possesses a great deal of expert knowledge on the planting of Oriental vegetables that benefitted the Complainant by increasing the profitability of the marketing arrangement between Complainant and the Podesta Farm (Tr. at 21-24, 31-35). The statute requires that the transaction[s] involve a perishable agricultural commodity and Respondent

alleges that Mr. Tan provided advice on the planting of produce which was to be subsequently sold by Complainant on behalf of Podesta Farm for an eighteen (18) percent commission fee. Although Respondent was not to be directly responsible for the sales of the produce, he was to share in the proceeds derived from the sale of the Podesta Farm produce in exchange for his consultation services on the planting and growing of produce on the Podesta Farm. The Secretary has recognized similar types of contractual arrangements, sometimes referred to as "joint ventures" which have been deemed to satisfy the first jurisdictional requirement of the statute. *See Eady v. Eady & Associates*, 37 Agric. Dec. 1589 (1978). Therefore, we find that Respondent has satisfied the first jurisdictional requirement of the statute.

Second, Respondent must demonstrate that the produce transaction[s] occurred in interstate or foreign commerce. For a party to be liable, it must have a contractual relationship involving the purchase and sale of produce – transportation, or the sale of bags, separate from the sale of produce is not such a relationship. *E.J. Harrison & Son v. A.E. Albert & Sons, Inc.*, 24 Agric. Dec. 884 (1965); *Reid & Joyce Packing Co. v. G.W. Touchstone*, 15 Agric. Dec. 884 (1956); *Anonymous*, 4 Agric. Dec. 332 (1945). The Podesta Farm is located in Mexico and the produce grown on that farm was being shipped from Mexico to various destinations within the United States. We find that the evidence contained in the record is sufficient to establish that the "consulting contract" would have involved produce transaction[s] occurring in interstate or foreign commerce which satisfies the second jurisdictional requirement of the statute.

Third, Respondent must demonstrate that its action within nine months from when the cause of action accrued. A cause of action accrues at the time when the right to institute and maintain a suit arises which is the time that the event occurs and not at the time when a party discovers the facts or learns of his rights thereunder." *Calava Growers of California v. International Food Marketing, Inc.*, 40 Agric. Dec. 972 (1981); *Fresh Pict Foods v. Consumer's Produce*, 29 Agric. Dec. 163 (1970). *See also Louisville Cement Co., Inc v. Interstate Commerce Commission*, 246 U.S. 638, 62 L.Ed 914, 38 S.Ct. 408 (1918); *Boler Fruit & Veg. Co. v. Kenworthy*, 19 Agric. Dec. 226 (1960). In addition, a counterclaim arising out of different transactions than those covered by a timely complaint must be filed within nine months after the cause of action as to such counterclaim accrued. *Sandra v. Gardner*, 31 Agric. Dec. 128 (1972); *Calcagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406 (1963); *C.F. Smith Inc. v. Bushala*, 21 Agric. Dec. 1365 (1962).

A review of the Department's record indicates that a timely informal complaint was filed by the Complainant in July 1996 seeking reparation for produce sales made to respondent (*see report of investigation*). There is a mention in the records

of the informal complaint proceeding that of respondent's allegation that it was owed money from Complainant in conjunction with a "consulting contract" but nothing informal or formal was filed with the Department by Respondent seeking reparation for these alleged consulting fees during the informal complaint stage. Complainant filed a formal complaint with the Department on November 1, 1996, which basically mirrored its informal complaint. On January 13, 1997, Respondent filed a timely answer and asserted several counterclaims including the one involving the alleged "consulting contract".

Respondent alleges that the parties entered into the "consulting contract" in 1991 and that the contract was in effect until April 1996 when Complainant terminated Albert Wu and thereafter allegedly severed its ties with respondent in relation to the "consulting contract". Respondent also states that, prior to Mr. Wu's termination, it never requested payment of the unpaid consulting fees from Complainant and Complainant never offered to pay him the consulting fees other than the two payments made in February 1992 and December 1993 for approximately $5,000. Respondent asserts that there was no specified provision as to when the consulting fees would be payable but that the fees would be computed on a yearly basis from the sales resulting from the perishable agricultural commodities originating from the Podesta Farm. Mr. Tan asserts that he intended to wait until the Podesta Farm operations became more profitable before requesting his lump sum payment. The alleged agreement between Complainant and Respondent was not a part of the marketing agreement entered into between Complainant and Podesta Farm but rather a completely separate agreement, upon which services were provided for the Podesta Farm and compensation was to be based on sales of the Podesta Farm produce. Mr. Tan alleges it was not until Mr. Wu was terminated in April 1996, when it requested payment of the unpaid commission fees and became aware that Complainant was refusing to acknowledge the contract or pay the commissions due under the contract due from as far back as 1991.

The evidence indicates that Complainant had a yearly contract with Podesta Farm from 1991 to 1996 to market its produce for a commission fee of 18 percent and that Complainant was required to account to the grower on a regular basis while a particular year's crop was being marketed by complainant. It appears that Complainant was paid its 18% commission as compensation for its services provided under the marketing agreement with Podesta Farm within the same year that the sales for a given crop year was taking place. Since Respondent's alleged commission fees were to be indirectly based upon the proceeds generated from the Podesta Farm produce sales, those sales figures ostensibly would have been available at the end of the marketing period in a given year and Respondent would have been able to compute the alleged commission fees due to it for that given year.

There is no evidence to suggest that Respondent ever made a formal request for the sales figures from the Podesta Farm produce sales prior to 1996. However, the fact that Respondent did not request an accounting regarding the Podesta Farm produce sales in the year in which they occurred does not mean that it was not capable of requesting that information for purposes of calculation of its commissions due under the alleged "consulting contract" or that it could not have instituted a suit to obtain those figures in order to seek reparation for monies allegedly owed by Complainant.

Based on the facts presented, we find that Respondent's cause of action accrued as early as the fall of 1992, when the sales from the 1991 planting season took place. At the very latest, Respondent's cause of action accrued on or about November 1992. Respondent could have filed an action against Complainant for recovery of its alleged consulting fees resulting from the sale of the Podesta Farm produce by Complainant on or about November 1992. The mere fact that Respondent never formally requested an accounting or payment of its commission fees until 1996 does not mean that Respondent's cause of action accrued in 1996 when Complainant refused to pay the total amount of commission fees alleged to be owed from 1991 to 1996. It is apparent that the Podesta Farm entered into a contract with Complainant in July 1991 for the marketing of its produce and that Complainant did, in fact, market the produce pursuant to this contract as early as the fall of 1992. The evidence shows that Complainant and Podesta Farm entered into a new contract every year subsequent to 1991 to cover its marketing agreement and that an accounting of the produce sales covered by respective contract was due prior to the signing of a new contract.

A cause of action accrues regardless of whether a party exercises his rights under that cause of action. Respondent cannot attempt to extend the accrual of its alleged cause of action by asserting that there was no specific period of time for payment of the commission fees pursuant to the agreement. Respondent's cause of action accrued on or November 1992, it would have been necessary for Respondent to file its claim for reparation no later than August 1993. Respondent filed its counterclaim seeking reparation for the alleged "consulting contract" on January 13, 1997, which is far beyond the nine month statute of limitations period. The fourth jurisdictional requirement, that Respondent be licensed or subject to licensing under the Act, is satisfied. However, since Respondent does not meet the statutory requirements that the complaint be filed within 9 months of the accrual of the cause of action, the Secretary has no jurisdiction over Respondent's counterclaim for commissions due pursuant to a "consulting contract".

Respondent is liable to Complainant in the amount of $58,249.00 for produce purchased, received and accepted in interstate commerce. The counterclaims filed by Respondent regarding the trucking claims and the "consulting contract" are hereby dismissed based on the Secretary's lack of jurisdiction over these issues.

Respondent's failure to pay Complainant this sum is a violation of section 2 of the Act for which reparation should be awarded. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate to award interest at a reasonable rate as part of each reparation award. *See Perl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963). Complainant was required to pay a $300 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.

Complainant and Respondent filed the appropriate forms for their claims for fees and expenses incurred in connection with the oral hearing. The parties' claims were properly served upon the parties and they were given an opportunity to object to the opposing party's claims. Neither party filed an objection to the opposing party's claim for fees and expenses. Fees and expenses will be awarded to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The prevailing party is the party in whose favor a judgment is entered even if the party does not recover its entire claim. *Bill Offutt v. Berry*, 37 Agric. Dec. 1218 (1978); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989).

We have reviewed Complainant's claim for fees and expenses. Complainant has claimed 3.75 in preparation of its answer and response to Respondent's cross-claim. It has been held that expenses which would have been incurred in connection with the case if that case had been heard by shortened procedure may not be awarded under section 7(a) of the Act. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). There Complainant's claim for recovery of $731.25 in preparation of answer and response to cross-claim are disallowed since Complainant would have had to incur these costs regardless of whether the matter was heard by oral hearing. Complainant claims $2,812.50 representing 11.25 hours at $250.00 per hour for scheduling and preparation of the oral hearing. We will

allow Complainant's counsel an hourly rate of $200.00 as reasonable based on the issues involved. We find that the 11.25 hours claimed by Complainant is a reasonable amount of time for preparation of the oral hearing. Therefore, Complainant will be allowed $2,250.00 for costs incurred in preparation for the oral hearing.

Complainant claims that it incurred costs of $5,000.00 in connection with its counsel's travel to and from the oral hearing in New York City. This claim is disallowed since it is our policy to not allow attorney's fees for time spent in travel. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979). Complainant requests reimbursement for 21.25 hours spent in scheduling continuation dates for the hearing and in preparation for the remainder of the hearing held by telephone conference. Based on the complexity of the issues involved, we will grant Complainant 15 hours at $200.00 per hour as being reasonable costs incurred by Complainant. Therefore, Complainant will be allowed to recover $3,000.00 in connection with costs incurred in scheduling hearing dates and preparation for hearing. Complainant claims 12.50 hours spent at the hearing which we find to be reasonable. Complainant will be allowed to recover costs incurred for the 12.50 hours spent at the hearing at $200.00 per hour totaling $2,500.00. Complainant also requests recovery for 38 hours spent in preparing its brief and proposed findings of fact. Expenses which would have been incurred under the shortened procedure are not recoverable under section 7(a) of the Act which would include findings of fact, conclusions of law and post hearing briefs. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). Therefore, Complainant's request is disallowed.

Complainant has claimed $1,526.42 for expenses incurred in airline and hotel expenses for the hearing held in New York. Complainant did not include an itemization as to how these expenses were computed, including copies of airline tickets and hotel receipts. However, respondent did not object to the Complainant's claim for recovery for its airline and hotel expenses. Therefore, we will allow Complainant's request for recovery of costs for airline and hotel expenses totaling $1,526.42 as being a reasonable expense. In addition, Complainant seeks recovery in the amount of $1,962.26 for costs incurred in obtaining hearing transcripts. We find this cost to be reasonable and therefore allow it as a reasonable expense. In total, Complainant will be allowed to recover $11,238.68 as reasonable fees and expenses incurred in connection with the oral hearing.

Order

Within 30 days from the date of this order, Respondent shall pay to Complainant, as reparation, $58,249.00 with interest thereon at the rate of 10 percent per annum from July 1, 1996, until paid plus the amount of $300.

Within 30 days from the date of this order, Respondent shall also pay to Complainant, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $11,238.68.

Copies of this order shall be served upon the parties.

DiMARE HOMESTEAD, INC. v. KOAM PRODUCE, INC.
PACA Docket No. R-00-0159.
Decision and Order filed November 16, 2000.

Misrepresentation and Mistake - adjustment contracts void on grounds of.

Federal inspections - credibility rebutted by bribery of federal inspectors.

Burden of proof - not met where federal inspections found unconvincing due to bribery of inspectors.

Where there was no showing that the particular inspections on the Hunts Point market of the tomato shipments at issue were falsified, but the inspections were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, and the inspections were performed at the place of business of the buying firm whose employee pleaded guilty to the bribery of federal inspectors, it was held that the failure of the buying firm to disclose the bribery of the federal inspectors to the seller to whom it submitted the inspections as a basis for adjustments to the original contracts amounted to a misrepresentation, and that the adjustment agreement was void on that basis. It was also held that the seller made a mistake as to a basic assumption on which the adjustments were made, and that the adjustment agreements were also void on the basis of that mistake.

Under the original f.o.b. contract the buyer who accepted the tomatoes had the burden of proving a breach on the part of the seller. Although under the Act federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing under the circumstances of this case; and it was also found that testimony from the buyer's employees was an insufficient basis on which to conclude that the seller breached the contract of sale. The seller was awarded the original contract price.

George S. Whitten, Presiding Officer.
Mike D. Bess, Orlando, FL, for Complainant.
Paul T. Gentile, New York, NY, 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 $4,800.00 in connection with transactions in interstate commerce involving tomatoes.

No Report of Investigation was filed by the Department. 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 any report of investigation filed by the Department. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Both parties filed briefs.

Before the time for the filing of briefs expired, and pursuant to section 47.7 of the Rules of Practice, the Deputy Administrator filed what is referred to in the Rules as a supplemental report of investigation, and a copy thereof was served upon the parties. As required by the Rules each party was then given opportunity to file affidavit evidence in rebuttal to the supplemental report of investigation, and both Complainant and Respondent filed supplemental evidence.

Findings of Fact

1. Complainant, DiMare Homestead, Inc., is a corporation whose address is 258 N. W. 1st Avenue, Florida City, Florida 33034.

2. Respondent, Koam Produce, Inc., is a corporation whose address is 238 NYC Terminal Market, Bronx, New York 10474. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about April 17, 1999, Complainant sold to Respondent under its invoice number 2102, and shipped from loading point in Florida, on a truck bearing tag number AT10398-NC, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger

tomatoes in 25 pound cartons at $7.85 per carton, or $6,280.00, plus $23.50 for a temperature recorder, or a total of $6,303.50, f.o.b.

4. On or about April 17, 1999, Complainant sold to Respondent under its invoice number 91077, and shipped from loading point in Florida, on a truck bearing tag number AT10398-NC, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 240 cartons of light pink plum tomatoes in 25 pound cartons at $6.90 per carton, and 560 cartons of pink plum tomatoes in 25 pound cartons at $6.90 per carton, or a total of $5,520.00, f.o.b.

5. Following arrival of the tomatoes mentioned in Findings of Fact 3 and 4, Respondent accepted the two lots, and called for a federal inspection. On April 20, 1999, at 5:45 a.m., a federal inspection of the two lots of tomatoes was made, and a certificate, No. K-679517-3, was issued by federal inspector Elias Malavet, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 52 to 53°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "DiMare" 5+6 + lgr
ORIGINS: FL
LOT ID.: 129DY
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT: B
TEMPERATURES: 51 to 52°F
PRODUCT: Plum Tomatoes
BRAND/MARKINGS: "Di Roma" 25lbs
ORIGINS: FL
LOT ID.: –
NUMBER OF CONTAINERS: 800 Crts
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	04 %	00 %	00 %	Sunken Discolored Areas (0 to 11%)	Average Approximately 85% light red and red.
	14 %	14 %	14 %	Soft (11 to 18%)	
	00 %	00 %	00 %	Decay	
	18 %	14 %	14 %	Checksum	
B	04 %	00 %	00 %	Sunken Discolored Areas (0 to 13%)	Average Approximately 90% light red and red.
	11 %	11 %	11 %	Soft (0 to 21%)	
	00 %	00 %	00 %	Decay	

	15 %	11 %	11 %	Checksum	Count: lot B, Ranges from 99 to 201 tomatoes per carton Average 140 tomatoes per carton

GRADE:

REMARKS: Count on lot B Reported at Applicant's Request.

6. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.50 per carton on the 800 cartons of 5x6 tomatoes and $1.00 per carton on the 800 cartons of Plum tomatoes, or a total of $2,000.00 on the two lots of tomatoes covered by Findings of Fact 3 and 4.

7. On or about April 19, 1999, Complainant sold to Respondent under its invoice number 2107, and shipped from loading point in Florida, on a truck bearing tag number WBL11E-FL, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger tomatoes in 25 pound cartons at $7.85 per carton, or $6,280.00, plus $23.50 for a temperature recorder, or a total of $6,303.50, f.o.b.

8. Following arrival of the load mentioned in Finding of Fact 7, Respondent accepted the tomatoes, and called for a federal inspection. On April 23, 1999, at 5:30 a.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-679880-5, was issued by federal inspector Elias Malavet, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 52 to 53°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "Dimare" 5x6 & lgr
ORIGINS: FL
LOT ID.: FL 129DY
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	17 %	17 %	17 %	Soft (13 to 21%)	
	04 %	00 %	00 %	Sunken discolored Areas (0 to 9%)	Average Approximately 85% light red and red.
	00 %	00 %	00 %	Decay	
	21 %	17 %	17 %	Checksum	

GRADE:

9. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.50 per carton, or $1,200.00 on the lot of tomatoes covered by Finding of Fact 7.

10. On or about April 24, 1999, Complainant sold to Respondent under its invoice number 2189, and shipped from loading point in Florida, on a truck bearing tag number XG21954-PA, to Respondent at the Hunts Point Market in Bronx, New York, one truck lot consisting of 800 cartons of DiMare brand 5x6 and larger tomatoes in 25 pound cartons at $8.85 per carton, or $7,080.00, plus $23.50 for a temperature recorder, or a total of $7,103.50, f.o.b.

11. Following arrival of the load mentioned in Finding of Fact 10, Respondent accepted the tomatoes, and called for a federal inspection. On April 23, 1999, at 5:30 a.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-680040-3, was issued by federal inspector Michael Tsamis, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 53 to 55°F
PRODUCT: Tomatoes
BRAND/MARKINGS: "DiMare" 25 lbs. 5x6
ORIGINS: FL
LOT ID.: 129-EEGR70
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	14 %	14 %	14 %	Soft (3 to 27%)	Average approximately 5% turning and pink, 80% red to light red color
	00 %	00 %	00 %	Decay	
	14 %	14 %	14 %	Checksum	

GRADE:

12. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.00 per carton, or $800.00 on the lot of tomatoes covered by Finding of Fact 10.

13. On or about April 26, 1999, Complainant sold to Respondent under its invoice number 91197, and shipped from loading point in Florida, on a truck bearing tag number TLM7538-OH, to Respondent at the Hunts Point Market in

Bronx, New York, one truck lot consisting of 800 cartons of pink Plum tomatoes in 25 pound cartons at $7.90 per carton, or $6,320.00, f.o.b.

14. Following arrival of the load mentioned in Finding of Fact 13, Respondent accepted the tomatoes, and called for a federal inspection. On April 28, 1999, at 1135 p.m., a federal inspection of the lot of tomatoes was made, and a certificate, No. K-680205-2, was issued by federal inspector Thomas Vincent, which disclosed in relevant part as follows:

LOT: A
TEMPERATURES: 54 to 55°F
PRODUCT: Plum Tomatoes
BRAND/MARKINGS: "DiRoma" 25 lbs. Net Wt.
ORIGINS: FL
LOT ID.: None
NUMBER OF CONTAINERS: 800 Cartons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	10 %	10 %	10 %	Soft (2 to 18%)	Decay in early stages
	02 %	02 %	02 %	Decay	Average Approx. 90% light red & red
	12 %	12 %	12 %	Checksum	

GRADE:

15. On the basis of the damage reported in the federal inspection quoted above the parties agreed to an allowance being granted to Respondent of $1.00 per carton, or $800.00 on the lot of tomatoes covered by Finding of Fact 13.

16. The informal complaint was filed on December 1, 1999, which was within nine months after the causes of action herein accrued.

Conclusions

The background to this proceeding involves the nine USDA fruit and vegetable inspectors who were arrested in October of 1999 for taking bribes from employees of thirteen produce firms on the Hunts Point Market, Bronx, New York. All nine of the inspectors have pleaded guilty in Federal Court. Some of the employees of the 13 produce firms have also pleaded guilty, one has been acquitted in a jury trial, one has been convicted, and others are being prosecuted. On February 25, 2000, Marvin Steven Friedman, an employee of Respondent, pleaded guilty to all counts of an indictment in the United States District Court for the Southern District of

New York. The indictment charged Mr. Friedman with ten counts of making cash payments to a USDA fruit and vegetable inspector, between April 6, and July 1, 1999, in order to influence the outcome of the inspection of fresh fruits and vegetables conducted at Koam Produce Inc., Respondent herein.

There is no showing on this record that falsified inspections were issued as to the specific lots of tomatoes listed in the findings of fact. However, the lots of tomatoes involved in this proceeding were all inspected by one of the convicted inspectors at the place of business of Koam Produce, Inc., on the Hunts Point Market, and Koam negotiated a reduction in the price of the tomatoes on the basis of the excessive damage shown by the federal inspections.

Complainant seeks to recover by this reparation action the amount of the adjustments on the five lots of tomatoes, totaling $4,800.00. Complainant asserts that the adjustment claims were allowed by Complainant at a time when Complainant was unaware of the bribery that was occurring on the Hunt's Point Market. Implicitly, Complainant asks that the allowances be set aside on the grounds of misrepresentation or mistake. In other words, it is contended that Respondent's withholding from Complainant of the information that it possessed about the bribery of federal inspectors caused Complainant to have a confidence in the federal inspections of the subject tomatoes that Complainant otherwise would not have had. Since Complainant's confidence in the federal inspections was central to its willingness to negotiate the adjustments, Complainant feels that the adjustment negotiations were grounded on misrepresentation and/or Complainant's mistake as to a basic assumption on which the adjustments were made.

We will first treat the subject of misrepresentation as a possible ground for the voiding of the adjustment agreements. The Restatement (Second) of Contracts, section 159, defines misrepresentation as "an assertion that is not in accord with the facts." Section 164(1) states that:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
>
> . . . .

Section 161 relates the circumstances under which non-disclosure is equivalent to an assertion:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> . . . .

The Comment to section 161 states: "[t]he notion of disclosure necessarily implies that the fact in question is known to the person expected to disclose it." However, the Comment also makes it clear that clause (a) of section 161 is not limited in its coverage to non-disclosure by the actual person who negotiated the transaction, and section 1-201(27) of the Uniform Commercial Code (referenced as applicable in the Comment to section 161) shows that knowledge of the pertinent fact can be imputed to a corporation under appropriate circumstances.[1] In the circumstances at issue in this case, Respondent's non-disclosure that it was making payments to a federal inspector is the same as an affirmative misrepresentation where Respondent knew that the Complainant would not know that the inspection certificate could be fraudulent or a misrepresentation unless Complainant knew of the bribery. Absent that knowledge, Complainant would take the statements on the inspection as a basis for agreeing to adjustments on the contract price.

Section 16 of the Act provides that:

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[1]Paragraph (27) of § 1-201 of the UCC affirms that knowledge received by an organization is effective for a particular transaction "from the time when it is brought to the attention of the individual conducting that transaction, *and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence*." (Emphasis supplied.) According to paragraph (27):

> An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

This definition of "due diligence" shows that the pertinent knowledge under consideration here (the bribery of federal inspectors) would have certainly been brought to the attention of the party conducting the tomato transactions if Respondent had exercised due diligence. This is so because the information was obviously significant, and because the person with unquestioned knowledge of the bribery, Marvin Steven Friedman, by reason of his position of responsibility in the firm, had ample reason to know that all Respondent's purchase transactions in which an adjustment would be negotiated on the basis of an inspection would be materially affected by the information.

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

The only benefit (other than to the person receiving the bribes) deriving from the falsification of inspections would be to the purchaser of the inspected produce, and not, directly at least, to any individual employee of the purchaser. The October 1999 edition of The Blue Book, published by the Produce Reporter Co., Carol Stream, Illinois, (of which we take official notice), lists Kimberly Park as President of Koam Produce, Inc. The listing states "Buying and sales handled by C.J. Park, Chang Y. Park & Charles Lamendola Marvin Friedman, Vegetables & Fruit." A general phone and fax number is given for the business, but residence and cell phone numbers are listed only for C.J. Park and Friedman. Although there is no explicit testimony in the record that Friedman was authorized by Koam to bribe the federal inspectors, we conclude that the bribing of the federal inspectors was within his inherent agency power, and was done by Friedman within the scope of his employment.[2] Respondent is thus deemed responsible under the Act for the bribery in which its employee participated.

Whether the individual inspections involved in this proceeding were falsified is immaterial for our purposes. Respondent asserted to Complainant the results of the federal inspections. Respondent then used those results as a basis for the negotiation of the adjustments. When it engaged in the negotiation of the adjustments it knew that disclosure of its involvement in the bribery of federal inspectors was necessary to prevent the previous assertions, made in the federal inspections, from being material.[3] Respondent's non-disclosure of this involvement was, therefore, equivalent to an assertion that no such bribery had taken place, and was a misrepresentation for which the adjustment agreements may be voided.

We will next treat the question whether the adjustment agreements are also voidable on the ground of a mistake by one of the parties. In certain circumstances,

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[2]See H. Reuschlein and W. Gregory, The Law of Agency and Partnership, § 26, p. 69-71 (second ed. 1989).

[3]It is obvious that the federal inspections would have instantly become immaterial to the adjustment negotiations if Respondent's involvement in the bribery of federal inspectors had been revealed to Complainant.

if Complainant was mistaken as to a basic assumption that underlay the adjustment agreements, such agreements are voidable at Complainant's option.

The Restatement (Second) of Contracts, section 151, defines "mistake" as "a belief that is not in accord with the facts." Section 153 states:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

To break this section down into its parts with regard to the circumstances at issue here, Complainant believed that Respondent was not making payments to federal inspectors to affect the outcome of inspections (mistake); that mistake was as to a basic assumption on which Complainant agreed to the adjustments (made the contract); Complainant's belief had a significant (material) effect on the agreed adjustments (agreed exchange of performances); that resulted in Complainant agreeing to less than invoice price (adverse to him). In these circumstances, the adjustments are voidable by Complainant if he does not bear the risk of the mistake under the rule stated in section 154.

According to section 154:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

First, as to clause (a), the risk of the mistake was not allocated to Complainant by any agreement between the parties. Second, as to clause (b) it is clear that Complainant was not aware, at the time the adjustments were made, that he had only limited knowledge with respect to the integrity of the federal inspections. The general limited knowledge that all people share is not in view here. Instead, what is meant by clause (b) is awareness of a specific area of limited knowledge, coupled with a determination to treat that area of limited knowledge as unimportant for purposes of the contract. As we have pointed out:

> Any belief that is not in accord with the facts must *always* be due to limited knowledge. If § 154(b) had in view that general awareness of limited knowledge which all reflective humans possess, all parties would always bear the risk of their mistake under §§ 152 and 153 and there would be no law relating to mistake.[4]

And third, as to clause (c) there is nothing in the circumstances of this case that would make it reasonable to allocate the risk of the mistake to Complainant.

Complainant made the adjustments because the federal inspections indicated that Complainant had breached the contract of sale. A basic assumption on which Complainant made the adjustments was the integrity of the federal inspection process applicable to produce inspected at Koam Produce, Inc. Clearly, if Complainant had known that an employee of Koam had bribed federal inspectors, and that the very inspectors who inspected the subject tomatoes were guilty of accepting bribes to falsify inspections, Complainant would not have been willing to rely upon the inspections performed by those inspectors as a basis for adjusting the contract of sale. We conclude that Complainant, in making the adjustments, made a mistake as to a basic assumption on which it made the adjustments. In view of the involvement of Respondent in the corruption of the inspection process enforcement of the adjustments would be unconscionable. Certainly Respondent knew of the mistake, and in addition it was the fault of Respondent that caused the mistake. We conclude that the adjustments should be voided on the grounds of both misrepresentation and mistake.

Although the adjustments are deemed to be voided, the original contracts are still in place. Respondent contends that Complainant breached these contracts by supplying tomatoes that did not meet contract requirements. Respondent submitted the affidavits of two of its employees stating that they personally inspected the tomatoes in the subject lots and observed that they were in fact "not in acceptable

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[4] *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.,* 46 Agric. Dec. 674, 682 (1987).

condition as evidenced by softness, over ripe condition and poor quality." Since Respondent accepted the lots of tomatoes it became liable for the full purchase price thereof less any damages resulting form a breach of contract on the part of Complainant.[5] Respondent had the burden of proving a breach by a preponderance of the evidence.[6] The Act, section 14(a), provides in relevant part that:

> . . . official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.) as prima-facie evidence of the truth of the statements therein contained.

This provision is no more than the typical statutory exception to the hearsay rule which excludes documents apart the testimony of the person who wrote them.[7] Prima facie evidence is always subject to rebuttal and contradiction. The guilty pleas of the inspectors, coupled with the implication of Respondent in the bribery of inspectors, rebuts the prima facie evidence presented by the federal inspections submitted in evidence in this proceeding. As the trier of the facts we are unconvinced by the statements in the federal inspections which testify to the poor condition of the subject tomatoes. In addition, "[w]e have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage."[8] We find that Respondent has not met its burden of proving a breach on the part of Complainant. Accordingly, Respondent is liable to Complainant for the balance of the contract price of the five lots of tomatoes, or $4,800.00.

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[5] *Norden Fruit Co., Inc. v. E D P, Inc.,* 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.,* 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.,* 46 Agric. Dec. 1681 (1987).

[6] See UCC 2-607(4). See also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

[7] See C. McCormick, Handbook of the Law of Evidence, §§ 291-292, pp. 614-615 (1954).

[8] *Mutual Vegetable Sales v. Select Distributors, Inc.,* 38 Agric. Dec. 1359 (1979). See also *Tyre Farm, Inc. v. Dandrea Produce, Inc.,* 45 Agric. Dec. 796 (1986); *G. J. Albert, Inc. v. Salvo,* 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc.,* 32 Agric. Dec. 1732 (1973); *B. G. Anderson Company, Inc. v. Mountain Produce Co.,* 29 Agric. Dec. 513 (1970).

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, $4,800.00, with interest thereon at the rate of 10% per annum from June 1, 1999, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

LAKE ERIE GREENHOUSE MANAGEMENT & LEASING CORPORATION OPERATING AS CLIFTON PRODUCE v. AGRISTAR PRODUCE LLC.
PACA Docket No. R-97-0075.
Order of Dismissal filed December 6, 2000.

Election of Remedies – Canadian counterclaim not compulsory.

Where a Canadian firm filed a formal reparation complaint before the Secretary, and thereafter filed a counterclaim against the reparation Respondent in civil court in Ontario, Canada covering the same breach as alleged in its complaint before the Secretary, it was found, based on material filed by counsel, that counterclaims are not compulsory in Canada, and that Complainant had made an election between its PACA remedy and the Canadian civil court remedy. The Complaint was dismissed.

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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).

George S. Whitten, Presiding Officer.
Frank C. Ricci, Leamington, Ontario, Canada, for Complainant.
Kenneth D. Nyman, Boise, Idaho, for Respondent.
W. Anthony Park, Boise, Idaho, for Respondent.
John Mill, Windsor, Ontario, Canada, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). On August 21, 1996, Complainant (hereafter sometimes Clifford) filed an informal reparation complaint before the Secretary, and on September 24, 1996, filed a formal complaint. Cliford's complaint seeks reparation from Respondent (hereafter sometimes Agristar) on the basis of an alleged failure to pay the purchase price for tomatoes sold by Clifford to Agristar and shipped from Canada, to Agristar in Idaho. Agristar filed an answer before the Secretary on October 29, 1996. Agristar's defense was that Clifford promised to give Agristar 60% of its production, and breached the promise. Agristar claimed a set-off, and sought to recover the excess of damages over the set-off in a counterclaim before the Secretary, also filed October 29, 1996. On September 12, 1996, Agristar filed a claim in the Ontario Court (General Division) against Cliford covering the same breach as is alleged in its counterclaim before the Secretary. Clifford then filed, on Nov. 4, 1996, a counterclaim in the Ontario Court based on the same cause of action as is alleged in Clifford's reparation complaint before the Secretary.

Following the filing of the pleadings before the Secretary, the parties were advised by administrative personnel of this Department that this matter could proceed only if the Complainant's counterclaim filed in the Canadian court was compulsory.[1] Thereafter, based upon a letter from Complainant's Canadian counsel (who admitted that he was not sure what was meant by "compulsory"), the administrative personnel determined that the counterclaim was "compulsory or necessary," and the case was referred for hearing. Respondent contended in response to this ruling that the Canadian counterclaim was not compulsory.

On August 24, 1999, the Superior Court of Justice, Windsor, Ontario, Canada issued what amounts to a default judgment against Agristar, that firm having withdrawn its complaint before that tribunal. On February 2, 2000, Complainant's

[1]We have held many times that section 5(b) of the Act forces litigants who are before the Secretary to elect whether they will pursue their action in a civil jurisdiction or this administrative forum. See *Hastings Potato Growers Association v. Southern Planters Company,* 20 Agric. Dec. 279 (1961). The only exception is where the claimant before the Secretary is also before the civil forum because of having filed a compulsory counterclaim. See *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.*, 48 Agric. Dec. 731 (1989).

counsel moved for a the issuance of a reparation order based on the alleged *res judicata* effect of the Canadian court judgment. This motion was served on opposing counsel, and counsel for both parties proceeded to brief the matter, and also to address the question of whether counterclaims are compulsory under Canadian court procedure.

The question of whether the Canadian counterclaim was compulsory is pertinent because of the provision in the Act providing for an election of remedies. That provision has been interpreted by us to not apply to a reparation claim that is also the subject of a compulsory counterclaim in state or federal court.[2] The applicable section of the Act refers to liability for violation of section 2 of the Act, a federal law having application only within the United States, and therefore it is appropriate to inquire whether the alternative presented in the election of remedies provision has any application to an action brought in a foreign jurisdiction. Section 5b of the Act (7 U.S.C. § 499e(b)) states:

> "Such liability [for violation of section 2] may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies[3] now existing at common law or by statute, and the provisions of this Act are in addition to such remedies."

In *M. S. Thigpen Produce Co., Inc. v. The Park River Growers, Inc.*, 48 Agric. Dec. 695 (1989) we stated:

> While it appears from an examination of analogous cases that a number of courts might treat the Perishable Agricultural Commodities Act as creating a distinct cause of action for the violation of Section 2, the general rule and the better rule is to the contrary. Moore, in treating the question makes the following observations:
>
> > What constitutes a single cause of action for these purposes [application of doctrine of res judicata barring second suit on same cause of action] has been a troublesome question. Generally, it has been held that the "cause of action," or "claim," as it is referred to in the Restatement

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[2] *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.,* 48 Agric. Dec. 731 (1989).

[3] The term "remedies" refers to procedural rights, not to substantive rights. *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 21 A.L.R.2d 832 (3rd Cir. 1950).

> (Second) [Judgements], is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. Thus, a judgement in an action to settle Indian land claims under the 1881 Treaty was a bar to a second suit involving the same land but relying on the 1895 Treaty. And a judgement in an action in the district court asserting that plaintiff's discharge was a violation of the Age Discrimination In Employment Act barred a subsequent action asserting that the same discharge was a breach of his employment contract. Similarly, a judgement in a possessory action in the state court barred a subsequent action in the federal court charging that his eviction violated his first amendment rights. And a summary judgement for defendant corporation in a suit on a note, pitched on the theory that the corporation was the alter ego of the debtor barred a later suit by the assignee of the note against the receiver of the corporation charging "conspiracy" and "joint venture." As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and his failure to assert them does not deprive the judgement of its effect as res judicata. (Moore's Federal Practice, 2nd ed. 1984 ¶ 0.410, p. 350-351.)

From the above it follows that, although federal PACA law is not applicable in Canadian courts, such courts are not thereby rendered incompetent to hear the underlying cause of action. Causes of action based upon breach of contractual obligations, and which underlie most of the prohibitions of section 2[4], are capable of litigation in both Canadian and American forums. This conclusion accords with the evident intent of Congress which was to avoid simultaneous litigation based on the same subject matter, while preserving the unique PACA remedy to those litigants who filed with the Secretary, and were willing to forego seeking enforcement of their claim in an alternate forum.

Under the Federal Rules of Civil Procedure (and in state courts which follow the Federal Rules) a counterclaim is compulsory only if it meets all four of the following conditions: (1) It must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. [Any claim that is "logically related" to another claim that is being sued upon is properly the basis for a compulsory counterclaim. Only claims that are unrelated or are related but within

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[4]For instance, section 2(4) makes it unlawful for a licensee "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any" transaction in interstate or foreign commerce.

the exceptions, need not be pleaded. See *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978).]; (2) It must be matured and owned by the pleader at the time he serves his pleading; (3) It must not require for its adjudication the presence of third parties of whom the court cannot acquire personal jurisdiction; and (4) It must not have been, at the time the original action was commenced, the subject matter of another pending action.[5] The term "compulsory" means that if a claim meeting the above criteria is not filed it is forever barred.

It is apparent from the material that has been filed by counsel that counterclaims in Canada are not compulsory. We therefore conclude that Complainant and Respondent in this matter made an election to proceed before the Ontario court when the complaint and counterclaim were filed before that court.[6] Accordingly, Complainant's motion for the entry of a reparation award is denied, and the complaint and counterclaim are dismissed.

Copies of this order shall be served upon the parties.

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[5]A PACA reparation action qualifies as "another pending action" [the phrase "another pending action" includes administrative proceedings. *Bethlehem Steel Co. v. Lykes Bros. Steamship Co.*, 35 F.R.D. 344 (D.D.C. 1964)] only if a formal complaint has been filed. A pending informal complaint is not viewed as commencing an "action." See *Trans West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.,* 42 Agric. Dec. 1955, 1957 n. 2 (1983).

[6]See *Symms Fruit Ranch, Inc. v. Arizona Fresh Foods, Inc.*, 41 Agric. Dec. 351 (1982).

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: MANGOS PLUS, INC.
PACA Docket No. D-98-0025.
Order Denying Petition for Reconsideration filed September 7, 2000.

Petition for reconsideration – Flagrant and repeated violations – Publication of facts and circumstances.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contention that the Chief ALJ made a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable. The Judicial Officer stated that the Chief ALJ did not find the investigation was credible and reliable, but, instead, found that the investigator's testimony was reliable and sufficient to establish Complainant's *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. The Judicial Officer also rejected Respondent's contention that the June 15, 2000, Decision and Order was erroneously based on unreliable testimony and Respondent's failure to rebut unreliable testimony.

Kimberly D. Hart, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by James W. Hunt, Chief 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 by filing a Complaint on August 13, 1998. Complainant instituted this 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].

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. On June 1, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and for a decision.

On June 15, 2000, I issued a Decision and Order: (1) denying Respondent's petition to reopen the hearing; (2) finding that, 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; (3) finding that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was

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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."

still outstanding; (4) concluding that 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)); and (5) ordering publication of the facts and circumstances set forth in the Decision and Order. *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 4, 10, 22 (June 15, 2000).

On July 31, 2000, Respondent filed Respondent's Petition for Reconsideration requesting reconsideration of the June 15, 2000, Decision and Order. On September 5, 2000, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration. On September 6, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 15, 2000, Decision and Order.

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).

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent contends the following statement in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 11 (June 15, 2000), is error:

The Chief ALJ did not find that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable, as Respondent contends.

I disagree with Respondent's contention that the above-quoted statement is error. The Chief ALJ did not make a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable in the Initial Decision and Order. Instead, the Chief ALJ addressed Respondent's contention that the 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.

Thus, the Chief ALJ found the testimony of the United States Department of Agriculture, Agricultural Marketing Service, investigator, Ms. Shelby, reliable and sufficient to establish Complainant's *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. The Chief ALJ did not address the issue of whether the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable.

Moreover, 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 willfully, flagrantly, and repeatedly 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 Co.*, 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. 1041 (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*, (continued...)

Complainant established a *prima facie* case. 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)).

Second, Respondent contends Ms. Shelby failed to conduct an adequate, error-free investigation and hence Ms. Shelby was not credible (Respondent's Pet. for Recons. at 1-3). Respondent contends I erroneously based the June 15, 2000, Decision and Order on Ms. Shelby's unreliable testimony and Respondent's failure to rebut Ms. Shelby's testimony (Respondent's Pet. for Recons. at 3-4).

I fully addressed Respondent's contentions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA

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[2](...continued)
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*, 526 U.S. 1098 (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. 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).

(7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___ (June 15, 2000). I have carefully reviewed my reasoning and conclusions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the June 15, 2000, Decision and Order, and I find no error.

Finally, Respondent requests that I reconsider the June 15, 2000, Decision and Order "revoking the Respondent's PACA license" (Respondent's Pet. for Recons. at 1). The June 15, 2000, Decision and Order does not revoke Respondent's PACA license. 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). Therefore, on June 15, 2000, when I issued the Decision and Order, Respondent did not have a PACA license which could be revoked, and I ordered publication of the facts and circumstances of Respondent's violations. *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___, slip op. at 22 (June 15, 2000).

For the foregoing reasons and the reasons set forth in *In re Mangos Plus, Inc.*, 59 Agric. Dec. ___ (June 15, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[3]

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[3]*In re David Tracy* Bradshaw, 59 Agric. Dec. ___, slip op. at 6 (Aug. 3, 2000) (Order denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel*
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the June 15, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed June 15, 2000, is reinstated, with allowance for time passed.

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

Order

The facts and circumstances set forth in the June 15, 2000, Decision and Order shall be published.

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Order Denying Motion to Lift Stay as to Irene T. Russo, d/b/a Jay Brokers, filed November 7, 2000.

Kimberly D. Hart, for Complainant.
Irene T. Russo, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, concluding that Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA] and revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506 (1999). On March 2, 1999, Respondent filed a petition for reconsideration of the January 25, 1999,

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[3](...continued)
Zimmerman, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, and on March 23, 1999, I denied Respondent's petition for reconsideration. *In re Produce Distributors*, 58 Agric. Dec. 535 (1999) (Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers).

On May 4, 1999, Respondent filed a request for a stay of the January 25, 1999, Order revoking Jay Brokers' PACA license, pending the outcome of proceedings for judicial review. On May 17, 1999, I granted Respondent's request for a stay. *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers).

The United States Court of Appeals for the Second Circuit affirmed the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers. *Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2^{d} Cir. 1999). Respondent filed a petition for a writ of certiorari which the Supreme Court of the United States denied on October 10, 2000. *Russo v. Department of Agric.*, 121 S. Ct. 308 (2000).

On October 17, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay Order for Irene T. Russo d/b/a Jay Brokers [hereinafter Motion to Lift Stay]. On November 6, 2000, Respondent filed a response to Complainant's Motion to Lift Stay, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Respondent states in her response to Complainant's Motion to Lift Stay that she has been granted an extension of time within which to file a petition for rehearing with the Supreme Court of the United States. Attached to Respondent's response to Complainant's Motion to Lift Stay is a copy of a letter from the Clerk of the Supreme Court of the United States to Respondent which states that on November 1, 2000, Justice Ginsburg extended the time within which Respondent may file a petition for rehearing to and including December 4, 2000.

I find that proceedings for judicial review of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, are not concluded. Therefore, Complainant's Motion to Lift Stay is denied.

———————

In re: MacCLAREN & ASSOCIATES, INC.
PACA Docket No. D-00-0022.
Order Dismissing Application for PACA License, Dismissing Notice to Show Cause and Canceling Hearing filed November 20, 2000.

Ruben D. Rudolph, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On November 15, 2000, Rhonda MacClaren, President of MacClaren & Associates, Inc., the Applicant in this matter, filed a notice that Applicant was withdrawing its application for a PACA license. In view of the notice, it is ordered that the license application filed herein be dismissed.

Accordingly, as the application is dismissed, the Notice to Show Cause filed on August 21, 2000, by the Associate Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, is also dismissed.

The hearing scheduled for January 24-25, 2001, is canceled.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: GOLDEN PHOENIX TRADING, INC.
PACA Docket No. D-99-0014.
Decision and Order filed August 1, 2000.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq*.) (PACA), was initiated on July 20, 1999, by a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, in the total amount of $988,874.49, to three (3) sellers for 71 lots of agricultural commodities which it purchased, received, and accepted in interstate commerce during May and June 1997. The complaint requests a finding that Respondent committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of its violations be published.

The complaint was served on Respondent by certified mail to Daniel E. Forsh, Trustee in Bankruptcy for Golden Phoenix Trading, Inc. (hereinafter "Trustee") since Respondent had ceased operating and was the debtor in an involuntary Chapter 7 proceeding in the United States Bankruptcy Court for the Western District of Washington, Case No. 98-00381). Respondent filed an answer through its Trustee on August 17, 1999. This answer asserts that Respondent is the subject of a pending Chapter 7 Bankruptcy proceeding and that all actions seeking pecuniary damages from Respondent are automatically stayed. This answer does not acknowledge, admit or deny Respondent's violations of Section 2(4) of the PACA as alleged in the complaint, but states "The Trustee has no concern over or opposition to the application of appropriate police power measures by the Department."

A copy of the complaint was also served on Michael Moore, Vice President, Golden Phoenix Trading, Inc. Mr. Moore filed a Notice of Answer on August 16, 1999. The responding party in this pleading, however, is Michael Moore not Respondent Golden Phoenix Trading, Inc. Michael Moore denies in his answer that he had any knowledge of the violations alleged, that he was ever personally involved in any produce transactions, that he had any knowledge of the financial

condition of the firm after approximately August 1996, when negotiations were commenced to buy-out his ownership interest, and asserts that he had resigned as a director in June 1997. Michael Moore attached supporting documentation, including pleadings filed in Bankruptcy Court and United States District Court actions involving PACA trust claims (brought by sellers alleged unpaid in this administrative proceeding), and a United States District Court decision holding that Michael Moore had no personal responsibility or liability for any PACA trust violations. As relief, Michael Moore has requested that the Administrative Law Judge "NOT find the RESPONDING PARTY, Michael Moore, liable for willfully, or flagrantly, or repeatedly violating any Sections, including Section 2(4) of the PACA (7 U.S.C. § 499b(4)."[1]

Neither answer filed in this proceeding constitutes a denial of the substantive allegations of the complaint by Respondent Golden Phoenix Trading, Inc. The failure of Respondent Golden Phoenix Trading, Inc. to deny or otherwise respond to the substantive allegations of the complaint shall be deemed under section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) to be an admission of said allegations for purposes of this proceeding.

On motion of Complainant for the issuance of a Decision Without Hearing by Reason of Admission of Facts, the following decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Golden Phoenix Trading, Inc., herein referred to as Respondent, is a corporation organized and existing under the laws of the State of Washington whose last business addresses were 3131 Elliott Avenue, Suite 770, Seattle, Washington 98121 and 19550 International Boulevard, Suite 330, Sea Tac, Washington 98188.

2. At all times material to this matter, Respondent operated subject to the PACA. PACA license number 951292 was issued to Respondent on May 8, 1995, but terminated on May 8, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), because Respondent failed to pay the required annual renewal fee.

3. Since January 12, 1998, Respondent has been a debtor in a proceeding under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq*.), which has been

[1]Michael Moore's answer was treated by the PACA Branch as a request for a determination of his responsibly connected status by the Chief of the PACA Branch. On March 1, 2000, the Acting Chief, PACA Branch, Fruit and Vegetable Programs notified Michael Moore of his determination that Mr. Moore was not responsibly connected to Golden Phoenix Trading, Inc. during the period of the alleged violations.

designated Case No. 98-00381, in the United States Bankruptcy Court for the Western District of Washington. The Chapter 7 trustee is Daniel E. Forsch, whose address is 1218 Third Avenue, Suite 1422, Seattle, Washington 98101.

4. Respondent failed to make full payment promptly of $988,874.49 to three sellers for 71 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce during May and June 1997.

Conclusion

Respondent has filed an answer which constitutes an admission of all of the material allegations contained in the complaint. Therefore, the following order is issued.

Order

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

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final September 15, 2000.-Editor]

In re: HURWITZ DISTRIBUTING COMPANY, INC.
PACA Docket No. D-00-0006.
Decision and Order filed August 11, 2000.

Kimberly D. Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) [hereinafter referred to as the

"Act"], instituted by a complaint filed on March 8, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that, during the period of June 4, 1998, through October 15, 1998, Respondent, Hurwitz Distributing Company, Inc. [hereinafter "Respondent"], failed to make full payment promptly to 44 sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,078.99 for 321 lots of perishable agricultural commodities, which it received, accepted and sold in interstate and foreign commerce. In February 1999, a pro rata distribution of trust assets totaling $179,712.85 was made to thirty-nine (39) PACA claimants who protected their trust rights under Section 5(c) of the PACA (7 U.S.C. § 499e(c)) by filing timely trust notices. This pro rata distribution reduced the amount that remains past due and unpaid for purchases made by Respondent in the course of interstate and foreign commerce to $817,366.14.

A copy of the complaint was served upon Respondent on March 20, 2000, which Respondent has not answered. The time for filing an answer having expired, and upon motion of the Complainant for issuance of a default order, the following Decision and Order shall be issued without further investigation of hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.1.39).

Findings of Fact

1. Respondent is a corporation whose business address is 55 Galli Drive, Suite J, Novato, California 94949-5713. Its mailing address is P.O. Box 4280, San Rafeal, California 94913-4280.

2. At all times material herein, Respondent was licensed under the provisions of the Act. PACA license number 840901 was issued to Respondent on March 16, 1984. This license terminated on March 16, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a) when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the complaint, Respondent, during the period of June 4, 1998 and October 15, 1998, failed to make full payment promptly to forty-four (44) sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,078.99 for 321 lots of perishable agricultural commodities, which it received, accepted and sold in interstate and foreign commerce. In February 1999, a pro rata distribution of trust assets totaling $179,712.85 was made to thirty-nine (39) PACA claimants who protected their trust rights under Section 5(c) of the Act (7 U.S.C. §499e(c)) by filing time trust notices. This pro rata distribution reduced the amount that remains past due and unpaid for

produce purchases made by Respondent in the course of interstate and foreign commerce to $817,366,14.

5. On October 19, 1999, Respondent filed a Voluntary Petition for Bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq*.) in the United States Bankruptcy Court for the Northern District of California. This petition has been designated Case No. 99-13208.

Conclusions

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

Order

It is ordered that Respondent's willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) be published.

This Order shall become effective on the eleventh day after this Decision becomes final. Pursuant to the Rules of Practice Governing Proceedings Under the Act, this Decision shall become final without further proceedings within thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 26, 2000.-Editor]

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In re: PREFERRED PRODUCE COMPANY.
PACA Docket No. D-00-0015.
Decision and Order filed August 31, 2000.

Mary Kyle Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) [hereinafter referred to as the "Act"], instituted by a Complaint filed on May 11, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1997, through September 1998, Respondent failed to make full payment promptly to 6 sellers in the total amount of $269,476.00 for 26 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the complaint was mailed to the Respondent by certified mail on May 12, 2000. This complaint has not been answered. The time for filing an Answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Preferred Produce Company, is a corporation organized and existing under the laws of the State of Virginia. Its business address is 2558 Paterson Avenue, Roanoke, Virginia 24016. Its mailing address was Post Office Box 3041, Roanoke, Virginia 24015.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 930351 was issued to Respondent on December 10, 1992. The license terminated on December 10, 1998, when Respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1997, through September 1998, Respondent purchased, received, and accepted in interstate commerce from 6 sellers, 26 lots of perishable agricultural

commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $269,476.00.

Conclusions

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

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

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

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

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 27, 2000.-Editor]

In re: JOHNNY S. TAWIL, d/b/a DISCOUNT WHOLESALE PRODUCE.
PACA Docket No. D-00-0013.
Decision and Order filed September 14, 2000.

Kimberly D. Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on March 30, 2000, by the Associate Deputy

Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period March through May 1999, Respondent, Johnny S. Tawil, doing business as Discount Wholesale Produce [hereinafter "Respondent"], failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $645,975.51 for 106 lots of fruits and vegetables, which it received, accepted, and sold in interstate commerce.

A copy of the Complaint was served upon Respondent on May 26, 2000. This Complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Johnny S. Tawil is an individual doing business as Discount Wholesale Produce [hereinafter referred to as "Respondent"] whose business address is 2182 E. 10th Street, Los Angeles, California 90021.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 971872 was issued to Respondent on July 23, 1997. This license was suspended on June 9, 1999, pursuant to Section 13(a) of the PACA (7 U.S.C. § 499m(a)), when Respondent failed to allow access to its business records. This license terminated on July 23, 1999, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph III of the Complaint, Respondent, during the period of March through May 1999, purchased, received, and accepted in interstate commerce from 15 sellers, 106 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $645,975.51.

Conclusions

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

Order

A finding is made that Respondent has committed willful, flagrant, and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall become effective on the eleventh day after this Decision becomes final.

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

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 26, 2000.-Editor]

In re: ALEX FARM CORPORATION.
PACA Docket No. D-00-0009.
Decision and Order filed September 22, 2000.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on March 15, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1997 through February 1999, Respondent failed to make full payment promptly to 16 sellers of the agreed purchase prices in the total amount of $419,922.50 for 229 lots of perishable agricultural commodities, that Respondent purchased, received and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, and it has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order

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. Alex Farm Corporation [hereinafter "Respondent"] is a corporation organized and existing under the laws of the State of Florida. Its mailing address is P.O. Box 524143, Miami, Florida 33152, and its business address is 1160 N.W. 21st Terrace, Miami, Florida 33127.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 941025 was issued to Respondent on April 18, 1994. This license terminated on April 18, 1999, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period December 1997 through February 1999, failed to make full payment promptly to 16 sellers of the agreed purchase prices in the total amount of $419,922.50 for 229 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

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

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 2, 2000.-Editor]

In re: MATOS PRODUCE CORP.
PACA Docket No. D-00-0017.
Decision and Order filed October 20, 2000.

Mary Kyle Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.; hereinafter referred to as the "Act"), instituted by a Complaint filed on June 7, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period October 1998 through May 1999, Respondent Matos Produce Corp. [hereinafter "Respondent"] failed to make full payment promptly to 17 sellers of the agreed purchase prices, or balances thereof, in the total amount of $591,424.00 for 186 shipments of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The complaint also noted that on June 3, 1999, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York, New York Division pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 700 *et seq*.), designated Case No. 99B43551. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Scheduled F - Creditors Holding Unsecured Nonpriority Claims that it owes all of the 17 sellers listed in Paragraph III of the Complaint $579,700.10. The Complaint alleged debt to the same 17 sellers of $591,424.00. This admission warrants the immediate issuance of a Decision without Hearing by Reason of Admissions. Complainant has filed a Motion for the issuance of a Decision without Hearing by Reason of Admissions, and the following Decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practices (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation whose business address was 20-21 Bronx Terminal Market, Bronx, New York 10451.

2. Pursuant to the licensing provisions of the PACA, license number 980486 was issued to Respondent on January 20, 1998. This license terminated on January 20, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. The Deputy Administrator, Fruit and Vegetable Division, AMS filed a Complaint alleging that Respondent, during the period October 1998 through May 1999, on or about the dates and in the transactions set forth in paragraph III of the Complaint, purchased, received and accepted 186 shipments of perishable agricultural commodities with agreed purchase prices in the total of $591,424.00 from 17 sellers in interstate commerce.

5. On June 3, 1999, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 700 *et seq*.) in the United States Bankruptcy Court for the Southern District of New York, New York Division. This petition has been designated Case No. 99B43551.

6. Respondent has admitted in bankruptcy pleadings that it owes an amount that totals $579,700.10, an amount less than that which the Complaint alleged, to the same17 sellers that are alleged to be unpaid for purchases in the Complaint. Schedule F consists of a table reflecting the name and address of the creditor and the amount of the unpaid produce debt as shown in the Complaint and in Respondent's bankruptcy filing.

SELLER'S NAME & ORIGIN	**BANKRUPTCY PLEADING**	**COMPLAINT**
World Food Trade Inc.,Miami, FL	$ 10,220.00	$ 10,260.00
T.C. Tropical Products, Bronx, NY Origin: Costa Rica Columbia, Ecuador, Dominican Republic, Trinidad, Tobago, CA, FL, ID	$194,931.45	$164,910.45
C.H. Robinson Company Minneapolis, MN	$114,452.00	$122,124.00
Armeno Foods, Inc., Bergenfield, NJ	$ 11,969.50	$ 21,027.50
Del Monte Fresh Produce N.A., Inc., Coral Gables, FL	$ 63,870.80	$ 75,100.00

Dade South Fruits & Vegetables, Inc. Miami, FL	$ 36,625.00	$ 38,098.50
Yucatica S.A. Costa Rica	$ 21,261.00	$ 33,408.00
Gonzalez and Tapanes a/t/a La Fe Foods North Bergen, NJ	$ 3,505.00	$ 3,656.00
Maurice A. Auerbach, Inc. South Hackensack, NJ	$ 9,321.00	$ 9,321.00
Banana Distributors of New York, Inc. Bronx, NY Origin: Ecuador, Columbia, Costa Rica, CA	$ 13,713.00	$ 14,991.00
Reliable of Miami, Inc. Miami, FL	$ 2,174.00	$ 3,890.00
Nalosa, LLC Wesalco, TX	$ 1,932.00	$ 476.00

M & M Packaging, Inc. Goshen, NY Orgin: TX, OR, ND, ME, MI	$ 16,166.00	$ 21,334.30
K.V.K International Elmont, NY Orgin: Trinidad, Grenada	$ 3,824.75	$ 3,824.75
American Banana Co. Inc. Origin: Ecuador, Colombia, Costa Rica	$ 67,660.00	$ 65,394.50 Less Offset: - 4,536.00 $ 60,858.50
Lili Ochoa, Inc. Miami, FL	$ 7,889.00	$ 7,909.00
D'Amico Farm Allentown, NJ	$ 185.00	$ 235.00
	Total Amount: $579,700.10	Total Amount 591,424.00

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 17 sellers at least $579,700.10 for 186 shipments of perishable agricultural commodities on June 3, 1999. Respondent's admitted failures to make full payment promptly constitute willful, flagrant and

repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b) and the facts and circumstances set forth above shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 3, 2000.-Editor]

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