

# AGRICULTURE DECISIONS

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UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

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

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

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

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index are included in a separate volume, entitled Part Four.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of [Editor.OALJ@usda.gov](mailto:Editor.OALJ@usda.gov).

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**COURT DECISIONS**

**KIRBY PRODUCE COMPANY, INC. v. UNITED STATES DEPARTMENT  
OF AGRICULTURE AND UNITED STATES OF AMERICA.**

**No. 99-1505.**

**Decided August 3, 2001.**

**(Cite as: 256 F.3d 830 (D.C. Cir.)).**

**PACA – Deference to decisions of USDA – Arbitrary and Capricious – No-Pay/Slow Pay – Material facts, lack of dispute – Implicit or equivocal facts, decision based upon, insufficient evidence to determine – Impossibility of performance not synonymous with predication of risk of nonperformance.**

Appellant, a merchant of perishable agricultural commodities, petitioned for review of the Judicial Officer's (JO) decision which had upheld the Administrative Law Judge (ALJ). The Court of Appeals held JO's decision to be arbitrary and capricious when Petitioner requested, but was not granted, a hearing on the underlying infraction. The JO had determined that there were no material issues of fact which were joined by the pleadings. The JO determined that an admission on the record in a prior case, that "full, prompt payment for perishable goods was not made" coupled with Petitioner's request for an indefinite adjournment in this case, constituted an admission that full payment would not be made prior to the time scheduled for hearing (as required to convert a no-pay case into a slow-pay case). The JO concluded that the revocation of the merchant's license was proper. The Court of Appeals determined that the "implicit or equivocal admission" in Petitioner's prior case was insufficient to remove a fact from a material dispute, citing *H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998). The case was remanded for factual determination.

**United States Court of Appeals  
District of Columbia Circuit**

Before: **WILLIAMS** and **GARLAND**, Circuit Judges, and **SILBERMAN**,  
Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge **GARLAND**.

**GARLAND**, Circuit Judge:

Kirby Produce Company, Inc. petitions for review of an order of the Department of Agriculture, which revoked its license as a merchant of perishable agricultural products for not promptly paying for fruit and vegetable shipments, in violation of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a *et seq.* The

Agriculture Department revoked Kirby's license without a hearing, concluding that there was no dispute of material fact warranting a hearing. Because the grounds upon which the Department made that conclusion were arbitrary and capricious, we grant the petition and remand for further proceedings.

## I

PACA regulates "the shipment of perishable agricultural commodities in interstate and foreign commerce through a system of licensing and administrative supervision of the conduct of licensees." *Quinn v. Butz*, 510 F.2d 743, 746 (D.C. Cir. 1975). Every "commission merchant" of such commodities must be licensed by the Secretary of Agriculture. See 7 U.S.C. § 499c.<sup>1</sup> PACA licensees are forbidden to engage in specified unfair practices, including the failure to "make full payment promptly in respect of any transaction" in a perishable agricultural commodity. 7 U.S.C. § 499b(4). "Full, prompt payment" means payment within ten days after the date the produce is accepted, unless otherwise agreed to in writing before the time of sale. 7 C.F.R. § 46.2(aa)(5), (11). If the Secretary determines that a licensee has violated the prompt payment requirement, the Secretary may suspend the offender's PACA license, and, if the violation was flagrant or repeated, may revoke it. 7 U.S.C. § 499h(a).

Although the Secretary is statutorily authorized to revoke a license for flagrant violations, Department of Agriculture policy during the relevant time period permitted a licensee to avoid revocation by making full payment prior to the date set for a hearing on the violations. Such payment would convert a "no-pay" case into a "slow-pay" case, and would result in license suspension rather than revocation. See *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999) (citing *In re Gilardi Truck & Transp.*, 43 Agric. Dec. 118 (1984)).<sup>2</sup>

In March 1996, various creditors, including PACA creditors, filed suit against Kirby in the United States District Court for the Eastern District of Tennessee, seeking payment for produce debts worth \$2.3 million. In June 1996, the district court issued an order, consented to by all parties, that established a payment

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<sup>1</sup>A "commission merchant" is "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another." 7 U.S.C. § 499a(5).

<sup>2</sup>The Department has since changed its standard for no-pay cases. For all complaints filed after January 25, 1999, a case is deemed no-pay if the alleged debts remain unpaid by the earlier of: (a) the hearing date, or (b) 120 days after the filing of the complaint. See *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 562 n.13 (1998).

arrangement and claims procedure. The order did not require payment by a date certain. See *Brown's Produce v. Kirby Produce Co.*, No. 3:96-cv-526 (E.D. Tenn. June 25, 1996).

On October 20, 1997, the Agriculture Department's Agricultural Marketing Service (the "Service") filed an administrative complaint, charging Kirby with violating PACA by failing promptly to make full payment for approximately \$1.6 million in fruits and vegetables from August 1995 through July 1996. The complaint sought revocation of Kirby's license for willful, flagrant, and repeated violations. Kirby's amended answer denied the complaint's material allegations, and the Service requested a hearing. The Administrative Law Judge (ALJ) scheduled one for January 13, 1999.

On November 10, 1998, Kirby's attorney filed a motion with the ALJ, seeking an adjournment of the hearing until Kirby paid its judgment creditors pursuant to the June 1996 order in the *Brown* case. The motion advised the ALJ of the *Brown* order and attached a copy. It also noted that "the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent," and concluded that "[f]ailure to grant this motion for adjournment will frustrate the order . . . and prejudice Respondent's position at the time of the hearing." App. at 20.

Shortly thereafter, the Agricultural Marketing Service filed a motion with the ALJ, seeking a decision on its complaint without a hearing. The Service contended that Kirby's consent to the *Brown* order constituted an admission of all material facts in the complaint. It argued that this admission, coupled with Kirby's apparent inability to pay prior to the hearing date, justified a decision without a hearing. Kirby objected on the grounds that the *Brown* order was an admission of nonpayment only as of June 1996, and that it still had the right to demonstrate full payment before the January 1999 hearing date.

On December 31, 1998, the ALJ canceled the hearing and revoked Kirby's license, concluding that Kirby's motion and attachments had admitted "all the material allegations of fact contained in the complaint." On May 28, 1999, Kirby appealed to the Agriculture Department's Judicial Officer, to whom the Secretary has delegated authority for final decisionmaking in adjudicatory proceedings. See 7 C.F.R. § 2.35. Kirby contended, inter alia, that it had in fact made full payment by January 13, 1999, the date for which the hearing had been scheduled. Notwithstanding that it had violated PACA by failing to pay promptly, Kirby argued that its full payment by the date of the hearing converted the case into a slow-pay case for which revocation was unwarranted.

The Judicial Officer issued his decision on July 12, 1999. He began by "agree[ing] with Respondent's contention that if Respondent paid all of its produce

sellers by the date of the hearing, this case would be a ‘slow-pay’ case,” and Kirby would suffer suspension rather than revocation. *In re Kirby Produce Co.*, 58 Agric. Dec. at 1011. However, instead of adjudicating whether Kirby had in fact paid by January 13, 1999, the Officer determined that Kirby’s consent to the *Brown* order constituted an admission that it had failed to pay promptly, and that Kirby’s motion for a continuance of the hearing constituted an admission that the company would not be able to pay by the hearing date. The Judicial Officer concluded that these admissions eliminated any issue of material fact and justified revocation of Kirby’s license without a hearing. Thereafter, Kirby sought reconsideration, which the Judicial Officer denied. Kirby now petitions for review of the order revoking its license. *See* 28 U.S.C. § 2342(2).

## II

We review final decisions in PACA cases under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E). Under that standard, we must “uphold the Judicial Officer’s decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence.” *JSG Trading Corp. v. USDA*, 176 F.3d 536, 541 (D.C. Cir. 1999).

Kirby concedes that it failed promptly to pay creditors for its PACA debts. But the company contends that it was able to pay in full—and in fact did pay in full—by the January 13, 1999 scheduled hearing date, and it denies that its November 10, 1998 motion was an admission to the contrary. Accordingly, Kirby argues that there was an issue of material fact as to its qualification for slow-pay status, and that the Department’s decision to revoke its license without a hearing was arbitrary and capricious.

PACA states that upon issuing a PACA complaint, the Secretary shall “afford [the respondent] an opportunity for a hearing thereon before a duly authorized examiner of the Secretary.” 7 U.S.C. § 499f(c)(2). Although a hearing is not required if there is no genuine factual dispute, *see Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607-08 (D.C. Cir. 1987), the Agriculture Department’s regulations require a hearing “[i]f any material issue of fact is joined by the pleadings.” 7 C.F.R. § 1.141(b). In its briefs and at oral argument, the Department conceded that if there had been an issue of material fact regarding Kirby’s ability to pay by the scheduled hearing date, revocation without a hearing would have been improper.

The Judicial Officer based his conclusion that there was no material dispute on two grounds. The first was that Kirby’s consent to the *Brown* order constituted an admission that the company had not promptly paid its PACA creditors. That point

is correct and undisputed, but it is also plainly insufficient to eliminate dispute as to whether Kirby could have made full payment by January 13, 1999.

The Officer's second ground was that Kirby's November 10, 1998 motion for an indefinite adjournment constituted an admission that the company would not be able to pay by January 13 of the following year. The Judicial Officer did not explain why it regarded Kirby's motion as an admission. Indeed, the Judicial Officer reached that conclusion without adjudicating Kirby's claim that it had in fact made full payment by January 13, and despite acknowledging that if Kirby actually had paid by that date, revocation could have been avoided. *See In re Kirby Produce Co.*, 58 Agric. Dec. at 1011.

Kirby's motion for adjournment stated: "[T]he payment of all produce debt prior to the hearing substantially reduces the potential sanction. . . . Failure to grant this motion for adjournment *will . . . prejudice* Respondent's position at the time of the hearing." App. at 20 (emphasis added). At oral argument, the Agriculture Department asserted that the term "prejudice" referred to Kirby's classification as a no-pay violator and that, by using the verb "will" rather than "could," Kirby implicitly admitted that its PACA debts could not possibly be paid by the time of the hearing. But under Agriculture Department precedent, an implicit or equivocal admission is insufficient to remove a fact from material dispute. *See In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (holding that before a hearing may be dispensed with, oral statements of a respondent's attorney "must *clearly* constitute an admission of the material allegations of the complaint") (emphasis added). That rule is especially apt in this circumstance. Litigants that move to extend deadlines often lament the harm likely to result if their motions are denied. To construe such a statement as admitting default, however, confuses prediction of risk with confession of impossibility. Kirby clearly intended to emphasize the risk that its payments could not be made before January 13, but it was not reasonable to infer that Kirby intended to admit that nonpayment was certain.

The Judicial Officer's unadorned statement, that Kirby's request for a continuance of the hearing "constitutes an admission" that Kirby would not be able to make full payment by the date of the hearing, did not represent analysis; it merely expressed a conclusion. Such a conclusion was particularly unreasonable in light of Kirby's protestations that it had intended no such admission. And it was doubly so in light of the Judicial Officer's refusal to determine whether Kirby had in fact paid by January 13, after the Officer acknowledged that if Kirby had actually met that deadline, revocation could have been avoided. *See In re Kirby Produce Co.*, 58 Agric. Dec. at 1011. Indeed, in his decision denying reconsideration, the Judicial Officer only added to the arbitrariness of his reasoning. There, in the face of Kirby's representation that full payment had been made prior to January 13,

1999, and again without determining whether that representation was correct, the Judicial Officer ruled that Kirby's "admission" that it "would not be able to" pay removed any issue of material fact as to whether it actually did pay by that date. *In re Kirby Produce Co.*, 58 Agric. Dec. 1032 (1999).

At oral argument, the Department offered to provide this court with an inspector's affidavit attesting that, as of October 31, 2000, Kirby still had not paid \$1.1 million of its PACA debt. After argument, Kirby submitted a declaration by its chief executive officer, made under penalty of perjury, that the company had in fact paid in full prior to January 13, 1999. Although both statements obviously cannot be true, it is just as clear that this court is not the proper authority to make the necessary factual determination. That is a task for the agency upon remand. *See Veg-Mix, Inc.*, 832 F.2d at 609.

### III

In revoking Kirby's license without a hearing, the Judicial Officer relied upon his conclusion that the company had admitted that it could not make payment by the date that had been scheduled for that hearing. That conclusion was arbitrary and capricious. We therefore grant Kirby's petition for review and remand the case for further proceedings consistent with this opinion.

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## DEPARTMENTAL DECISIONS

**In re: H.C. MACCLAREN, INC.**

**PACA Docket No. D-99-0012.**

**Decision and Order.**

**Filed November 8, 2001.**

**Alteration of inspection certificates – False accounts of sales – Egregious violation defined – Willful violations – Flagrant and repeated violations – Liability for employee violations – Reason to know – Sanction recommendation – Sanction policy – Civil penalty – License revocation.**

The Judicial Officer (JO) revoked Respondent's PACA license for making false and misleading statements, for a fraudulent purpose, in connection with transactions involving perishable agricultural commodities in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The JO found that Respondent's employees altered 53 United States Department of Agriculture (USDA) inspection certificates and made eight false accounts of sales resulting in Respondent's underpayment to its produce suppliers and/or brokers of \$137,502.15. The JO found that Respondent's employees acted within the scope of their employment when they altered the USDA inspection certificates and made the false accounts of sales; therefore, the JO concluded, as a matter of law, that Respondent was responsible for its employees' violations (7 U.S.C. § 499p). The JO rejected Respondent's request for the assessment of a civil penalty and reversed the Chief ALJ's assessment of a \$50,000 civil penalty stating that Respondent's violations were egregious and egregious violations warranted either suspension or revocation of the violator's PACA license. The JO held the Chief ALJ erroneously failed to find that Respondent's violations were willful. The JO found Complainant failed to prove by a preponderance of the evidence that Respondent's principals knew of the violations but found that Respondent's principals should have known of the violations. The JO rejected Complainant's contention that the Chief ALJ's failure to discuss more of the violative transactions and the testimony of each of Complainant's witnesses were error. The Judicial Officer rejected Respondent's contention that the assessment of civil penalties in similar cases which were settled by the entry of consent decisions should determine the sanction in the proceeding. The Judicial Officer stated that consent orders are given no weight in determining the sanction in a litigated case.

Eric Paul and Ruben D. Rudolph, Jr., for Complainant.

Stephen P. McCarron, for Respondent.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

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

## PROCEDURAL HISTORY

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 June 17, 1999. 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. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period June 1994 through November 1996, H.C. MacClaren, Inc. [hereinafter Respondent], made, for a fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent altered 53 United States Department of Agriculture inspection certificates to falsely indicate the percentage of defects, the range of defects, the number of cartons, and/or the temperature range of perishable agricultural commodities and, in one case, the inspection applicant's name; (2) Respondent submitted the 53 United States Department of Agriculture inspection certificates to 22 of Respondent's suppliers and/or brokers and, as a result, Respondent underpaid these 22 suppliers and/or brokers \$130,903; (3) during the period June 1994 through November 1996, Respondent made, for a fraudulent purpose, false and misleading statements in connection with transactions in perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce in that Respondent made false accounts of sale that incorrectly reported the net proceeds that Respondent received for its sale of perishable agricultural commodities in interstate commerce; (4) Respondent submitted these false accounts of sale to seven of Respondent's suppliers and, as a result, Respondent paid these seven suppliers \$6,599.15 less than it would have paid if the accounts of sale had been accurate; and (5) Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-V). On July 7, 1999, Respondent filed an "Answer to Complaint" denying the material allegations of the Complaint.

On September 20 and 21, 2000, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Detroit, Michigan. Eric Paul and Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Respondent.

On December 4, 2000, Respondent filed "Brief of Respondent," and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order." On December 12, 2000, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order (with Revised Transcript Citations)" [hereinafter Complainant's Post-Hearing Brief]. On January 3, 2001, Respondent filed "Reply Brief of Respondent" and Complainant filed "Reply Brief."

On March 23, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that during the

period June 1994 through November 1996, Respondent, by altering United States Department of Agriculture inspection certificates and accounts of sales, made, for a fraudulent purpose, false and misleading statements in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) assessed Respondent a \$50,000 civil penalty (Initial Decision and Order at 18).

On May 23, 2001, Complainant appealed to the Judicial Officer. On July 19, 2001, Respondent filed "Respondent's Opposition to Complainant's Appeal Petition." On September 11, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except for the sanction imposed by the Chief ALJ against Respondent. Therefore, except for the Chief ALJ's sanction, the Chief ALJ's discussion of the sanction, and other minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law as restated.

Complainant's exhibits are designated by "CX." York Stenographic Services, Inc., the court reporting company responsible for transcribing the September 2000 hearing, provided a transcript on October 13, 2000. This October 13, 2000, transcript is in two volumes. One volume of the transcript relates to the segment of the hearing conducted on September 20, 2000, and contains pages numbered 2 through 291. The second volume of the transcript relates to the segment of the hearing conducted on September 21, 2000, and contains pages numbered 2 through 204. The Hearing Clerk requested that York Stenographic Services, Inc., provide a second transcript with the pages sequentially numbered. York Stenographic Services, Inc., provided the second transcript in which the pages are numbered 2 through 466. The Chief ALJ's Initial Decision and Order references the October 13, 2000, transcript. Therefore, in this final Decision and Order, I reference the October 13, 2000, transcript, to wit: references in this Decision and Order to "Tr. Vol. I" relate to the September 20, 2000, hearing transcript segment; and references to "Tr. Vol. II" relate to the September 21, 2000, hearing transcript segment.

#### **APPLICABLE STATUTORY PROVISIONS**

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.

....

**(e) Alternative civil penalties**

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

....

**§ 499n. Inspection of perishable agricultural commodities**

....

**(b) Issuance of fraudulent certificates; penalties**

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

....

**§ 499p. Liability of licensees for acts and omissions of agents**

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.

7 U.S.C. §§ 499b(4), 499h(a), (e), 499n(b), 499p.

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

**Statement of the Case**

At the hearing, Respondent did not deny that three of its employees altered 53 United States Department of Agriculture inspection certificates and made eight false accounts of sales during the period June 1994 through November 1996, as alleged in the Complaint (Tr. Vol. I at 6). The evidence presented by Complainant establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, three of Respondent's commission-paid salespersons, altered the United States Department of Agriculture inspection certificates in the course of their employment. Norman Olds and Frederick Gottlob each altered 26 United States Department of Agriculture inspection certificates. Alan Johnston altered one United States Department of Agriculture inspection certificate. Complainant estimated that Respondent gained \$85,498.30 from Norman Olds' alterations, \$44,743.20 from Frederick Gottlob's alterations, and \$661.50 from Alan Johnston's alteration. (CX 12-CX 60.) Respondent did not challenge Complainant's estimates which were attached as Appendix A to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix A to this Decision and Order and incorporated in this Decision and Order by reference.

The evidence presented by Complainant establishes that Norman Olds and Frederick Gottlob made eight false accounts of sales in the course of their employment. Norman Olds made one false account of sale and Frederick Gottlob made seven false accounts of sales. Complainant estimated that Respondent gained \$485.25 from Norman Olds' false account of sale and \$6,113.90 from Frederick Gottlob's seven false accounts of sales. (CX 61-CX 68.) Respondent did not

challenge Complainant's estimates which were attached as Appendix B to the Complaint. These estimated gains are accordingly deemed to be admitted and are attached as Appendix B to this Decision and Order and incorporated in this Decision and Order by reference.

The following are examples of the transactions in which Norman Olds, Frederick Gottlob, and Alan Johnston made alterations.

**Inspection Certificate M-910462-1.** United States Department of Agriculture inspection certificate M-910462-1 relates to a f.o.b. purchase by Respondent on April 19, 1995, of 920 cartons of iceberg lettuce from Dole Fresh Vegetables, Inc. The United States Department of Agriculture inspector found some decay in the lettuce and the shipping temperature of the lettuce (42 to 46 degrees) was excessive for the commodity. Norman Olds, who handled this transaction, altered the United States Department of Agriculture inspection certificate to show that the temperature was within shipping contract specifications (37 to 41 degrees) to make it appear that the decay was not attributable to the high shipping temperature. Norman Olds then negotiated a \$15,640 reduction in the amount Respondent owed Dole Fresh Vegetables, Inc. (CX 21.)

**Inspection Certificate K-164560-5.** United States Department of Agriculture inspection certificate K-164560-5 relates to a purchase on March 23, 1996, of lettuce by Respondent from Anderson Farms. Frederick Gottlob handled the transaction and altered the United States Department of Agriculture inspection certificate to increase the number of United States Department of Agriculture-inspected containers from 160 to 460 to increase the extent of the damage found in the lettuce. Frederick Gottlob was then, because of the misrepresentation, able to negotiate a \$2,887.80 reduction in the amount Respondent owed Anderson Farms and increase the amount of his commission. (CX 41.)

The Anderson Farms transaction was also one of the eight false accounts of sales (CX 61-CX 68). These false accounts of sales involved arrangements between Respondent and shippers whereby Respondent handled produce for a shipper's account. Frederick Gottlob altered the records in the Anderson Farms account to change the gross proceeds of the transaction from \$2,681 to \$2,232; expenses from \$1,192.20 to \$1,639.50; and net proceeds from \$1,488.80 to \$592.50. Frederick Gottlob's false accounting understated the actual net proceeds by \$896.30. (CX 65.)

**Inspection Certificate K-164203-2.** United States Department of Agriculture inspection certificate K-164203-2, the only inspection certificate altered by Alan Johnston, was changed by Alan Johnston to double the number of inspected cartons of apples purchased on February 20, 1996, from Hansen Fruit & Cold Storage Co., Inc., from 49 to 98. This alteration had the effect of increasing the number of

defects. Based on this alteration, Alan Johnston obtained a \$705.50 reduction in the amount owed Hansen Fruit & Cold Storage Co., Inc. Alan Johnston said he made the change in the United States Department of Agriculture inspection certificate to correct a counting error by the inspector. (CX 37.)

The evidence clearly establishes that Respondent's employees made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales. As Respondent's salespersons willfully committed these unlawful acts in the scope of their employment, the acts are deemed to be the acts of Respondent (7 U.S.C. § 499p).<sup>1</sup> Accordingly, I find Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

As for the sanction for the violations, Complainant contends Respondent's PACA license should be revoked (Complainant's Post-Hearing Brief at 40). Respondent requests the assessment of a civil money penalty of \$100,000 or less (Brief of Respondent at 6).

Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209. Pursuant to the licensing provisions of the PACA, Respondent was issued PACA license number 740476 on September 18, 1974. Respondent's PACA license has been renewed annually. (Answer to Complaint ¶ 2.)

Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia. (Tr. Vol. II at 40-41, 87; CX 6 at 1, CX 7 at 19.) Gregory MacClaren and Darrell Moccia, together with four salespersons, buy and sell produce for the company. They all work in the same area with raised dividers separating the desks and handle about 400 transactions a month. (Tr. Vol. I at 23-25, 133-34, 232-33; Tr. Vol. II at 41-42.)

Each transaction has its own file. The salesperson handling a transaction places identifying initials on the outside file jacket and writes on the jacket the amount of the invoice which is used by an office worker to pay the invoice and calculate the salesperson's commission. United States Department of Agriculture inspection certificates, invoices, and other records relating to the transaction are placed in the file. (Tr. Vol. I at 29, 50; Tr. Vol. II at 69-70.) Darrell Moccia testified that, prior to the United States Department of Agriculture's investigation, he did not routinely

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<sup>1</sup>See also *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 1996).

look in the files prepared by the salespersons, except when he received a complaint from a shipper. He said he had relied on the office staff to bring any problems to his attention. (Tr. Vol. II at 51-54.)

In December 1996, United States Department of Agriculture investigators visited Respondent's place of business for the purpose of checking on a transaction involving another company that was under investigation for possible altered United States Department of Agriculture inspection certificates. When the investigators checked Respondent's file relating to this transaction, they found two copies of the same United States Department of Agriculture inspection certificate. The two copies contained conflicting entries. Neither Gregory MacClaren nor Darrell Moccia could explain the discrepancy. The United States Department of Agriculture investigators then looked at 36 files and found the entries on the United States Department of Agriculture inspection certificates in 11 of the files handled by Norman Olds, Frederick Gottlob, and Alan Johnston did not match the entries on the United States Department of Agriculture's copies of the certificates. (Tr. Vol. I at 9-15.) Norman Olds, Frederick Gottlob, and Alan Johnston admitted making alterations to the United States Department of Agriculture inspection certificates (Tr. Vol. I at 18-23, 131-33, 225-28, 263-64; CX 3 at 2-4). Gregory MacClaren and Darrell Moccia told the investigators that they were unaware of the alterations but that they wanted to cooperate and do what was necessary to get "to the bottom" of the matter. They then instituted their own investigation. Darrell Moccia told Norman Olds "if you did it, you might as well get everyone [sic] of [the files] out and let's get it out in the open. Because if there's [sic] ill gains in it in our books, I want them out, I want to pay the bills." (Tr. Vol. II at 44-45.)

Darrell Moccia and Gregory MacClaren then had Norman Olds, Alan Johnston, and Frederick Gottlob go through their files to find and retrieve any altered United States Department of Agriculture inspection certificates (Tr. Vol. I at 20, 264-65). Norman Olds testified that he and his wife went through his files involving all the transactions he handled in his 7 years with Respondent (Tr. Vol. I at 266). He gave the files with altered United States Department of Agriculture inspection certificates to a United States Department of Agriculture investigator who observed that some of the file jackets for the transactions handled by Norman Olds contained the initials "DNM" rather than "NO." DNM are the initials of Darrell N. Moccia. Norman Olds and Darrell Moccia testified that Norman Olds had used the initials DNM for some transactions because of a 2-year "no-compete" agreement that Norman Olds had with the produce company for whom he worked before being hired by Respondent. Norman Olds, with Darrell Moccia's concurrence, had put the initials DNM rather than his own initials, NO, on the jacket files for those transactions he handled that involved companies that also did business with his former employer

to avoid a conflict with the no-compete agreement. Darrell Moccia put the initials DM on the transactions he handled to distinguish them from the DNM transactions handled by Norman Olds. The office workers who paid the invoices and computed the commissions knew that files with the initials DNM meant Norman Olds and those with DM meant Darrell Moccia. (Tr. Vol. I at 193-94, 213-15, 255-57, 281-82.)

Norman Olds, Alan Johnston, and Frederick Gottlob gave statements to United States Department of Agriculture investigators admitting that they had altered United States Department of Agriculture inspection certificates. They each stated that Gregory MacClaren and Darrell Moccia were not aware of their actions. (CX 3 at 2-4; Tr. Vol. I at 228-29.) Frederick Gottlob added in his statement that he had acted “independently” (CX 3 at 3). However, at the hearing Frederick Gottlob testified that, while his statement was true “at the time” he prepared it, he was told by Norman Olds some months later that Gregory MacClaren and Darrell Moccia had been aware that the United States Department of Agriculture inspection certificates were being altered. He said that Norman Olds was a partner in the business, a supervisor, and the office manager, that he had gotten the idea to alter certificates from Norman Olds, that Norman Olds showed him how to make the alterations, and that the alterations were a secret between he and Norman Olds. Frederick Gottlob said the practice of altering the United States Department of Agriculture inspection certificates had started after Norman Olds began working for Respondent, which was about 2 years after Frederick Gottlob’s date of employment. However, he hedged this assertion when asked if he had altered any United States Department of Agriculture inspection certificates before Norman Olds’ arrival, with the response “It’s possible that I did. I’m not sure.” (Tr. Vol. I at 132, 144, 152, 157-58, 172.)

As for falsifying accounts of sales, the record shows that Frederick Gottlob, who called the practice “creaming the file,” was responsible for seven of the eight accounts of sales that Complainant alleges were falsified (CX 61-CX 63, CX 65-CX 68). Frederick Gottlob, however, implied that other salespersons had also falsified accounts of sales by claiming that it “was a common practice in the office” and that Greg MacClaren was aware of it. He also asserted that everyone joked about the practice (Tr. Vol. I at 135-36, 167). Frederick Gottlob named Daniel Schmidlin as one of the salespersons he saw falsifying an account of sale and said Gregory MacClaren had made up a letterhead to create a false account of sale for a transaction with a company called Metro Produce. However, he qualified his assertion by saying that he did not know whether Gregory MacClaren had falsified the account. He also said that he learned the “white-out trick” that he used to alter United States Department of Agriculture inspection certificates from Gregory

MacClaren who had used white-out on documents to be used for a shipment to Canada. (Tr. Vol. I at 135-37, 159, 161-62, 166-68.) Gregory MacClaren explained that he had sometimes re-used manifest papers for the shipment of grapes to Canada by using white-out to create a blank manifest form to write in the information for a new shipment of grapes. He said no false information was put on the forms. (Tr. Vol. II at 106-07, 138-40.) Complainant does not allege that this practice was unlawful.

Daniel Schmidlin, who was not alleged to have altered United States Department of Agriculture inspection certificates or to have made false accounts of sales, testified that he was not aware that Norman Olds or Frederick Gottlob or anyone at Respondent altered United States Department of Agriculture inspection certificates or made false accounts of sales until the United States Department of Agriculture conducted its investigation. He also said that Norman Olds was just another salesperson and was not his supervisor. (Tr. Vol. I at 242-50.)

Norman Olds testified that he was not a supervisor but that, under the terms of his employment with Respondent, he was to receive 10 percent of the company's stock after being there 10 years. He said he never told Frederick Gottlob or anyone at the company that he had altered United States Department of Agriculture inspection certificates and was unaware that Frederick Gottlob had also altered them. (Tr. Vol. I at 265-66, 278-81.)

Perry Chiarelli, who worked for Respondent for about 6 weeks as a salesperson, said he received training from Darrell Moccia on being a buyer and broker and received coaching from Norman Olds on dealing with trucking companies and growers. He testified that Norman Olds was Respondent's best salesperson and was "kind of like our supervisor" (Tr. Vol. I at 183). Perry Chiarelli said he saw Norman Olds alter a United States Department of Agriculture inspection certificate and quit a week later. When Gregory MacClaren asked him why he was quitting, Perry Chiarelli responded that he was not comfortable working with "scoundrels." However, he said he did not go into specifics with Gregory MacClaren as to the persons he regarded as scoundrels, but testified that he meant "not only the buyers but the growers and even the brokers, just the industry as I had seen it firsthand" (Tr. Vol. I at 184). He also talked to Darrell Moccia when he quit but said he did not remember whether he used the word scoundrel with Darrell Moccia. He said he told Darrell Moccia that United States Department of Agriculture inspection certificates were being altered but then said he was not sure whether he had actually used the word "alterations" in his conversation with Darrell Moccia and that he may have said "I was not comfortable with what Norm [Olds] was doing as far as the inspections I could have said." (Tr. Vol. I at 175-80, 183-84, 187-88.)

Jayne Mounce, one of Respondent's office workers, said that Norman Olds was

a supervisor but that she never saw him directing the other salespersons. She also said she was not aware that United States Department of Agriculture inspection certificates had been altered until the time of the United States Department of Agriculture investigation. (Tr. Vol. I at 194-95, 213-14.)

Alan Johnston, who admitted altering a United States Department of Agriculture inspection certificate after a United States Department of Agriculture inspector made a mistake in counting the number of cartons in a shipment from Hansen Fruit & Cold Storage Co., Inc., said he called Hansen Fruit & Cold Storage Co., Inc., about the inspector's mistake and told them that he had altered the United States Department of Agriculture inspection certificate to reflect the correct count. He said that Hansen Fruit & Cold Storage Co., Inc., did not "have a problem with that." Alan Johnston, however, followed up with a letter to Hansen Fruit & Cold Storage Co., Inc., to document what he had done because he said he realized he should not have altered the United States Department of Agriculture inspection certificate. He said he sat next to Norman Olds but was not aware that Norman Olds or Frederick Gottlob had altered United States Department of Agriculture inspection certificates. (Tr. Vol. I at 225-38; CX 3 at 4.)

Norman Olds and Frederick Gottlob offered to resign from the company, but Gregory MacClaren gave them the option of staying and paying Respondent the amount it owed the produce shippers because of the altered United States Department of Agriculture inspection certificates. Gregory MacClaren told them "we're going to try to work through this" by making restitution to the shippers. Norman Olds and Frederick Gottlob were told to call all shippers who were affected by the altered United States Department of Agriculture inspection certificates and Gregory MacClaren made follow-up calls to the same shippers. He testified that he has paid back almost 100 percent of the amounts Respondent underpaid shippers because of the alterations. (Tr. Vol. II at 98-103, 109.)

Norman Olds continued working as a salesperson with an agreed upon amount deducted from his pay as restitution to cover the loss caused by his misdeeds. Frederick Gottlob continued working for another month and a half. However, Gregory MacClaren and Darrell Moccia said Frederick Gottlob's attitude changed and when his sales would equal his "draw," he would stop making sales. Darrell Moccia said that Frederick Gottlob "kept spouting off that he had a wife that had a good job and he didn't really need to work hard and make a lot of money." Frederick Gottlob, who testified after receiving a grant of immunity from federal criminal prosecution, admitted that he did not have the "greatest attitude." Gregory MacClaren fired Frederick Gottlob in April 1997 after an encounter over Frederick Gottlob's work performance. Respondent sued Frederick Gottlob, Frederick Gottlob countersued, but the suits were later dropped by both sides. Frederick

Gottlob left the company without paying any restitution to Respondent. (Tr. Vol. I at 138, 152, 155-57, 172-73, 275, 288-89; Tr. Vol. II at 49-50, 90, 104-09.)

### **Discussion**

Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or revocation. 7 U.S.C. § 499h(e). The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and provides one example of a violation of the PACA in which a civil penalty, rather than license revocation or suspension, might be appropriate, as follows:

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

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

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

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, supported expansion of authority to assess civil penalties during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

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

....

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

MR. HATAMIYA. . . .

....

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

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 12, 34 (1995).*

The Administrator, Agricultural Marketing Service, also submitted a written statement, which was made part of the record of the hearing, stating that license suspension or revocation is appropriate for egregious violations of the PACA, as follows:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law.

However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 106 (1995).*

The Administrator of the Agricultural Marketing Service's statements make clear that, although the United States Department of Agriculture supported the 1995 amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious" violations of the PACA.

"Egregious" is defined as "conspicuously bad" (Webster's Collegiate Dictionary 369 (10th ed. 1997)). The intentional alteration and falsification of United States Department of Agriculture inspection certificates and making of false accounts of sales for a fraudulent purpose that cause produce shippers monetary loss clearly meets this definition of egregious. The alteration of United States Department of Agriculture inspection certificates is particularly egregious because these certificates play a critical role in the produce industry. Steven J. Koran, regional sales manager for Dole Fresh Vegetables, Inc., one of the produce suppliers Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified regarding the role of United States Department of Agriculture inspection certificates, as follows:

[BY MR. PAUL:]

Q. Okay. Please indicate to me what role do USDA inspections play in the produce business.

[BY MR. KORAN:]

A. The role of the USDA inspections is pretty much our eyes and ears for any sort of quality claims. It's pretty much the only method we have to settle any disputes on quality grade.

Q. What is Dole's practice with respect to the use of inspections or requiring of inspection certificates?

A. Pretty much any time there's a quality issue we require an inspection to be taken before any adjustment be taken off of the file from the agreed upon FOB price.

Q. If a receiver requests an adjustment, do you ever grant one without an inspection?

A. On very rare occasions if the quantity of the item is insignificant but not very often.

Tr. Vol. I at 62-63.

Similarly, Cloyse Edward Little, the general manager of Mills Distributing Company, a produce supplier Respondent underpaid as a result of its alterations of United States Department of Agriculture inspection certificates, testified that United States Department of Agriculture inspection certificates play an extremely important role in the produce industry (Tr. Vol. I at 85-86). The important role of United States Department of Agriculture inspection certificates is reflected in section 14(b) of the PACA (7 U.S.C. § 499n(b)) which makes the alteration of a United States Department of Agriculture inspection certificate a criminal offense.

Complainant contends Respondent knew that Norman Olds, Frederick Gottlob, and Alan Johnston altered United States Department of Agriculture inspection certificates and that Norman Olds and Frederick Gottlob made false accounts of sales or, if it did not know, Respondent's lack of knowledge was due to its willful ignorance and Respondent's PACA license should therefore be revoked (Complainant's Post-Hearing Brief at 28-33).

The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA

(7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employees, Norman Olds, Frederick Gottlob, and Alan Johnston, were acting within the scope of their employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employees are deemed to be knowing and willful violations by Respondent (7 U.S.C. § 499p).<sup>2</sup>

The evidence offered to establish Respondent's owners, Gregory MacClaren and Darrell Moccia, knew that United States Department of Agriculture inspection certificates were being altered was the testimony of Perry Chiarelli and Frederick Gottlob. Perry Chiarelli, however, could not recall whether he had told Gregory MacClaren and Darrell Moccia that Norman Olds had altered a United States Department of Agriculture inspection certificate or whether he had just complained that he was quitting because he considered everyone connected with the produce industry "scoundrels."

As for Frederick Gottlob's testimony, it was too inconsistent and unsubstantiated to be given much credence. He first gave a statement that he said was true "at the time" that he had acted independently and that Gregory MacClaren and Darrell Moccia were unaware of his misdeeds. He then changed his statement by testifying that he had started altering United States Department of Agriculture inspection certificates at Norman Olds' instigation and that he had later learned from Norman Olds that Gregory MacClaren and Darrell Moccia had known of their actions. He then even changed this statement by conceding that he may have started altering United States Department of Agriculture inspection certificates before Norman Olds was employed by Respondent. He claimed Norman Olds was not only a salesperson but also a partner, a supervisor, and office manager. Norman Olds was a potential partner and a top salesperson who "supervised" to the extent of coaching Perry Chiarelli on how to become a salesperson, but there is no evidence that he had the authority or responsibility of a supervisor or an office manager. Moreover, if Norman Olds were a supervisor or manager, it would have meant that, with Gregory MacClaren and Darrell Moccia working in the same area, there would have been the very unlikely ratio of three supervisors and managers to three salespersons.

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<sup>2</sup>See note 1.

Finally, Frederick Gottlob, who was responsible for seven of the eight false accounts of sales, claimed that falsifying accounts of sales was such a common practice everyone joked about it. He specifically named Daniel Schmidlin and Gregory MacClaren as two of the other culprits. There was a lack of corroboration for this assertion, and I do not find Frederick Gottlob a credible witness. His testimony has little value. I find Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before the violations were discovered during a United States Department of Agriculture investigation in December 1996.

However, I find Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during a United States Department of Agriculture investigation. Commission merchants, brokers, and dealers are prohibited from: (1) making, for a fraudulent purpose, any false or misleading statement in connection with a transaction involving any perishable agricultural commodity; (2) failing to truly and correctly account in respect of any transaction in any perishable agricultural commodity to the person with whom the transaction is had; and (3) failing, without reasonable cause, to perform any specification of duty, express or implied, arising out of any undertaking in connection with a transaction involving a perishable agricultural commodity. (7 U.S.C. § 499b(4)). Cloyse Edward Little, the general manager of Mills Distributing Company, who supervises seven salespersons and has been in the produce industry since 1956, testified that he examines the salespersons' transaction files, including inspection certificates, to evaluate their performance and commissions and that a manager cannot do an adequate job of managing unless he or she reviews the salespersons' transactions files (Tr. Vol. I 93-94). Similarly, Jane E. Servais, Complainant's sanction witness, testified as to the responsibilities of a principal of a PACA licensee to review its salespersons' transaction files, as follows:

BY MR. PAUL:

Q. Now, Ms. Servais, does the agency consider that licensees have a responsibility to have true and accurate records?

[BY MS. SERVAIS:]

A. Yes.

Q. And to supervise their employees in the preparation of such records?

A. They have to provide oversight. They are responsible for the acts of their employees.

Q. And you've heard the testimony that the Respondent's principles [sic] have indicated as to not looking in file jackets. And does that conform with your understanding of appropriate supervision?

A. I don't think any supervisor looks over every employee on every single transaction. But there are checks and balances in place in all businesses, or should be. The fact that they should have, and had opportunity and had access to these files, yes, I do believe they should have, at least on a random sampling basis, check over what their employees were doing.

Tr. Vol. II at 182-83.

In light of the prohibitions in section 2(4) of the PACA (7 U.S.C. § 499b(4)), Gregory MacClaren's and Darrell Moccia's failure to review at least a portion of the transaction files prepared by Respondent's salespersons constitutes gross negligence. Given the large number of altered United States Department of Agriculture inspection certificates and false accounts of sales, Gregory MacClaren's and Darrell Moccia's review of a portion of the transaction files prepared by Respondent's salespersons would likely have resulted in Gregory MacClaren's and Darrell Moccia's discovery of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) prior to December 1996.

Complainant contends PACA license revocation is the only appropriate sanction in this case because the "message" a monetary penalty would send to Respondent and other regulated produce brokers and dealers is that the sanction for altering United States Department of Agriculture inspection certificates and making false accounts of sales is only a "cost of doing business" (Tr. Vol. II at 180).

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute

involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant's sanction witness, Ms. Servais, an administrative official charged with the responsibility for achieving the purposes of the PACA, recommended the revocation of Respondent's PACA license and provided the reasons for her recommendations, including the seriousness of Respondent's violations, the number of Respondent's violations, the time during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, and the mitigating and aggravating circumstances relevant to Respondent's violations<sup>3</sup> (Tr. Vol. II at 171-90).

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Respondent's principals, Gregory MacClaren and Darrell Moccia, acted responsibly when they became aware of the fraudulent practices of Respondent's salespersons. Respondent took prompt measures to discover all of the United States Department of Agriculture inspection certificates that had been altered and all of the false accounts of sales that Respondent's salespersons had made and to provide restitution to the produce shippers for the underpayments resulting from these altered inspection certificates and false accounts of sales. I agree with Complainant's sanction witness that Respondent's restitution of the amounts it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales is a mitigating circumstance.

Complainant noted that Respondent retained the salespersons who were

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<sup>3</sup>Ms. Servais testified Respondent's restitution of the amounts that it underpaid its suppliers and/or brokers because of the alterations of United States Department of Agriculture inspection certificates and the making of false accounts of sales and the corrective action Respondent took to ensure that future violations of the PACA would not occur are mitigating circumstances. Ms. Servais further testified Respondent's retention of the salespersons who altered United States Department of Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance. (Tr. Vol. II at 175, 195.)

responsible for the unlawful conduct. However, Respondent did so on the condition that they pay restitution. Respondent fired the one salesperson, Frederick Gottlob, who did not pay restitution. Nonetheless, I agree with Complainant's sanction witness that Respondent's retention of salespersons who altered United States Department of Agriculture inspection certificates and made false accounts of sales after Respondent's principals learned of their identities is an aggravating circumstance.

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Complainant's sanction witness testified that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA (Tr. Vol. II at 173-74). However, Complainant's sanction witness also testified that she did not know whether a civil penalty would be just as effective a deterrent as the suspension or revocation of a PACA license (Tr. Vol. II at 200). Therefore, while I agree with Ms. Servais' sanction recommendation, I give no weight to her testimony on the deterrent effect of the various sanctions that may be imposed against Respondent.

Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons working for or employed by Respondent, and Norman Olds', Frederick Gottlob's, and Alan Johnston's alteration of United States Department of Agriculture inspection certificates and making false accounts of sales constitute egregious violations of the PACA. I find Respondent's principals' prompt admission of Respondent's violations of the PACA; efforts to identify all altered United States Department of Agriculture inspection certificates, false accounts of sales, and underpaid suppliers and/or brokers; corrective actions to ensure that violations of the PACA do not occur in the future; and prompt payment of the amounts underpaid as a result of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are mitigating circumstances. Nevertheless, considering the seriousness of Respondent's willful violations, the number of Respondent's willful violations,<sup>4</sup> the 29-month period during which the willful violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money Respondent underpaid its suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to

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<sup>4</sup>Ms. Servais testified that in no previous case had the United States Department of Agriculture discovered as many altered United States Department of Agriculture inspection certificates as it discovered during the investigation of this case (Tr. Vol. II at 189).

deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

### **Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7201 W. Fort, Suite 81, Detroit, Michigan 48209.

2. Pursuant to the licensing provisions of the PACA, license number 740476 was issued to Respondent on September 18, 1974. Respondent's PACA license has been renewed annually.

3. Respondent operates as a broker under the PACA. Respondent's president, director, and 51 percent stockholder is Gregory MacClaren. Respondent's vice-president, director, and 49 percent stockholder is Darrell Moccia.

4. During the period June 1994 through November 1996, Gregory MacClaren and Darrell Moccia, and Respondent's salespersons, Norman Olds, Frederick Gottlob, Alan Johnston, and Daniel Schmidlin, bought and sold perishable agricultural commodities for Respondent. The salespersons were paid by commission.

5. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds, Frederick Gottlob, and Alan Johnston, made false and misleading statements in connection with interstate transactions in perishable agricultural commodities by altering 53 United States Department of Agriculture inspection certificates involving 49 transactions to underpay 22 of Respondent's suppliers and/or brokers in amounts totaling \$130,903 as set forth in Appendix A of this Decision and Order.

6. During the period June 1994 through November 1996, Respondent, through its salespersons Norman Olds and Frederick Gottlob, made eight false accounts of sales to underpay seven suppliers in amounts totaling \$6,599.19 as set forth in Appendix B of this Decision and Order.

7. Respondent's owners, Gregory MacClaren and Darrell Moccia, did not know, but should have known, during the period June 1994 through November 1996, that the United States Department of Agriculture inspection certificates, referenced in paragraph 5 of these Findings of Fact, were altered and that the false accounts of sales, referenced in paragraph 6 of these Findings of Fact, were made.

8. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, first learned of the altered United States Department of Agriculture inspection certificates referenced in paragraph 5 of these Findings of Fact and the

false accounts of sales referenced in paragraph 6 of these Findings of Fact.

9. In December 1996, Respondent's owners, Gregory MacClaren and Darrell Moccia, took prompt action to provide restitution to the suppliers and/or brokers who were underpaid because of the altered United States Department of Agriculture inspection certificates and false accounts of sales.

#### **Conclusion of Law**

Respondent's alterations of 53 United States Department of Agriculture inspection certificates and making of eight false accounts of sales, for a fraudulent purpose, constitute repeated, flagrant, and willful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Complainant raises six issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ's failure to conclude that Respondent's violations of the PACA were willful, is error (Complainant's Appeal Pet. at 5-7). Respondent argues that willfulness is irrelevant (Respondent's Opposition to Complainant's Appeal Pet. at 1 n.1).

I agree with Complainant's contention that the Chief ALJ erroneously failed to conclude that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.<sup>5</sup> The record

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<sup>5</sup>See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (continued...)

clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, intentionally altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob, for a fraudulent purpose, intentionally made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements which Respondent's employees willfully placed on United States Department of Agriculture inspection certificates and accounts of sales are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Respondent's employees Norman Olds, Frederick Gottlob, and Alan Johnston

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<sup>5</sup>(...continued)

(1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (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 National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'") The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

were acting within the scope of their employment when they willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the willful violations by Respondent's employees are deemed to be willful violations by Respondent.<sup>6</sup> Therefore, in this Decision and Order, I restate the Chief ALJ's Initial Decision and Order to reflect my conclusion that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are willful.

I reject Respondent's argument that willfulness is irrelevant. Respondent's willfulness has a direct bearing on the sanction which I impose for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated and flagrant. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 29-month period during which Respondent committed the violations.<sup>7</sup>

Second, Complainant contends the Chief ALJ erred in finding that Respondent and its owners, Gregory MacClaren and Darrell Moccia, "did not know, and should not have known," that United States Department of Agriculture inspection certificates were altered or that false accounts of sales were made (Complainant's Appeal Pet. at 8-13). In response, Respondent states the Chief ALJ's findings of

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<sup>6</sup>See *In re Jacobson Produce, Inc.*, 53 Agric. Dec. 728 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 1996).

<sup>7</sup>See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating that violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding that 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

fact and credibility determinations are “supported by substantial evidence and entitled to great weight” (Respondent’s Opposition to Complainant’s Appeal Pet. at 1 n.1).

I agree with Complainant’s contention that Respondent knew of the alterations of 53 United States Department of Agriculture inspection certificates and the making of eight false accounts of sales. The record clearly establishes that Norman Olds, Frederick Gottlob, and Alan Johnston, for a fraudulent purpose, knowingly altered 53 United States Department of Agriculture inspection certificates and Norman Olds and Frederick Gottlob knowingly made eight false accounts of sales in connection with transactions involving perishable agricultural commodities that Respondent purchased, accepted, and sold in interstate commerce. The false and misleading statements that Respondent’s employees knowingly placed on United States Department of Agriculture inspection certificates and accounts of sales for a fraudulent purpose are prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a broker, within the scope of his or her employment or office, shall in every case be deemed the act of the broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee’s agents and employees. Respondent’s employees Norman Olds, Frederick Gottlob, and Alan Johnston were acting within the scope of their employment when they knowingly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing violations by Respondent’s employees are deemed to be knowing violations by Respondent.<sup>8</sup>

I agree with the Chief ALJ’s finding that Complainant failed to prove by a preponderance of the evidence that Gregory MacClaren and Darrell Moccia knew of the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) before they were discovered during a United States Department of Agriculture investigation in December 1996. However, I find that Gregory MacClaren and Darrell Moccia should have known of the violations before they were brought to their attention during the United States Department of Agriculture investigation and, in this Decision and Order, I restate the Chief ALJ’s Initial Decision and Order to reflect

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<sup>8</sup>See note 6.

my finding and to provide my reasons for this finding.

Third, Complainant contends the Chief ALJ erred in failing to find that Respondent's violations were egregious violations for which license revocation would be the appropriate sanction (Complainant's Appeal Pet. at 13-15).

The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for egregious violations of the PACA is revocation or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a \$50,000 civil penalty for its 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a \$50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of \$137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.<sup>9</sup> Further, in light of the number of violations, the seriousness of the violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I do not find the mitigating circumstances sufficient to warrant the assessment of a civil monetary penalty rather than the revocation of Respondent's PACA license.

Fourth, Complainant contends the Chief ALJ erred in failing to enter relevant findings of fact. Specifically, Complainant contends the Chief ALJ failed to discuss a number of the transactions in which Respondent made false statements for a

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<sup>9</sup>See *In re Potato Sales, Co., Inc.*, 54 Agric. Dec. 1220, 1233 (1995) (revoking the respondent's PACA license for willfully, repeatedly, and flagrantly misrepresenting the origin of apples in violation of the PACA despite the respondent's president's and owner's lack of actual knowledge of the violations).

fraudulent purpose. (Complainant's Appeal Pet. at 15-16.)

Respondent does not deny that it made, for a fraudulent purpose, false and misleading statements on 53 United States Department of Agriculture inspection certificates and eight accounts of sales in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The Chief ALJ concluded that Respondent, by altering 53 United States Department of Agriculture inspection certificates and making eight false accounts of sales, for a fraudulent purpose, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 18). However, the Chief ALJ chose to discuss only examples of the transactions in which Respondent altered United States Department of Agriculture inspection certificates and made false accounts of sales for a fraudulent purpose, rather than to discuss all of Respondent's fraudulent transactions (Initial Decision and Order at 4-5). I do not find the Chief ALJ's failure to discuss additional transactions, in which Respondent made false statements for a fraudulent purpose, error, as Complainant suggests.

Moreover, Complainant contends the Chief ALJ's failure to discuss Steven J. Koran's testimony (Tr. Vol. I at 59-80), Cloyse Edward Little's testimony (Tr. Vol. I at 83-104), Richard Alcocer's testimony (Tr. Vol. I at 105-18), and Jeb Johnson's testimony (Tr. Vol. I 118-29), is error (Complainant's Appeal Pet. at 15-16).

The Administrative Procedure Act requires that each initial decision include findings, conclusions, and the reasons for the findings and conclusions, as follows:

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

. . . .

(c) . . . .

. . . All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c).

Similarly, section 1.132 of the Rules of Practice defines the word “decision” as follows:

**§ 1.132 Definitions.**

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

*Decision* means: (1) The Judge’s initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge’s (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties[.]

7 C.F.R. § 1.132.

Neither the Administrative Procedure Act nor the Rules of Practice require that an administrative law judge discuss the testimony given by each witness. Therefore, while I quote Steven J. Koran’s testimony and reference Cloyse Edward Little’s testimony in this Decision and Order, I do not find the Chief ALJ erred by failing to discuss the testimony given by Steven J. Koran, Cloyse Edward Little, Richard Alcocer, and Jeb Johnson.

Complainant contends Steven J. Koran’s, Cloyse Edward Little’s, Richard Alcocer’s, and Jeb Johnson’s testimony establish “the key role played by USDA inspection certificates in the industry and the absolute reliance that was placed upon them in the transactions that are the subject of this proceeding” and the Chief ALJ’s “failure to give due consideration to their testimony may have been a significant factor in his selection of sanction in this case” (Complainant’s Appeal Pet. at 16).

While the Chief ALJ did not discuss Steven J. Koran’s, Cloyse Edward Little’s, Richard Alcocer’s, and Jeb Johnson’s testimony, the Chief ALJ concluded that Respondent’s violations of the PACA are serious (Initial Decision and Order at 16). Moreover, the Chief ALJ characterized Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as “egregious,” stated that the definition of the word “egregious” is “outstandingly bad,” and noted that section 14(b) of the PACA (7 U.S.C. § 499n(b)) makes the alteration and falsification of a United States

Department of Agriculture inspection certificate a crime (Initial Decision and Order at 12). Therefore, I reject Complainant's speculation that the Chief ALJ's assessment of a \$50,000 civil penalty may have been based on the Chief ALJ's underestimation of the importance of United States Department of Agriculture inspection certificates to the produce industry.

Fifth, Complainant contends the Chief ALJ erred in failing to accord due deference to the agency's sanction recommendation (Complainant's Appeal Pet. at 16-18). Respondent contends the Chief ALJ was not required to follow Complainant's sanction recommendation (Respondent's Opposition to Complainant's Appeal Pet. at 3).

The Chief ALJ states the United States Department of Agriculture's policy is that "deference is to be accorded to the opinion of a sanction witness who has acquired specialized knowledge of the produce industry." (Initial Decision and Order at 15.)

I disagree with the Chief ALJ's description of the United States Department of Agriculture's sanction policy. The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The United States Department of Agriculture's policy is to give appropriate weight to the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute; it is not to accord deference to the recommendations of any sanction witness who has acquired knowledge of the produce industry, as the Chief ALJ states.

The Initial Decision and Order establishes that the Chief ALJ considered and rejected the sanction recommendation given by Complainant's sanction witness, Ms. Servais. While the Chief ALJ is required to give appropriate weight to recommendations of administrative officials charged with achieving the congressional purpose of the PACA, I agree with Respondent that the Chief ALJ is not required to follow the recommendation of Complainant's sanction witness. It is well settled that the recommendations of administrative officials as to the sanction

is not controlling, and in appropriate circumstances, the sanction imposed may be less, or different, than that recommended by administrative officials.<sup>10</sup> Ms. Servais' testimony regarding her recommendation that Respondent's PACA license be revoked includes the basis for her recommendation and her reasons for rejecting Respondent's contention that the assessment of a civil penalty would be appropriate in this case. Ms. Servais' reasons for her recommendation include the number and type of violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, and the amount of money Respondent underpaid its suppliers and/or brokers. (Tr. Vol. II at 171-90.) While I give no weight to Ms. Servais' testimony on the deterrent effect of the various sanctions that may be imposed against Respondent, I agree with Ms. Servais that these factors establish that the assessment of a civil penalty against Respondent is not appropriate. Further, I conclude that revocation of Respondent's PACA license is necessary to deter Respondent and other potential violators from future violations of the PACA. Consequently, I revoke Respondent's PACA license.

Sixth, Complainant contends the Chief ALJ erred in failing to provide a rational basis for his selection of a \$50,000 civil penalty (Complainant's Appeal Pet. at 18-19).

I agree with Complainant's contention that the Chief ALJ did not provide a rational basis for his assessment of a \$50,000 civil penalty against Respondent. The Chief ALJ, citing *In re Kanowitz Fruit & Produce Co., Inc.*, 56 Agric. Dec. 917 (1997), correctly states the United States Department of Agriculture has held that

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<sup>10</sup>*In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *appeal docketed*, No. CIV F 015606 AWISMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *appeal docketed*, No. 01-3508 (6th Cir. May 12, 2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, No. 00-60844 (5th Cir. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (*per curiam*); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

PACA license revocation or suspension is the appropriate sanction for egregious violations of the PACA. Further, I agree with the Chief ALJ's conclusion that "[t]he intentional alteration and falsification of a USDA inspection certificate that causes produce shippers monetary loss clearly meets the definition of egregious." (Initial Decision and Order at 12.) Despite the Chief ALJ's finding that Respondent's violations of the PACA are egregious and the Chief ALJ's conclusion that the appropriate sanction for an egregious violation of the PACA is revocation or suspension of the violator's PACA license, the Chief ALJ assessed Respondent a \$50,000 civil penalty for Respondent's 61 violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 16). I disagree with the Chief ALJ's assessment of a \$50,000 civil penalty for Respondent's 61 egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) which resulted in underpayment to Respondent's produce suppliers and/or brokers of \$137,502.15. Respondent's violations of the PACA are not rendered any less serious or egregious because they were personally performed for Respondent by employees acting within the scope of their employment rather than by Respondent's officers and owners.<sup>11</sup> Further, in light of the number of Respondent's willful violations, the seriousness of Respondent's willful violations, the 29-month period during which the violations occurred, the number of Respondent's employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which Respondent underpaid its produce suppliers and/or brokers, Respondent's retention of the salespersons who engaged in the unlawful conduct, and Respondent's principals' failure to review transaction files prepared by Respondent's salespersons, I conclude a civil penalty would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Further, I conclude revocation of Respondent's PACA license is necessary to deter future violations of the PACA by Respondent and other potential violators.

Respondent cites three cases involving the alteration of United States Department of Agriculture inspection certificates in which civil penalties were assessed and states Complainant has not shown that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases (Respondent's Opposition to Complainant's Appeal Pet. at 3 n.2).

I agree with Respondent that in *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished); *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished); and *In re Jacobson Produce, Inc.*, 55 Agric. Dec.

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<sup>11</sup>See note 9.

709 (1996) (Modified Order and Order Lifting Stay), respondents found to have altered United States Department of Agriculture inspection certificates were assessed civil penalties. Moreover, I agree with Respondent that Complainant failed to show that there has been an increase in the making of false or misleading statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) because of the assessment of civil penalties in these cases. In addition, Complainant's sanction witness testified that she does not know whether a civil penalty might be just as effective a deterrent as suspension or revocation of a violator's PACA license (Tr. Vol. II at 200).

However, I disagree with Respondent's contention that it should be assessed a civil penalty in this case on the basis of the assessment of civil penalties in the three cases which it cites. Two of the cases cited by Respondent, *In re Evergreen International, Inc.*, 59 Agric. Dec. 506 (2000) (unpublished), and *In re R.A.M. Produce Distributors, Inc.*, 58 Agric. Dec. 707 (1999) (unpublished), were settled by the issuance of consent decisions. The Judicial Officer has long held that consent orders are given no weight in determining the sanction in a litigated case.<sup>12</sup> In a case in which the parties agree to the entry of a consent decision, there is generally no record or argument to establish the basis for the sanction. The sanction may appear to be less than warranted because of problems of proving the allegations of the complaint or because of unrevealed mitigating circumstances. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause the sanction in a consent decision to appear less severe than appropriate. Conversely, the sanction in a consent decision may seem more severe than appears warranted because of unrevealed aggravating circumstances. Thus, I do not find that sanctions agreed to by parties and embodied in consent decisions are relevant to the issue of whether a sanction assessed in a litigated case is appropriate.

In the only litigated case cited by Respondent, *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994), the Judicial Officer suspended the respondents' PACA licenses for 90 days for false and misleading statements made for a fraudulent purpose by means of altering seven United States Department of Agriculture inspection certificates. After appeal to the United States Court of Appeals for the Second Circuit, the parties agreed to the modification of the order in *In re Jacobson Produce, Inc.* (Decision as to Jacobson

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<sup>12</sup>See *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 155 (1992), *aff'd sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 14, 1998), *printed in*, 57 Agric. Dec. 841 (1998), *aff'd*, No. 98-16766 (9th Cir. Feb. 8, 2000); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974); *In re Dean Witter & Co.*, 33 Agric. Dec. 11, 13 (1973).

Produce, Inc.), 53 Agric. Dec. 728 (1994), and in accordance with their Joint Motion to Modify Order, I assessed Jacobson Produce, Inc., a \$90,000 civil penalty. *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay). I find, just as with a consent decision, there is no record or argument to establish the basis for the sanction modification agreed to by the parties in *In re Jacobson Produce, Inc.* Therefore, I do not find the sanction agreed to by the parties in *In re Jacobson Produce, Inc.*, and embodied in *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (Modified Order and Order Lifting Stay), should be given any weight in determining the sanction to be imposed in this proceeding.

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

#### **ORDER**

Respondent's PACA license is revoked. The revocation of Respondent's PACA license shall become effective 60 days after service of this Order on Respondent.

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**APPENDIX A: ALTERED INSPECTIONS**

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
43260	Dole Fresh Vegetables, Inc., Salinas, California	M-889371-1	8/16/94	6	Lot A - Decay (average defects) Lot A - Decay (serious damage) Lot A - Statement Added to Decay Lot A - Checksum (average defects) Lot A - Checksum (serious damage) Remarks/Grade	<b>Invoice/Price:</b> \$3882.25 <b>Credit/Payment:</b> (\$2494.75) <b>Gain:</b> \$1387.50
43262	Dole Fresh Vegetables, Inc., Salinas, California	M-908010-2	8/16/94	2	Lot A - Soft rot (average defects) Lot A - Checksum (average defects)	<b>Invoice/Price:</b> \$4165.50 <b>Credit/Payment:</b> (\$2916.00) <b>Gain:</b> \$1249.50
43283	Steinbeck Country Marketing Inc. Salinas, California	M-908091-2	8/25/94	2	Temperatures (2)	<b>Invoice/Price:</b> \$2839.20 <b>Credit/Payment:</b> (\$1271.50) <b>Gain:</b> \$1567.70
43330	Fresh Western Marketing, Inc. Salinas, California  JJ Marketing Co. Chualar, California	M-908208-2	8/25/94	2	Temperatures (2)	<b>Invoice/Price:</b> \$6186.00 <b>Credit/Payment:</b> \$552.50 <b>Gain:</b> \$6738.00  <b>Brokerage fee ret'd:</b> \$212.50 <b>Gain:</b> \$212.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
44420	Varsity Produce Sales, Inc., Bakersfield, California	M-909716-3	2/20/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$3316.70 <b>Credit/Payment:</b> (\$1295.75) <b>Gain:</b> \$2020.95
44494	Teixeira Farms, Inc. Santa Maria, California	M-909861-7	3/7/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$2313.00 <b>Credit/Payment:</b> (\$997.00) <b>Gain:</b> \$1316.00
44589	Merrill Farms Salinas, California	M-909991-2	3/20/95	6	Temperatures (2) Decay (average defects) Decay (serious damage) Checksum (average defects) Checksum (serious damage)	<b>Invoice/Price:</b> \$10325.80 <b>Credit/Payment:</b> (\$8813.80) <b>Gain:</b> \$1512.00
44642	The Players Sales, Inc. Blythe, California	M-910136-1	3/27/95	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$5581.80 <b>Credit/Payment:</b> (\$4321.80) <b>Gain:</b> \$1260.00
44861	Merrill Farms Salinas, California	M-910349-0 M-910477-9	4/24/95 4/24/95	2 2	Temperatures (2) Temperatures (2)	<b>Invoice/Price:</b> \$10515.10 <b>Credit/Payment:</b> \$266.00 <b>Gain:</b> \$10781.00

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
44871	Dole Fresh Vegetables, Inc. Salinas, California	M-910462-1	4/24/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$22575.00 <b>Credit/Payment:</b> (\$6935.00) <b>Gain:</b> \$15640.00
45041	Tanimura & Antle, Inc. San Francisco, California	M-910621-2	5/11/95	1	Number of Containers	<b>Invoice/Price:</b> \$5658.50 <b>Credit/Payment:</b> (\$828.50) <b>Gain:</b> \$4830.00
45131	Growers Vegetable Express Salinas, California	M-910845-7	5/23/95	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$1865.75* <b>Credit/Payment:</b> \$378.00 <b>Gain:</b> \$2243.75
45245	Tanimura & Antle, Inc. San Francisco, California	M-910937-2	6/5/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8070.00 <b>Credit/Payment:</b> (\$ 1868.40) <b>Gain:</b> \$ 6201.60
45269	Tom Bengard Ranch, Inc. Salinas, California	M-910983-6	6/5/95	1	Temperatures (1)	<b>Invoice/Price:</b> \$ 5386.00 <b>Credit/Payment:</b> (\$ 4636.00) <b>Gain:</b> \$ 750.00

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
45290	Tanimura & Antle, Inc. San Francisco, California	M-911039-6	6/12/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 4748.50 <b>Credit/Payment:</b> (\$ 250.30) <b>Gain:</b> \$ 4498.20
45458	Dole Fresh Vegetables, Inc. Salinas, California	M-911285-5	6/30/95	3	Temperatures (2) Other (comments)	<b>Invoice/Price:</b> \$ 6359.50 <b>Credit/Payment:</b> (\$ 3508.30) <b>Gain:</b> \$ 2851.20
45625	C & V Farms Watsonville, California	M-911464-6 M-911615-3	7/26/95 8/2/95	2 2	Lot A - Temperatures (2) Temperatures (2)	<b>Invoice/Price:</b> \$ 3159.25 <b>Credit/Payment:</b> \$ 844.50 <b>Gain:</b> \$ 4003.75
45912	Tom Bengard Ranch, Inc. Salinas, California	K-162638-1	9/12/95	1	Applicant	<b>Invoice/Price:</b> \$ 1893.45 <b>Credit/Payment:</b> (\$1292.85) <b>Gain:</b> \$ 600.60
46135	Green Gro Gonzales, California	K-162860-1	10/9/95	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 1968.00 <b>Credit/Payment:</b> (\$ 988.80) <b>Gain:</b> \$ 979.20

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
46446	Tanimura & Antle, Inc. San Francisco, California	K-163146-4	11/14/95	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 4223.50 <b>Credit/Payment:</b> (\$ 2263.50) <b>Gain:</b> \$ 1900.00
46912	E. Schaffner Packing, Inc. El Centro, California	K-163644-8	1/11/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8336.35 <b>Credit/Payment:</b> (\$ 1661.50) <b>Gain:</b> \$ 6674.85
46985	Anderson Farms Huron, California	K-163725-5	1/16/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1345.20* <b>Credit/Payment:</b> (\$ 228.00) <b>Gain:</b> \$ 1117.20
46989	Yurosek Marketing, Inc. Bakersfield, California	K-075735-1	1/22/96	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 4221.60 <b>Credit/Payment:</b> (\$ 3101.65) <b>Gain:</b> \$ 1120.00
47210	Dole Fresh Vegetables Inc. Salinas, California	K-164090-3	2/15/96	3	Lot B - Discoloration (average defects) (2) Lot B - Checksum (average defects)	<b>Invoice/Price:</b> \$ 6678.00* <b>Credit/Payment:</b> (\$ 3561.60) <b>Gain:</b> \$ 3116.40

<b>HCM File #</b>	<b>Seller/Broker</b>	<b>Inspection Certificate #</b>	<b>Date of Inspection</b>	<b>Number of Alterations</b>	<b>Location of Alterations</b>	<b>Gain Attributed to Alteration of Certificate</b>
47244	Anderson Farms Huron, California	K-164124-0	2/21/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 960.00 <b>Credit/Payment:</b> (\$ 423.00) <b>Gain:</b> \$ 537.00
47259	Hansen Fruit & Cold Storage Co., Inc. Yakima, Washington	K-164203-2	2/23/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1470.00* <b>Credit/Payment:</b> (\$ 808.50) <b>Gain:</b> \$ 661.50
47415	E. Schaffner Packing, Inc. El Centro, California	K-164430-1	3/18/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 3410.55 <b>Credit/Payment:</b> (\$ 1237.75) <b>Gain:</b> \$ 2172.80
47432	E. Schaffner Packing, Inc. El Centro, California	K-164467-3	3/19/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 3099.60 <b>Credit/Payment:</b> (\$ 1386.00) <b>Gain:</b> \$ 1713.60
47507	Durant Distributing, Inc. Santa Maria, California	K-163381-4	3/25/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 183.75* <b>Credit/Payment:</b> \$ 115.75 <b>Gain:</b> \$ 299.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
47521	Anderson Farms Huron, California	K-164560-5	3/29/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 3480.00 <b>Credit/Payment:</b> (\$ 592.50) <b>Gain:</b> \$ 2287.50
47657	Anderson Farms Huron, California	K-164658-7	4/8/96	2	Temperatures (1) Number of Containers	<b>Invoice/Price:</b> \$ 1415.00 <b>Credit/Payment:</b> (\$ 975.00) <b>Gain:</b> \$ 440.00
47676	Tanimura & Antle, Inc. San Francisco, California	K-164649-6	4/9/96	2	Discoloration (average defects) Checksum (average defects)	<b>Invoice/Price:</b> \$ 5750.00 <b>Credit/Payment:</b> (\$ 1348.00) <b>Gain:</b> \$ 4402.00
47714	Dole Fresh Vegetables Inc. Salinas, California	K-164712-2 K-164713-0	4/15/96 4/15/96	4 2	Lot A - Temperatures (2) Lot B - Temperatures (2) Temperatures (2)	<b>Invoice/Price:</b> \$ 11383.50 <b>Credit/Payment:</b> (\$ 5591.50) <b>Gain:</b> \$ 5792.50
47737	Dole Fresh Vegetables Inc. Salinas, California	K-164806-2	4/20/96	6	Lot A - Temperatures (2) Lot B - Temperatures (2) Lot C - Temperatures (2)	<b>Invoice/Price:</b> \$ 4815.50 <b>Credit/Payment:</b> (\$ 3689.10) <b>Gain:</b> \$ 1126.40

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
47904	Pacific International Marketing, Inc. Salinas, California	K-164974-8	5/4/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 4368.00 <b>Credit/Payment:</b> (\$ 2979.20) <b>Gain:</b> \$ 1388.80
		K-165052-2	5/4/96	2	Temperatures (2)	
47972	C & V Farms Watsonville, California	K-165045-6	5/8/96	6	Lot B - Decay (average defects) Lot B - Decay (serious damage) Lot B - Decay (offsize/defects) Lot B - Checksum (average defects) Lot B - Checksum (serious damage) Lot C - Number of Containers	<b>Invoice/Price:</b> \$ 4159.50 <b>Credit/Payment:</b> ( \$ 2530.75) <b>Gain:</b> \$ 1628.75
48075	Mills Distributing Company Salinas, California	K-165244-5	5/21/96	8	Temperatures (2) Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage) Number of Containers	<b>Invoice/Price:</b> \$ 5314.75 <b>Credit/Payment:</b> (\$ 4864.75) <b>Gain:</b> \$ 450.00

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48085	C & V Farms Watsonville, California	K-165099-3	5/22/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 4617.29 <b>Credit/Payment:</b> (\$ 1126.00) <b>Gain:</b> \$ 3491.25
48173	Yurosek Marketing, Inc. Bakersfield, California	K-165174-4	6/3/96	2	Lot A - Discoloration (average defects) Lot A - Checksum	<b>Invoice/Price:</b> \$ 5904.00 <b>Credit/Payment:</b> ( 5038.60) <b>Gain:</b> \$ 865.40
48248	Ocean Valley Sales Salinas, California	K-165402-9	6/6/96	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$ 9061.55 <b>Credit/Payment:</b> (\$ 4188.50) <b>Gain:</b> \$ 4873.05
48358	Durant Distributing Inc. Santa Maria, California	K-165323-7	6/19/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 840.00 <b>Credit/Payment:</b> (\$ 160.00) <b>Gain:</b> \$ 680.00
48452	Merrill Farms Salinas, California	K-165656-0	6/28/96	3	Temperatures (2) Number of Containers (3)	<b>Invoice/Price:</b> \$ 1128.75 <b>Credit/Payment:</b> (\$ 796.25) <b>Gain:</b> \$ 332.50

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48454	Mills Distributing Company Salinas, California	K-165514-1	7/2/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 1109.25 <b>Credit/Payment:</b> (\$ 768.00) <b>Gain:</b> \$ 341.25
48796	Neil Bassetti Farms Greenfield, California	K-166059-6	8/13/96	8	Temperatures (2) Number of Containers Decay (average defects) Decay (serious damage) Decay (offsize/defects) Checksum (average defects) Checksum (serious damage)	<b>Invoice/Price:</b> \$ 4439.00 <b>Credit/Payment:</b> (\$ 1415.00) <b>Gain:</b> \$ 3024.00
48802	Mills Distributing Company Salinas, California	K-166052-1	8/12/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 2091.00 <b>Credit/Payment:</b> (\$ 1627.25) <b>Gain:</b> \$ 463.75
48873	Neil Bassetti Farms Greenfield, California	K-259824-1	8/23/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 2156.50 <b>Credit/Payment:</b> (\$ 1972.75) <b>Gain:</b> \$ 183.75

HCM File #	Seller/Broker	Inspection Certificate #	Date of Inspection	Number of Alterations	Location of Alterations	Gain Attributed to Alteration of Certificate
48999	Mills Distributing Company Salinas, California	K-260005-4	9/18/96	3	Temperatures (2) Number of Containers	<b>Invoice/Price:</b> \$ 2017.00 <b>Credit/Payment:</b> (\$ 1282.00) <b>Gain:</b> \$ 735.00
49178	Fresh Western Marketing, Inc. Salinas, California	K-260186-2	10/14/96	2	Temperatures (2)	<b>Invoice/Price:</b> \$ 8073.50 <b>Credit/Payment:</b> ( \$1857.50) <b>Gain:</b> \$ 6216.00
49336	Mills Distributing Company Salinas, California	K-260398-3	11/6/96	1	Number of Containers	<b>Invoice/Price:</b> \$ 4019.50 <b>Credit/Payment:</b> (\$ 1794.70) <b>Gain:</b> \$ 2224.80

Definitions

Invoice: price listed on invoice from supplier to Respondent.

Price: where price was not agreed upon by Respondent and its supplier, price is calculated as Market News price reduced by freight cost, broker's fee, and Respondent's profit or commission.

Credit: payment made by supplier to Respondent or credit claimed by Respondent on another invoice because of losses on the listed transaction.

Payment: partial payment made by Respondent towards the invoice or price; indicated by "( )"

Gain: total gain realized by Respondent on the listed transaction.

<b>HCM FILE #</b>	<b>SELLER/BROKER</b>	<b>REPORTED GROSS PROCEEDS</b>	<b>REPORTED EXPENSES</b>	<b>REPORTED NET PROCEEDS</b>	<b>ACTUAL GROSS PROCEEDS</b>	<b>ACTUAL EXPENSES</b>	<b>ACTUAL NET PROCEEDS</b>	<b>DIFFEREN CE</b>
44420	Varsity Produce Sales, Inc. Bakersfield, California	\$1904.00	\$1694.55	\$209.45	\$2476.00	\$1548.35	\$927.65	\$718.20
44494	Teixeira Farms, Inc. Santa Maria, California	\$2604.00	\$1624.00	\$980.00	\$2500.00	\$1345.00	\$1155.00	\$175.00
44861	Merrill Farms Salinas, California	\$1215.10	\$1481.10	(\$266.00)	\$1953.00	\$1307.50	\$645.50	\$912.50
46912	E. Schaffner Packing, Inc. El Centro, California	\$ 4914.00	\$ 3276.00	\$ 1638.00	\$ 4504.50	\$ 2381.25	\$ 2123.25	\$ 485.25
47521	Anderson Farms, Huron, California	\$ 2232.00	\$ 1639.50	\$ 592.50	\$ 2681.00	\$ 1192.20	\$ 1488.80	\$ 896.30
47972	C & V Farms Watsonville, California	\$ 2613.65	\$ 2040.15	\$ 573.50	\$ 3719.00	\$ 1995.39	\$ 1720.61	\$ 1147.00

<b>HCM FILE #</b>	<b>SELLER/BROKER</b>	<b>REPORTED GROSS PROCEEDS</b>	<b>REPORTED EXPENSES</b>	<b>REPORTED NET PROCEEDS</b>	<b>ACTUAL GROSS PROCEEDS</b>	<b>ACTUAL EXPENSES</b>	<b>ACTUAL NET PROCEEDS</b>	<b>DIFFERENCE</b>
48085	C & V Farms Watsonville, California	\$ 4226.25	\$ 3123.75	\$ 1102.50	\$ 5376.50	\$ 2883.75	\$ 2492.75	\$ 1390.25
49336	Mills Distributing Company, Salinas, California	\$ 3283.20	\$ 1512.00	\$ 1771.20	\$3874.00	\$ 1228.15	\$ 2645.85	\$ 874.65

**In re: PMD PRODUCE BROKERAGE CORP.  
PACA Docket No. D-99-0004.  
Decision and Order on Remand.  
Filed November 26, 2001.**

**PACA – Failure to pay – Discharge of official duties – Burden of proof – Preponderance of the evidence – Due process – Petition to reopen hearing – Publication of facts and circumstances.**

The Judicial Officer (JO) affirmed the Initial Decision and Order on Remand issued by Chief Administrative Law Judge (ALJ) James W. Hunt concluding Respondent committed repeated, flagrant, and willful violations of the Perishable Agricultural Commodities Act, 1930 (PACA), by failing to make full payment promptly for produce. The JO rejected Respondent's contention that the ALJ failed to consider the evidence before issuing a decision. The Judicial Officer stated that in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties. ALJs must consider the record in a proceeding prior to the issuance of a decision in that proceeding and an ALJ is presumed to have considered the record prior to the issuance of his or her decision. The JO refused to draw an inference from a similarity between a party's filing and an ALJ's decision that the ALJ failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. The JO also rejected Respondent's contention that the ALJ's findings of fact were unreliable. The JO concluded, after reviewing the record, that the ALJ's findings of fact were supported by reliable, probative, and substantial evidence. Moreover, the JO stated Complainant proved by a preponderance of the evidence that Respondent violated 7 U.S.C. § 499b(4), as alleged in the Complaint. The JO further rejected Respondent's contention that it was denied due process. Finally, the Judicial Officer denied Respondent's petition to reopen the hearing. As Respondent no longer had a PACA license, the JO ordered the publication of the facts and circumstances set forth in the Decision and Order on Remand.

Ruben D. Rudolph, Jr., for Complainant.

Paul T. Gentile, for Respondent.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

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

### **PROCEDURAL HISTORY**

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 November 16, 1998. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the 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].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an "Answer" on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a "Motion for Bench Decision" and "Complainant's Proposed Findings of Fact, Conclusions, and Order," requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.<sup>1</sup> Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a

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<sup>1</sup>On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance). On August 3, 2001, Ruben D. Rudolph, Jr., entered an appearance on behalf of Complainant and gave notice that he was replacing Jane McCavitt as counsel for Complainant (Notice of Substitution of Counsel).

compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately \$769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed "Complainant's Response to Respondent's Appeal." On February 15, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's January 7, 2000, appeal petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal).

On March 15, 2000, Respondent filed "Respondent's Petition for Reconsideration." On March 29, 2000, Complainant filed "Complainant's Response to Respondent's Motion for Reconsideration." On March 30, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of

Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed "Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures." On April 4, 2001, Respondent filed "Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure."

On April 5, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge. On April 6, 2001, I denied Respondent's petition to reopen the hearing and remanded the proceeding to Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] to: (1) provide Respondent with an opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)); and (2) issue a decision. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order).

On May 17, 2001, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions and Order." On June 6, 2001, the Chief ALJ issued a "Decision on Remand" [hereinafter Initial Decision and Order on Remand] in which the Chief ALJ adopted the ALJ's November 30, 1999, Bench Decision.

On July 25, 2001, Respondent filed "Respondent's Petition for Reconsideration" requesting that the Chief ALJ reverse the Bench Decision and the Initial Decision and Order on Remand or order a new hearing. On September 7, 2001, Complainant filed "Complainant's Reply to Respondent's Petition for Reconsideration." On September 12, 2001, the Chief ALJ issued "Order Denying Petition for Reconsideration."

On October 22, 2001, Respondent filed a petition for a new hearing and appealed to the Judicial Officer. On November 9, 2001, Complainant filed "Complainant's Response to Respondent's Appeal." On November 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition for a new hearing and a decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order on Remand. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand as

the final Decision and Order on Remand. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

### **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

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.

....

**(e) Alternative civil penalties**

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

7 U.S.C. §§ 499b(4), 499h(a), (e).

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;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

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

The record establishes that, as found by the ALJ in his decision orally announced at the close of the November 17, 1999, hearing, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities which Respondent

purchased, received, and accepted in interstate or foreign commerce.

Respondent contends Complainant failed to meet its burden of proving that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent contends Complainant did not obtain information about a case pending before the United States District Court for the Southern District of New York, which relates to “extended payment terms and other matters that could directly effect [sic] the Complainant’s contention that the Respondent violated the PACA” and “Complainant became aware, or should have been aware, prior to the hearing, that creditors had received payments from the Respondent pursuant to a payment plan entered between and among certain produce creditors and the Respondent[.]” (Respondent’s Proposed Findings of Fact, Conclusions and Order at 2).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties may enter into a payment plan that varies the time for payment set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)). However, such a payment plan must be reduced to writing before the parties enter into the transaction and “the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.” 7 C.F.R. § 46.2(aa)(11). Thus, Respondent had the burden to not only allege a written payment plan but also to prove its existence. Moreover, Respondent, as the party having the best knowledge of the court case and any alleged agreement with its creditors, had the burden of proof with respect to those matters. *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985). Respondent did not meet its burden of proving the existence of its alleged payment plan.

Having considered the record in the light of Respondent’s Proposed Findings of Fact, Conclusions and Order, I adopt the findings of fact, conclusion of law, and discussion in the ALJ’s November 30, 1999, Bench Decision, which is the written excerpt of the ALJ’s decision orally announced at the close of the November 17, 1999, hearing.

**ADMINISTRATIVE LAW JUDGE’S BENCH DECISION  
(AS RESTATED)**

**Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of New York State. Respondent’s business mailing address is 60 Kenwood Road, Garden City, New York 11530. (Answer ¶ 2.)
2. At all times material to this proceeding, Respondent was either licensed or

operating subject to license under the PACA. PACA license number 860612 was issued to Respondent on February 4, 1986. Respondent's PACA license terminated on February 4, 1999, when Respondent failed to pay the annual renewal fee. (Answer ¶ 2; CX 1; Tr. 69-70.)

3. During the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce (CX 4-CX 22; Tr. 34-57).

4. Between October 20, 1999, and November 1, 1999, a United States Department of Agriculture investigator contacted 16 of the 18 unpaid produce sellers to determine the status of the outstanding debts listed in the Complaint. This compliance review revealed that Respondent continued to owe approximately \$769,000 for purchases that Respondent made from produce sellers listed in the Complaint during the time period set forth in the Complaint. (Tr. 31-33.)

#### **Conclusion of Law**

Respondent's failures to make full payment promptly of the agreed purchase prices for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, as specifically alleged in paragraph 3 of the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

#### **Discussion**

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for any commission merchant, dealer, or broker to fail to make full payment promptly with respect to any transaction involving any perishable agricultural commodity made in interstate or foreign commerce. "Full payment promptly" is defined in 7 C.F.R. § 46.2(aa)(5) as requiring payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) states that parties who elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.

At the November 17, 1999, hearing, Michael Saunders, a United States Department of Agriculture investigator, testified without contradiction that the

amounts alleged in the Complaint were, in fact, unpaid by Respondent and that all of these amounts involved transactions in interstate or foreign commerce (Tr. 11, 25).

Two representatives of Respondent's produce sellers, Marc Rubin of Rubin Brothers Produce Corporation and James Bevilacqua of D'Arrigo Brothers Company, testified (Tr. 61-66, 81-88). Mark Werner, the principal owner of Respondent, also testified (Tr. 90-93). There was no testimony to establish that any written agreement had been entered into between Respondent and any of its produce sellers prior to the transactions, which are the subject of this proceeding, which altered the terms of payment. None of the amounts alleged in the Complaint were paid within 10 days. In fact, as of the date of the hearing, most of the amounts still remain unpaid.

Respondent's failures to make full payment promptly of the agreed purchase prices for these 633 lots of perishable agricultural commodities over a period of approximately 42 months in amounts totaling \$767,426.45 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent's 633 violations are repeated because repeated means more than one. Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the period of time during which the violations occurred.

Furthermore, Respondent's violations are willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent knowingly shifted the risk of non-payment to Respondent's produce sellers, who involuntarily became Respondent's creditors. Under these circumstances, Respondent intentionally violated the PACA and

operated in careless disregard of the payment requirements of the PACA.

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

#### Respondent's October 22, 2001, Appeal Petition

Respondent raises four issues and petitions for a new hearing in Respondent's October 22, 2001, Appeal Petition. First, Respondent contends the ALJ did not consider the evidence when he issued a decision orally at the close of the November 17, 1999, hearing. Respondent bases this contention on the similarity between the ALJ's November 17, 1999, oral decision and Complainant's Proposed Findings of Fact, Conclusions, and Order filed November 12, 1999. (Respondent's October 22, 2001, Appeal Pet. at 3.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.<sup>2</sup> Administrative law judges must

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<sup>2</sup>See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or (continued...))

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<sup>2</sup>(...continued)

testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. \_\_\_, slip op. at 37-40 (Aug. 16, 2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity  
(continued...)

consider the record in a proceeding prior to the issuance of a decision in that proceeding.<sup>3</sup> An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. I draw no inference from a similarity between a party's filing and an administrative law judge's decision that the administrative law judge failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. Moreover, the record establishes the ALJ presided at the reception of the evidence during the November 17, 1999, hearing. Further still, the ALJ's oral decision at the close of the hearing is supported by evidence in the record. The ALJ's presence during the reception of the evidence and the support in the record for the ALJ's oral decision belies Respondent's contention that the ALJ did not consider the evidence prior to the issuance of the oral decision. Therefore, I reject Respondent's contention that the ALJ did not consider the evidence before issuing the oral decision at the close of the November 17, 1999, hearing.

Second, Respondent contends the ALJ's factual findings are unreliable and should not serve as a basis for the Bench Decision. Specifically, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review the record in a case pending in the United States District Court for the Southern District of New York regarding claims made by Respondent's unpaid produce creditors. Further, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review a written agreement among Respondent and its produce creditors whereby Respondent's produce creditors agreed to extended payment terms and the waiver of their rights under the PACA. Respondent asserts that as a result of this failure to review the record in the case pending in the United States District Court for the Southern District of New York and the written agreement among Respondent and its produce creditors, the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." (Respondent's October 22, 2001, Appeal Pet. at 4-5.)

I infer Respondent contends that a review of the record in the unnamed case to which Respondent refers and the written agreement among Respondent and its produce creditors would reveal that Respondent's produce creditors extended the time Respondent had to pay its debt for perishable agricultural commodities. I

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<sup>2</sup>(...continued)

supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

<sup>3</sup>*See* 5 U.S.C. § 556(d).

further infer Respondent takes the position that this purported written agreement containing extended payment terms would be sufficient to establish that Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I agree with the Chief ALJ that Respondent, as the party having the better knowledge of a case in which it was apparently a party and the agreement it made with its produce creditors, has the burden of introducing evidence regarding the case and the agreement. Moreover, while section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)), the agreement must be reduced to writing before the parties enter the transaction and the party claiming the existence of the agreement has the burden of proving it.

Mark Werner, Respondent's principal owner, testified that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, neither Mr. Werner nor any other witness testified that Respondent entered into written agreements electing to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) before entering into the perishable agricultural commodities transactions that are the subject of this proceeding. To the contrary, Mr. Werner's testimony establishes that the agreement Respondent made with its creditors to extend the time for payment was made in 1996 after Respondent entered the transactions that are the subject of this proceeding. Further, Michael Saunders, the United States Department of Agriculture investigator who investigated Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), testified that, during his review of Respondent's records, he did not find any evidence of written agreements between Respondent and any of its produce sellers in which the parties elected to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) (Tr. 27).

I disagree with Respondent's contention that the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." Instead, I conclude, after reviewing the record, the ALJ's findings of fact are supported by reliable, probative, and substantial evidence. Complainant proved by a preponderance of the evidence that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and

accepted in interstate or foreign commerce in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>4</sup>

Third, Respondent asserts that prior to the commencement of this proceeding, Respondent and its produce creditors entered into an agreement that calls for payment to be made by Respondent to its produce creditors over a period of time exceeding 30 days. Respondent contends, as a consequence of this agreement, Complainant no longer has a “statutory interest” in transactions that are the subject

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<sup>4</sup>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 Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *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), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *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), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 122 S. Ct. 458 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (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).

of the Complaint, as follows:

It is well settled that in the event parties to a produce transaction agree in writing to payment terms that exceed thirty (30) days, the transaction no longer falls within the trust provisions of the PACA and the parties cannot avail themselves of the rights, protection and remedies of the PACA. In effect, the parties waive their rights under the PACA and, in doing so, recognize that they do not need or desire the protection of the statute or the administrative agency, in this case the Complainant, to enforce the provisions of the PACA. As a consequence, the Complainant no longer has a statutory interest in the transactions that are the subject matter of this complaint.

Respondent's October 22, 2001, Appeal Pet. at 5 (emphasis in original).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)). Any such agreement must be reduced to writing before the parties enter the transaction regarding perishable agricultural commodities and the party claiming the existence of the agreement has the burden of proving it. The record contains no evidence that Respondent entered into a written agreement with any of its produce sellers for extended payments prior to the transactions which are the subject of this proceeding.

Respondent did introduce evidence that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, such an agreement does not constitute a basis for Respondent's contention that "Complainant no longer has a statutory interest in the transactions that are the subject matter of [the C]omplaint." (Respondent's October 22, 2001, Appeal Pet. at 5).

Fourth, Respondent contends that it is entitled to due process and has been denied due process (Respondent's October 22, 2001, Appeal Pet. at 6).

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. I agree with Respondent that it is entitled to due process in this proceeding. However, I disagree with Respondent's contention that it was denied due process in this proceeding. The record clearly establishes that Respondent was given notice

of the proceeding in accordance with both the due process clause of the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act (5 U.S.C. § 554(b)). Further, Respondent was given an opportunity for a hearing and Respondent took advantage of that opportunity.

Finally, Respondent requests a new hearing in order to preserve Respondent's rights and ensure confidence in and integrity of the disciplinary system. Respondent states that during this new hearing "a through [sic] presentation of all the evidence and issues should be considered." (Respondent's October 22, 2001, Appeal Pet. at 6.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite.* . . .

. . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I deny Respondent's petition for a new hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce. Finally, Respondent does not identify the issues in this proceeding which it believes should be considered that have not been considered.

**Sanction**

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this

proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing was held, by the time the answer was due. Cases in which a respondent had failed to pay by the date of the hearing were referred to as “no-pay” cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing (or, if no hearing was held, by the time the answer was due) and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as “slow-pay” cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff’d*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent’s present compliance not involve credit agreements for more than 30 days.<sup>5</sup>

PACA license revocation is the appropriate sanction in a “no-pay” case. However, Respondent chose not to renew its PACA license and thereby allowed its license to lapse on February 4, 1999. Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture is authorized to publish the facts and circumstances of the violation. 7 U.S.C. § 499h(a). In light of the lapse of Respondent’s PACA license, the appropriate sanction for Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the publication of the facts and circumstances of Respondent’s violations.

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

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<sup>5</sup>In *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), the Judicial Officer changed the “slow-pay/no-pay” policy. However, the new policy applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc.*, was published in *Agriculture Decisions*, or after personal notice of *In re Scamcorp, Inc.*, served on a respondent, whichever occurs first. The instant proceeding was instituted before January 25, 1999, and neither party alleges that Respondent was given personal notice of *In re Scamcorp, Inc.* Moreover, application of the new “slow-pay/no-pay” policy to this proceeding would not change the disposition of this proceeding.

**ORDER**

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth in this Decision and Order on Remand shall be published, effective 60 days after service of this Order on Respondent.

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATION DECISIONS**

**SPENCER FRUIT COMPANY v. L & M COMPANIES, INC.**

**PACA Docket No. R-01-0023.**

**Decision and Order.**

**Filed July 3, 2001.**

**Contracts — Mistake**

**Federal inspections – credibility rebutted by bribery of federal inspectors**

**Burden of proof – not met where federal inspections found unconvincing due to bribery of inspectors**

Complainant sold a load of grapes to Respondent, and Respondent sold the load to a firm on the Hunts Point Terminal Market whose employee later pleaded guilty to bribing federal inspectors. On the basis of inspections performed by inspectors who later pleaded guilty to accepting bribes, contract modifications were negotiated by the Hunts Point firm with Respondent, and by Respondent with Complainant. It was held that the modifications negotiated between Complainant and Respondent were based upon a mutual mistake of fact, and were voidable by Complainant.

Under the original f.o.b. contract the Respondent who accepted the grapes had the burden of proving a breach on the part of Complainant. 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, and that the Respondent failed to prove a breach of contract. The Complainant was awarded the original contract price that was based on inspections by inspectors who pleaded guilty to accepting bribes.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Louis W. Diess, III, 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 \$16,540.50 in connection with transactions in interstate commerce involving two truckloads of grapes.

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

The amount claimed in the formal complaint does not exceed \$30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, Respondent filed an answering statement, and Complainant did not file a statement in reply. Neither party filed a brief.

#### **Findings of Fact**

1. Complainant, Spencer Fruit Company, is a partnership composed of Spencer Fruit Company Investors, LP, and Far Western Securities Company. Complainant's address is P. O. Box 1246, Reedly, California.

2. Respondent, L & M Companies, Inc., is a corporation doing business as L & M West Coast, whose address is 2925 Huntleigh Dr., Suite 204, Raleigh, North Carolina. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 17, 1998, Complainant sold to Respondent, 540 cartons of Pride and Joy brand Flame grapes at \$8.00 per carton, or \$4,320.00, and 900 cartons of Sun Star brand Thompson Seedless grapes at \$7.00 per carton, or \$6,300.00, plus \$1.50 per carton for cooling and palletizing, or \$2,160.00, plus \$10.00 for an air bag, and \$23.50 for a temperature recorder, less a shipper discount of \$.25 per carton, or \$260.00, or a total for the load of \$12,453.50, f.o.b.

4. Respondent resold the load to Johnson Associated Fruit Company, Inc., in Rockaway, New Jersey, and Johnson Associated Fruit Company, Inc. resold the load to Jacobson Produce in Bronx, New York.

5. On or about September 17, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on September 23, 1998, after unloading from the truck, with the following results in relevant part:

LOT: A  
 TEMPERATURES: 35 to 37 F  
 PRODUCT: Table Grapes  
 BRAND/MARKINGS: "Sun Star" 19 lbs. TH. SDLSS  
 ORIGINS: CA  
 LOT ID.: 820-362  
 NUMBER OF CONTAINERS: 90?  
 INSP. COUNT: ?

LOT: B  
 TEMPERATURES: 36 to 37 F  
 PRODUCT: Table Grapes  
 BRAND/MARKINGS: "Pride & Joy" 19 lbs. A. SDLSS  
 ORIGINS: CA  
 LOT ID.:  
 NUMBER OF CONTAINERS: 5??  
 INSP. COUNT: ?

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	00 %	%	Shattered berries (8 to 16%).	
	04 %	00 %	%	Sunken and Shriveled Cap stems	
	04 %	00 %	%	Brown discoloration	
	02 %	02 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	1/2%	1/2%	%	Decay	
	23 %	03 %	%	Checksum	
B	14 %	00 %	%	Shriveled berries (5 to 21%)	
	09 %	00 %	%	Shattered berries (8 to 11%)	
	03 %	03 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	01 %	01 %	%	Decay	
	28 %	05 %	00 %	Checksum	

GRADE:

...

Inspector's Signature [Michael Tsamis]

6. On the basis of the inspection Respondent negotiated an adjustment with

Complainant in the amount of \$9,033.00, and remitted a balance of \$3,420.50.

7. On or about November 10, 1998, Complainant sold to Respondent, 2,002 cartons of Sun Star brand Red Globe grapes at \$7.00 per carton, or \$14,014.00, plus cooling and palletizing at \$1.50 per carton, or \$3,003.00, and a temperature recorder at \$23.50, less a shipper discount of \$.25 per carton, or \$500.50, or a total of \$16,540.00, f.o.b.

8. Respondent resold the load to Jacobson Produce in Bronx, New York.

9. On or about November 10, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on November 12, 1998, at 9:15 a.m., while still loaded on the truck, with the following results in relevant part:

LOT: A  
 TEMPERATURES: 36 to 38 F  
 PRODUCT: table grapes  
 BRAND/MARKINGS: "Sunstar" Red Globe, 19 lbs n/wt  
 ORIGINS: CA  
 LOT ID.: 919-361, 362  
 NUMBER OF CONTAINERS: 2000 lugs  
 INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	12 %	%	Wet and sticky (0 to 45%)	Decay Early to moderate some advance stages
	01 %	01 %	%	Torn around capstem	
	04 %	04 %	%	Decay (- 1/2 to 16%)	
	17 %	17 %	%	Checksum	

GRADE:

REMARKS: inspected During process of unloading

...

Inspector's Signature: [Edmond Esposito]

10. On the basis of the inspection Respondent negotiated an adjustment with Complainant in the amount of \$7,507.50 and remitted a balance of \$9,032.50.

11. Two employees of Jacobson Produce, Lawrence Gisser and John Tucci, pleaded guilty to the bribing of federal fruit and vegetable inspectors to secure the falsification of federal inspections. The two inspectors, Michael Tsamis and Edmond Esposito, who inspected the two loads of produce involved in this proceeding pleaded guilty to taking bribes to falsify federal inspections of fruit and vegetables.

12. The informal complaint was filed on December 9, 1999, which was within the time permitted under section 6(a)(1) of the Act, as amended.

### **Conclusions**

The background to this proceeding involves the joint investigation by the Department's Office of the Inspector General, and the F.B.I., known as Operation Forbidden Fruit. As a consequence of the investigation nine USDA fruit and vegetable inspectors were arrested in October of 1999 for taking bribes from employees of various produce firms on the Hunts Point Terminal Market, Bronx, New York. Eight of the inspectors have pleaded guilty in Federal Court to the acceptance of bribes, and the remaining inspector is a cooperating witness who agreed to plead guilty, and has testified in open court as to his guilt. Fifteen employees of fourteen produce firms were implicated in the investigation. One of the employees of one of the produce firms has been acquitted, one has been convicted in a jury trial, and two employees of one firm are unindicted cooperating witnesses. In all, twelve employees of Hunts Point firms have either been convicted of, or pleaded guilty to, the bribery of a public official.

Complainant seeks to recover the amounts of the adjustments which it granted to Respondent on the two loads of grapes, and states that the "balance is due to federal inspections done by fraudulent federal inspectors." Implicit in Complainant's claim is the contention that these adjustments, which were granted because of the problems shown by the inspections performed on arrival at Jacobson Produce, would not have been made had Complainant known that the receiving firm had been involved in the bribery of the inspectors that inspected the grapes that were the subject of the adjustment. There is no contention that Respondent had any knowledge, at the time of the negotiation of the adjustments, of the involvement in the bribery by the employees of Jacobson or by the federal inspectors. In essence Complainant is contending that the adjustments were based upon a mutual mistake of fact.

The Restatement (Second) of Contracts, section 152, states that:

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution or otherwise.

There has been no relief granted to Complainant such as is referred to in paragraph (2) above, and it is clear that Complainant does not bear the risk of the mistake under the rule stated in section 154. That section states:

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.<sup>1</sup>

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 Jacobson Produce. Clearly, if Complainant had known that employees of Jacobson Produce had bribed federal inspectors, and that the very inspectors who inspected the subject grapes 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. There is no reason to believe that Respondent was any more aware of these factors than was Complainant. We conclude that Complainant and Respondent, in agreeing to the adjustments, made a mistake as to a basic assumption on which the adjustments were made. The contract modification is voidable at Complainant's option, and Complaint seeks to avoid the modification by its action herein. We conclude that the modifications should be set aside.

The two loads of grapes were accepted by Respondent, and Respondent, therefore, became liable to Complainant for their full contract price, less any damages resulting from any breach of contract on the part of Complainant. Respondent had the burden of proving both a breach and damages.

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.<sup>2</sup> Prima facie evidence is always subject to rebuttal and contradiction. The guilty

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<sup>1</sup>*Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, at 682 (1987).

<sup>2</sup>See C. McCormick, *Handbook of the Law of Evidence*, §§ 291-292, pp. 614-615 (1954).

pleas of the inspectors, coupled with the implication of the receiving firm 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 grapes. Respondent submitted no further evidence of the condition of the grapes on arrival in New York. 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 two loads of grapes, or \$16,540.50.

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.<sup>3</sup> 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.<sup>4</sup> 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, \$16,540.50, with interest thereon at the rate of 10% per annum from December 1, 1998, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

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**ZEUS SERVICE, S.A. v. L.A. WROTEN CO., INC.**

**PACA Docket No. R-98-0062.**

**Order of Dismissal.**

**Filed August 27, 2001.**

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<sup>3</sup>*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).

<sup>4</sup>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).

**Attorney Fees, effect of dismissal without prejudice on award.**

Where a Chilean complainant, who had posted the double bond required by section 6(e) of the Act, requested a voluntary dismissal of its complaint due to the refusal of two of its key witnesses to come from Chile to attend the hearing in the United States, a dismissal without prejudice was ordered, and Respondent was, therefore, not the prevailing party under the fee-shifting provision of section 6(e).

George S. Whitten, Presiding Officer.  
Lawrence H. Meuers, for Complainant.  
Stephen P. McCarron, 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.*). A timely complaint was filed in which Complainant sought an award of reparation in connection with a contract to consign 128,000 boxes of Chilean sweet onions to Respondent for sale in the United States. In the formal complaint Complainant sought damages for unauthorized deductions allegedly made by Respondent in the amount of \$124,492.54 (Count I), for breach of contract by the refusal to accept the balance of the onions in the amount of \$794,784.03 (Count II), and for negligent sale of the onions received in the amount of \$268,125.60 (Count III).

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Thereafter, depositions were taken, and, following many delays, the matter was set for oral hearing in Florida. Approximately six weeks before the oral hearing was scheduled to begin Complainant encountered difficulty in getting two Chilean witnesses to attend, and requested that their testimony be taken by video conference at Complainant's expense. Respondent opposed this request on the grounds that the credibility of these witnesses was crucial to the outcome of the case, the language barrier would be exacerbated if the testimony was received by video conference, and that Respondent felt it necessary that it be allowed to cross-examine the two witnesses in person. For the reasons put forward by Respondent the presiding officer denied Complainant's request. Complainant then filed a motion for voluntary dismissal of the complaint. Respondent objected to the dismissal of the complaint on the ground that Complainant, as a non-resident of the United States was required,

pursuant to section 6(e) of the Act<sup>1</sup>, to post a bond in double the amount of its claim conditioned on the payment of costs, including a reasonable attorney's fee if respondent prevailed. Respondent maintained that by reason of Complainant's voluntary dismissal Respondent had prevailed and was entitled to attorney fees. The presiding officer gave both parties opportunity to brief the issue.

In contrast to section 7(a) of the Act, section 6(e) does not require that an oral hearing take place for an award of attorney fees to the prevailing party to be made. In spite of this, Complainant, in its brief, seeks to apply section 47.19(d) of the Rules of Practice to this situation. However, such an application is not possible since that section was implemented in direct consequence of the passage of the fees and expenses provision of section 7(a) of the Act, and relates only to that section. There is no provision in the Rules of Practice that relates to the "payment of costs, including a reasonable attorney's fee" under section 6(e) of the Act. However, the award of costs and attorney fees are clearly authorized under that section of the Act.

A more central question to this case is whether Respondent should be deemed to have prevailed in this proceeding as a result of Complainant's voluntary dismissal of its complaint. A voluntary dismissal is generally without prejudice under the Federal Rules of Civil Procedure.<sup>2</sup> As Moore points out:

This leaves the plaintiff free to refile the action at a later date and does not in any way alter the legal relationship between the parties. As such, a dismissal without prejudice does not render the defendant a prevailing party for purposes of the fee-shifting statutes.<sup>3</sup>

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<sup>1</sup>7 U.S.C. 499f. The section reads as follows: "In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: Provided, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond."

<sup>2</sup>See Fed. R. Civ. P. 41(a). The Federal Rules of Civil Procedure are, of course, not applicable to this administrative proceeding. However, for purposes of the application of the fee-shifting provisions of section 6(e) of the Act, the way in which the Rules deal with voluntary dismissals, together with the federal case law as to the consequences for fee-shifting, is analogous and compelling.

<sup>3</sup>10 Moore's Federal Practice, § 54.171[3][c][iv] (Matthew Bender 3d ed.).

The case cited by Moore<sup>4</sup> concerned a voluntary dismissal under Rule 41(a)(1)(i). Dismissals under 41(a)(2) are also without prejudice unless specified in the order of the district court. In this case Complainant was intent on the prosecution of its case until two of its key witnesses refused to come to the United States from Chile to testify. Complainant urged that the testimony of these witnesses be taken by video conference, and we declined to order such testimony at Respondent's request. Complainant's request for voluntary dismissal, therefore, says nothing as to the merits of its case, and such dismissal will be granted without prejudice. Since the dismissal will be without prejudice, we cannot say that Respondent has prevailed in this proceeding, and we cannot award costs or attorney fees to Respondent.

#### **Order**

The complaint is dismissed without prejudice.  
Copies of this order shall be served upon the parties.

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**PSM PRODUCE, INC. v. BOYER PRODUCE, INC.**  
**PACA Docket No. R-99-0007.**  
**Decision and Order.**  
**Filed September 20, 2001.**

**Contracts, failure to show breach – Inspections, not necessary, show count under certain circumstances.**

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins, and for payment to be made on the basis of a per pound price for the total weight of the loads, but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which averaged more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received.

George S. Whitten, Presiding Officer.  
Byron E. White, for Complainant.  
Tyrie A. Boyer, for Respondent.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

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<sup>4</sup>*Szabo Food Serv. v. Canteen Corp.*, 823 F2d 1073 (7th Cir. 1987) cert. dismissed, 485 U.S. 901 (1988).

### **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 \$28,747.33 in connection with multiple transactions in interstate commerce involving pumpkins.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Following the timely filing of the answer Respondent filed a motion to permit the late filing of a counterclaim, together with a proposed counterclaim. The proposed counterclaim arose out of the same transactions as those which are the subject of the formal complaint. Although the motion had not been ruled upon, and the counterclaim was a proposed counterclaim which had not been timely filed, it was nevertheless inadvertently served upon Complainant, and Complainant filed a reply thereto. Since Respondent's counterclaim alleged damages in the amount of \$34,482.33, and Respondent requested an oral hearing, the matter was initially handled as an oral hearing case. Pursuant to the request of Respondent the deposition of Phil Ratliff, president of Complainant, was taken. Subsequently the presiding officer noted the mistake, denied Respondent's motion for permission to file a counterclaim, and ruled that the counterclaim should not have been served, and should be rejected. Respondent filed a petition to the Secretary for reconsideration of this ruling, and on December 14, 1999, we issued an order affirming the ruling of the presiding officer.

The amount claimed in the formal complaint does not exceed \$30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement which included the deposition of Phil Ratliff, Complainant's president, and Complainant filed a statement in reply. Both parties filed briefs.

### **Findings of Fact**

1. Complainant, PSM Produce, Inc. (hereafter sometimes PSM), is a

corporation whose address is P. O. Box 543, Green Valley, Arizona.

2. Respondent, Boyer Produce, Inc. (hereafter sometimes Boyer), is a corporation whose address is 15A SW2nd Avenue, Williston, Florida. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 15, 1997, CDC Sales (hereafter sometimes CDC), of McAllen, Texas, through its owner and principal Dean Bearden, and acting as an agent for Complainant which was CDC's undisclosed principal, entered into an agreement to supply pumpkins to Respondent to meet the needs of Respondent's customers, primarily Walmart, but also Albertson's. It was agreed between Dean Bearden and Kennedy G. Boyer, president of Respondent, that the pumpkins to be shipped to Walmart would average 15 pounds, and that the smallest would be the approximate size of a volleyball. The pumpkins shipped to Albertson's would average 18 pounds and be shipped in bins instead of in bulk. All of the Albertson's loads were shipped to Plant City, Florida and were priced at 8.5 cents per pound f.o.b. Shipments of the bulk pumpkins to Walmart were to be on a delivered basis. Pricing was to be established upon a base price of \$.065 per pound with freight cost added in so that the delivered price would vary depending on the destination. The total delivered prices were to be 10 cents per pound on shipments to Alabama, 9.5 cents per pound on shipments to Mississippi, 10.5 cents per pound on shipments to Georgia, and 11 cents per pound on shipments to Florida. It was also agreed that, as to the 15 pound average pumpkins to be shipped to Walmart, the number of pounds to be paid by Respondent would not exceed the actual number of pumpkins received multiplied by 15. The agreement as to the pumpkins to be shipped in bulk to Walmart was memorialized by the following writing:

FAX

DATE: 9/15/97

TO: Dean  
ATTENTION:  
FROM: Ken

CONTENTS: 25 loads of pumpkins at  
0.10 ¢/lb Dlvd to Alb  
0.095 ¢ Dlvd to Miss  
0.105 ¢/lb. Dlvd to Ga  
0.11 ¢/lb. Dlvd to Fla.

Starting 9/27 thru 10 Oct 97

Will pay on pumpkins receive/and (sic) 15 lb Ave.

Approx down size is volley ball<sup>1</sup>  
CDC to arrange transportation.

/s/ Dean Bearden      Thank you,

/s/ Ken Boyer

4. CDC issued "confirmations" which were generally dated the day following shipment. Instead of stating the names of the seller and buyer, these "confirmations" stated near the top of the page, on the left, under the designation "SHIP TO:," "PACIFIC SOUTHWEST MARKETING, P.O. BOX 543, GREENVALLEY, AZ, 85614, and parallel to this on the right, also under the designation "SHIP TO:," "BOYER PROD. WILLISTON, FLA." Generally, a purchase order number was also stated next to "BOYER PROD.," and underneath was a third "SHIP TO;" which was generally followed by a statement of the ultimate destination or destinations. The body of the "confirmation" contained a statement of the quantity in pounds followed by a description. A typical specimen of one of the descriptions reads: "BULK PUMPKINS 15# AVE. AT .065 PER # FOB. APPROX. CT. 3050 FREIGHT: A&A WILL INVOICE BOYER .035 PER #"

5. PSM issued invoices as to each load. These were usually dated on, or the day after, the date of CDC's "confirmations." However, a few were dated the day before the "confirmations," and a few were dated three to twenty-one days following the date on the "confirmations." All of the invoices gave the name and address of Boyer under both the headings "Bill To," and "Ship To." In addition, the same poundage as on the "confirmations" was given, together with a computation of the amount due at \$.065 per pound on the bulk loads, or \$.085 per pound on the loads shipped in bins. One load was billed on a delivered basis at \$.1025 per pound, and accompanied by the statement that freight was prepaid by the shipper.

6. On September 25, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,660 pounds total [PSM Inv. 1450; CDC Conf. 5076; Boyer load 3443]. The pumpkins were shipped on September 25, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's in Plant City, Florida. CDC's "confirmation" shows the price as \$.085 per pound, f.o.b., but Complainant invoiced Respondent at \$.065 per pound, f.o.b. On September 30, 1997, trouble was reported by the receiver to Boyer, and by Boyer to CDC as follows: "Truck delivered to Walmart

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<sup>1</sup>A regulation volley ball is approximately 8.27 inches in diameter.

instead of Albertson's - Hired WestWind to p/u from Wal-Mart and re-del to Albertson's. Albertson's rejected for size. . . . FINAL SETTLEMENT: Sent to Meeks Farms to rework & Re -del. To Albertson's on 10/2." A federal inspection was performed at the place of business of Albertson's in Plant City, Florida, on 10/1/97, at 7:10 a.m., with the following results in relevant part:

LOT: A  
TEMPERATURES: 77 to 82 °F  
PRODUCT: Pumpkins  
BRAND/MARKINGS: "No Brand"  
ORIGINS: TX  
LOT ID.:  
NUMBER OF CONTAINERS: 44 Bins  
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A					Weight 2 to 33 ¾ mostly 4 to 24 (illegible) lbs per pumpkin average 15.43 lbs.

GRADE:

REMARKS: Weight reported only at applicant's request.

On the same day, at 3:20 p.m., at the place of business of Meek Farm Produce & Brokerage, Inc., Plant City, Florida, a second federal inspection of the pumpkins was performed with the following results in relevant part:

LOT: A  
TEMPERATURES: 82 to 86 °F  
PRODUCT: Pumpkins  
BRAND/MARKINGS: "No Brand"  
ORIGINS: TX  
LOT ID.:  
NUMBER OF CONTAINERS: 44 bins  
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
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SIZE: 8¼ to 14¼ inch in diameter

Mostly 9¼ to 12 inch in diameter

Average 10.75 inches in diameter with 32% of pumpkins 8¼ inches to 10 inches and 68% of pumpkins 10 to 14¼ inches in diameter

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GRADE:

REMARKS: Restricted to size only at applicant's request.

Respondent remitted \$1,122.00, after deducting \$1,195.90 from the \$2,317.90 invoice amount. Complainant has agreed to this deduction, and there is no further amount due on this load.

7. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,880 pounds [PSM Inv. 1463; CDC Conf. 5084; Boyer load 3444]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Huntsville, Alabama. On arrival the load was found to contain 1,592 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,880 pounds, or \$2,982.20. Respondent paid Complainant \$732.00, and Complainant has agreed to accept this amount.

8. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,640 pounds [PSM Inv. 1466; CDC Conf. 5085; Boyer load 3445]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Jasper, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,640 pounds, or \$3,031.60, f.o.b. Respondent paid Complainant \$2,246.60.

9. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 41,540 pounds [PSM Inv. 1460; CDC Conf. 5083; Boyer load

3446]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Prattville, and Selma, Alabama. Walmart in Prattville received 1,052 pumpkins, and Walmart in Selma received 1,300 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 41,540 pounds, or \$2,700.10, f.o.b. Respondent paid Complainant \$2,070.60.

10. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,880 pounds [PSM Inv. 1464; CDC Conf. 5086; Boyer load 3447]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Huntsville, Alabama. Walmart received 2,859 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,880 pounds, or \$2,787.20, f.o.b. Respondent has paid Complainant in full for these pumpkins.

11. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,740 pounds [PSM Inv. 1467; CDC Conf. 5087; Boyer load 3448]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,740 pounds, or \$2,843.10, f.o.b. Respondent paid Complainant \$2,295.00.

12. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,200 pounds [PSM Inv. 1468; CDC Conf. 5090; Boyer load 3452]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Athens, Alabama, and Lawrenceburg, Tennessee. Walmart received a total of 2,243 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,200 pounds, or \$2,938.00, f.o.b. Respondent paid Complainant \$1,792.00.

13. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,100 pounds [PSM Inv. 1474; CDC Conf. 5093; Boyer load 3453]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Tuscaloosa, Alabama. Walmart received 2,236 pumpkins. Complainant invoiced

Respondent at the rate of \$.065 per pound for the 44,100 pounds, or \$2,866.50, f.o.b. Respondent paid Complainant \$1,810.50.

14. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1476; CDC Conf. 5094; Boyer load 3454]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Newman, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,520 pounds, or \$3,023.80, f.o.b. Respondent paid Complainant \$2,224.75.

15. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,100 pounds [PSM Inv. 1477; CDC Conf. 5095; Boyer load 3455]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Sylacauga and Bessemer, Alabama. The store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,100 pounds, or \$2,801.50, f.o.b. Respondent paid Complainant \$1,896.00.

16. On September 27, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,180 pounds [PSM Inv. 1462; CDC Conf. 5082; Boyer load 3456]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainesville, Georgia. Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,180 pounds, or \$2,741.70, f.o.b. Respondent paid Complainant \$2,107.20.

17. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,720 pounds [PSM Inv. 1484; CDC Conf. 5097; Boyer load 3457]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,720 pounds, or \$2,906.80, f.o.b. Respondent paid Complainant \$1,439.85.

18. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,360 pounds [PSM Inv. 1487; CDC Conf. 5102; Boyer load

3458]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Florance, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,360 pounds, or \$2,948.40, f.o.b. Respondent paid Complainant \$1,944.90.

19. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,900 pounds [PSM Inv. 1488; CDC Conf. 5103; Boyer load 3459]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,900 pounds, or \$2,788.50, f.o.b. Walmart received 2,252 pumpkins. Respondent paid Complainant \$1,774.00.

20. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,940 pounds [PSM Inv. 1515; CDC Conf. 5140; Boyer load 3460]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,940 pounds, or \$2,856.10, f.o.b. Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. Respondent paid Complainant \$1,707.40.

21. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 47,340 pounds [PSM Inv. 1498; CDC Conf. 5108; Boyer load 3461]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 47,340 pounds, or \$3,077.10, f.o.b. Walmart received 3,122 pumpkins. Respondent paid Complainant \$3,023.55, and has waived any contest as to the remainder of the invoiced amount being due.

22. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1491; CDC Conf. 5099; Boyer load 3462]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Rome, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the

46,520 pounds, or \$3,023.80, f.o.b. Walmart received 2,459 pumpkins. Respondent paid Complainant \$2,012.10.

23. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,560 pounds [PSM Inv. 1486; CDC Conf. 5098; Boyer load 3463]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,560 pounds, or \$2,766.40, f.o.b. Walmart Stores received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location. Respondent paid Complainant \$1,642.90.

24. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,900 pounds [PSM Inv. 1497; CDC Conf. 5109; Boyer load 3464]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,900 pounds, or \$2,983.50, f.o.b. Walmart received 1,200 pumpkins at the Stockbridge location, and 1,500 pumpkins at the Rincon location, of which 54 were damaged and left on the truck. Respondent paid Complainant \$2,355.00.

25. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,410 pounds [PSM Inv. 1489; CDC Conf. 5100; Boyer load 3465]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,410 pounds, or \$2,951.65, f.o.b. Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location. Respondent paid Complainant \$1,730.50.

26. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,780 pounds [PSM Inv. 1470; CDC Conf. 5091; Boyer load 3466]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,780 pounds, or \$3,040.70, f.o.b. Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the

Decatur location, and 474 pumpkins at the Cullman location. Respondent paid Complainant \$1,473.70.

27. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,220 pounds [PSM Inv. 1461; CDC Conf. 5088; Boyer load 3467]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,220 pounds, or \$2,809.30, f.o.b. Respondent paid Complainant \$2,384.30.

28. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,460 pounds [PSM Inv. 1469; CDC Conf. 5092; Boyer load 3468]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,460 pounds, or \$2,954.90, f.o.b. Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location. Respondent paid Complainant \$2,471.90.

29. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1478; CDC Conf. 5096; Boyer load 3469]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,420 pounds, or \$2,952.30, f.o.b. Respondent paid Complainant \$1,963.20.

30. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,800 pounds [PSM Inv. 1490; CDC Conf. 5101; Boyer load 3470]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,800 pounds, or \$2,847.00, f.o.b. Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and from Stone Mountain a remaining 345 pumpkins were sent to Walmart

Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. Ninety four pumpkins were refused and taken to a landfill. Respondent paid Complainant \$1,783.67.

31. On September 27, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 38,500 pounds total [PSM Inv. 1465; CDC Conf. 5081; Boyer load 3471]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted the load under protest as to size, and the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of \$.085 per pound for the 38,500 pounds, or \$3,272.50, f.o.b. Respondent paid Complainant \$1,401.70.

32. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1504; CDC Conf. 5118; Boyer load 3472]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Complainant invoiced Respondent at the rate of \$.1025 per pound for the 45,420 pounds, or \$4,769.10, delivered. Respondent paid Complainant \$3,717.90.

33. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,120 pounds [PSM Inv. 1503; CDC Conf. 5114; Boyer load 3475]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Bowling Green, Kentucky. Walmart Stores received 2,256 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,120 pounds, or \$2,997.80, f.o.b. Respondent paid Complainant \$1,708.40.

34. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,320 pounds [PSM Inv. 1501; CDC Conf. 5117; Boyer load 3477]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,320 pounds, or \$3,010.80, f.o.b. Respondent paid Complainant \$3,010.80, and nothing further is due on this load.

35. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,600 pounds [PSM Inv. 1485; CDC Conf. 5105; Boyer load 3482]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cookville, Tennessee. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,600 pounds, or \$2,769.00, f.o.b. Respondent paid Complainant \$2,222.47.

36. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,760 pounds [PSM Inv. 1492; CDC Conf. 5104; Boyer load 3484]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,760 pounds, or \$2,909.40, f.o.b. Respondent paid Complainant in full for this load.

37. On October 8, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,560 pounds [PSM Inv. 1495; CDC Conf. 5116; Boyer load 3485]. The pumpkins were shipped on October 8, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Walmart stores received 2,556 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,560 pounds, or \$2,831.40, f.o.b. Respondent paid Complainant \$2,283.30.

38. On October 7, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 35,760 pounds total [PSM Inv. 1495; CDC Conf. 5112; Boyer load 3486]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of \$.085 for 35,760 pounds, or \$3,039.60. Respondent has paid Complainant \$389.12.

39. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,840 pounds [PSM Inv. 1499; CDC Conf. 5113; Boyer load 3487]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in

Cummins, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,840 pounds, or \$2,979.60, f.o.b. Respondent paid Complainant \$2,678.78. Respondent admits that there is a balance of \$300.82 still due on this load.

40. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 32,960 pounds total [PSM Inv. 1505; CDC Conf. 5119; Boyer load 3489]. The pumpkins were shipped on October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color. The pumpkins were sent to Meeks Farm for reworking. On October 15, 1997, at 11:00 a.m., the pumpkins were federally inspected at the place of business of Meeks Farm Produce & Brokerage, Inc., Plant City, Florida, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	67 to 68 °F	Pumpkins	"No Brand"		NM	42	
	Y						
LOT	AVERAGE	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER		
A	15 %	15 %	%	Soft rot (8 to 20%)	Soft rot Mostly early some advanced stages.		
	15 %	15 %	%	checksum	Many pumpkins show green color affecting 1/4 to 1/2 of surface not affecting grade.		

REMARKS: Presence of green color not affecting grade shown only at applicant's request.

Complainant invoiced Respondent at the rate of \$.085 for 32,960 pounds, or \$2,801.60. Respondent did not pay Complainant any amount for this load.

41. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,360 pounds total [PSM Inv. 1506; CDC Conf. 5120; Boyer load 3491]. The pumpkins were shipped on

October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 32,720 pounds, or \$2,781.20. Respondent has paid Complainant the full invoice amount for this load.

42. On October 14, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,260 pounds [PSM Inv. 1510; CDC Conf. 5125; Boyer load 3492]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,260 pounds, or \$2,876.90, f.o.b. Respondent paid Complainant \$2,771.85. Respondent admits that there is a balance of \$105.05 still due on this load.

43. On October 14, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 34,060 pounds total [PSM Inv. 1509; CDC Conf. 5130; Boyer load 3503]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 34,060 pounds, or \$2,895.10. Respondent has paid Complainant the full invoice amount for this load.

44. The formal complaint was filed on May 18, 1998, which was within nine months after the cause of action herein accrued.

### **Conclusions**

Complainant, PSM, brings this action to recover balances alleged due on 38 loads of pumpkins sold to Respondent by CDC over a three week period in late September and early October of 1997. The evidence clearly shows that CDC, in making the sales, was acting as an agent for PSM who was, initially at least, in the position of an undisclosed principal. At some point prior to the close of the shipment period PSM's existence as the principal was disclosed. It is not material to ascertain exactly when this took place since PSM clearly has standing, both as an undisclosed principal and a disclosed principal, to bring this action.<sup>2</sup> It is also clear that, under the close agency relationship that existed between PSM and CDC,

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<sup>2</sup>See *Diazeteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994).

even after disclosure of PSM as the principal, CDC was able to bind its principal, and able to receive all contractual notice in place of its principal.<sup>3</sup>

The primary issue that underlies most of the disputed transactions concerns the proper interpretation of the written contract set forth in Finding of Fact 3. The evidence shows that, except as to one load, Complainant unilaterally changed the terms of the contract to f.o.b., and proceeded to bill on an f.o.b. basis. CDC furthered this change in the contract by noting on it's a confirmation@ the new f.o.b. terms, and that the freight charge would be billed to Respondent by the trucking firms. This would have been a clear breach of the contract, except that Respondent acquiesced in the change, thus creating a modification of the original contract terms. However, the crucial provision: A Will pay on pumpkins receive/and (sic) 15 lb Ave.@ was never changed, and must be viewed as governing all the bulk load transactions. Respondent asserts that the meaning of this provision was based upon Walmart's requirements that entailed the sale of the pumpkins to the ultimate consumer on a per pumpkin basis. Walmart wanted pumpkins that averaged 15 pounds, but as long as the pumpkins were at least the size of a volley ball, was not concerned if they were moderately oversized. However, since they would be selling the pumpkins at a fixed per pumpkin price, rather than on the basis of weight, they intended to pay on a per pumpkin basis as though each pumpkin weighed 15 pounds. This, at any rate, is Respondent's view of the background against which the meaning of the provision quoted above must be assessed. Respondent maintains that it is liable to Complainant only for the number of pumpkins received, and that the price paid for the pumpkins received is to be governed by the agreed maximum of 15 pounds per pumpkin. It would not be a breach of the contract if the weight received exceeded the 15 pound average, but such average would limit the amount to be paid under the contract.

Complainant, in its opening statement, discounted the written contract signed by its agent Charles Bearden, and asserted that the pumpkins were sold on a transaction by transaction basis. Complainant attached the affidavit of Charles Bearden in which Mr. Bearden stated:

Mr. Ken Boyer's so called "contract" was just an understanding on general pricing structure and weights to be shipped to general locations. When Mr. Boyer contacted myself in an effort to

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<sup>3</sup>See *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (1978); and *George Arakelian v. Leonard O'Day*, 31 Agric. Dec. 1395 (1972).

purchase pumpkins, we did not discuss specific locations and times that the pumpkins were to be shipped and delivered. This was not a contract, by any means, but a general understanding on general pricing structure and no specific details were known at that time. The only contract we had between PSM Produce, Inc. and Boyer Produce, Inc. was the confirmation of sales.

Complainant, no doubt led astray by Mr. Bearden's specious reasoning in his statement quoted above, never addressed the crucial question of the meaning of the contract signed by its agent. This is unfortunate, for Respondent's assessment of its meaning is essentially unopposed in the record. While the important clause, "Will pay on pumpkins receive/and (sic) 15 lb Ave.," is certainly susceptible of the interpretation urged by Respondent, the clause is not a model of clarity. However, the meaning was clarified early in the series of transactions. The third of the bulk loads, shipped on September 27, 1997, contained 45,880 pounds of pumpkins, but the produce manager at Walmart in Huntsville, Alabama noted on the bill of lading that the load contained only 1,592 pumpkins, or an average weight per pumpkin of 28.82 pounds. Bearden made the following handwritten note on the "confirmation":

10/2

Upon Del. Rec. said (illegible) was to (sic)  
Big. Could only pay by each. Reported same  
to Phil.

By the making of this note, and by reporting the message to Complainant, Bearden, in effect, acknowledged the correctness of Respondent's view of the meaning of the phrase: "Will pay on pumpkins receive/and (sic) 15 lb Ave." We conclude that the meaning of the phrase is that attributed to it by Respondent.

Complainant's Phil Ratliff, in his deposition, accepted the fact that the parties had agreed that the pumpkins should average 15 pounds. However, he maintained that a substantial variation from that average would be a breach of contract which would have to be proven by a federal inspection, and that notice of the breach would have to be given in a timely fashion. We see no basis for such an interpretation. A variation upwards from the 15 pound average was never viewed by any of the Walmart stores as a breach of the contract such stores had with Respondent, and, under what we have concluded is the proper interpretation of the crucial clause of the written contract, such a variation would not be a breach of the

contract between Complainant and Respondent. Consequently, no notice of a breach would be required when a load arrived that exceeded a 15 pound average weight.

The question of proof is another matter. We 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.<sup>4</sup> However, the reason for this requirement primarily concerns the need for a standardized assessment of the damage according to established categories, and based on statistically valid sampling methods. It is also helpful that the methods used by federal inspectors accord with the Department's published grade standards, and the allowed tolerances under those standards, and under the suitable shipping condition rule applicable in f.o.b. sales. The fact that a federal inspection is neutral adds credence to the results. However, here there was no reason for Walmart, or Respondent, to call for a federal inspection in the absence of a breach. Moreover, the counting of the pumpkins was a normal and necessary function for Walmart to receive the pumpkins into its inventory, since they would be sold by Walmart to its customers on a per pumpkin basis, and paid for by Walmart on a per pumpkin basis. The pertinent evidentiary problem concerns whether the alleged arrival count is adequately documented (in some cases it is not), and the evident conflict with the number of pumpkins stated on CDC's "confirmations." As to this latter problem, we note that the "confirmations" state that the count is approximate. In some instances it is evident that this approximate count was arrived at by simply dividing the weight by 15. In other instances it is not apparent how the approximate number was arrived at. The figure comes from Bearden, and there was no showing that he was present at the loading, nor was there any showing as to who might have reported the approximate pumpkin count to him. We conclude that the actual count at destination, when properly documented, takes precedence over the approximate count on CDC's "confirmations."

Part of Respondent's deduction from the invoice prices billed by Complainant was for excess freight. Respondent does not explain this deduction. Freight is most often billed at a flat rate. Respondent did not offer in evidence any of the freight bills, and we have no way of knowing that any excess freight was actually incurred by Respondent. Accordingly, we will disallow all of Respondent's deductions for excess freight.

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<sup>4</sup>*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); and *B. G. Anderson Company, Inc. v. Mountain Produce Co.*, 29 Agric. Dec. 513 (1970)

We now must deal with each transaction. Complainant had difficulty making up its mind whether it wished to admit that no further payment is due on the first transaction, that covered by Finding of Fact 6.<sup>5</sup> In the formal complaint, as well as in the informal complaint, Complainant submitted its invoices as to each transaction, but merely stated the total amounts paid by Respondent in several large payments, and the total amount it deemed due on the total of all the transactions, namely \$31,525.52, less two allowances of \$1,870.00 on PSM invoice 1465 (Finding of Fact 31), and \$906.76 on PSM invoice 1505 (Finding of Fact 40), or a net amount of \$28,747.96. It is only when we examine the answer of Respondent that we are enabled to see the amounts paid by Respondent on each transaction, and the balances in dispute. Complainant never challenged these amounts. Respondent has asserted that Complainant admitted in the deposition of Phil Ratliff, taken December 7, 1998, that no further amount was due from Respondent on the first load. In that deposition the following exchange took place:

Q. All right, sir. Now, did you look at Exhibit 26 to see what I was talking about up there at the load number one? That is 3443. You invoiced for 35,660 pounds. You invoiced for \$2,317.90. And Boyer paid \$1122.60 (sic). And you've told me that you don't have any argument with Boyer being credited for those expenses. Is that correct?

A. No. And part of the justification, back to the answer as far as why we invoice him for that in our original filing, is because the paperwork that he provided to me that we worked off of did not have this on it.

Q. All right. But you agree now that he is entitled to that credit.

A. There was never an argument with the inspection, he was entitled.

...

A. The only point of contention I think that was mentioned throughout the shuffle of paperwork and so forth was the authorization of Meeks to sell. But - - as far as the losses that

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<sup>5</sup>This problem is present as to most of the admissions noted in the Findings of Fact, but will be dealt with in detail only here.

they incurred and so forth in handling. So I don't have any problems with that.

Q. You don't have any problem now after reading that with the authorization of Meeks, do you?

A. I have no problem with the fact that they are entitled to compensation.

Q. And that Boyer is entitled to credit?

A. That's what I said.

...

Q. I see. All right. So that - - that does reflect then that you received \$1122 (sic) from Boyer on load 3443.

A. Correct, when we received his check and his paperwork.

Q. And today you have no argument with that.

A. No. I didn't have an argument with it to begin with.<sup>6</sup>

However, in Complainant's opening statement filed January 20, 2000, Phil Ratliff, on behalf of Complainant, asserted that all the amounts claimed in the formal complaint were still due. In Respondent's answering statement the assertion was made that the unpaid balance as to this load was admitted by Ratliff to not be due, and the deposition of Ratliff was attached. Finally, in the statement in reply, Complainant explicitly and unequivocally admitted that no amount is now claimed due as to this load. However, in its brief, Complainant again asserted that Respondent is not entitled to any damages or deductions from Complainant's invoices," and urged that an "order be issued for the full amount claimed by the complaint." We find this vacillation inexplicable, and conclude that no amount is due on this transaction.

The second transaction is set forth in Finding of Fact 7. Complainant invoiced Respondent for 45,880 pounds of bulk pumpkins shipped to Walmart in Huntsville, Alabama, at the rate of \$.065 per pound, or \$2,982.20. Respondent paid Complainant \$732.00, and Complainant has admitted in Ratliff's deposition (see page 101), and in the Statement in Reply that no further amount is due on this transaction. In spite of the contrary position taken by Complainant in its brief, we find that no further amount is due as to this load.

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<sup>6</sup>Deposition of Phil Ratliff taken December 7, 1998, at the request of Respondent, pp. 95-97.

The transaction covered by Finding of Fact 8 consisted of one bulk load of pumpkins weighing 46,640 pounds shipped to Walmart in Jasper, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,640 pounds, or \$3,031.60, f.o.b, and Respondent paid Complainant \$2,246.60. At an average of 15 pounds per pumpkin the load should have contained 3,109 pumpkins. The CDC "confirmation" states that the approximate count was 3,100. Respondent claims that the load contained only 2,586 pumpkins and paid on that basis, less costs for the excess freight. However, the only evidence that the load contained 2,586 pumpkins was in the form of a handwritten notation on the bill of lading. This notation consisted only of the figure "2586" with a circle drawn around it. Next to the figure was the figure "2500" without a circle. There was no signature, nor were there any initials, clearly associated with either figure. We have already indicated our low regard for the evidence of approximate count contained on the CDC "confirmation." Our regard for this evidence on the bill of lading is even lower. We conclude that Respondent owes Complainant a balance of \$785.00 on this transaction.

The transaction covered by Finding of Fact 9 consisted of one bulk load of pumpkins weighing 41,540 pounds shipped to Walmart Stores, in Prattville, and Selma, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 41,540 pounds, or \$2,700.10, f.o.b. Respondent paid Complainant \$2,070.60. Respondent asserts that the load contained 2,352 pumpkins, which would make the pumpkins average 17.66 pounds. The evidence for the number of pumpkins received consists of a "STORE DROP SHEET" which is a pre-printed form under the Boyer letterhead, with columns for "STORE #," "STORE NAME ADDRESS PHONE," "QUANTITY ORDERED," "QUANTITY RECEIVED," "RECEIVER'S SIGNATURE," and the "STORE STAMP." The drop sheets apparently accompanied the loads and were presented to the receiving stores by the trucker to be filled out. The store number column, store name-address-phone column, and quantity ordered column are printed and appear to have been filled out before the truck left. The quantity received, and receiver's signature columns are filled out in hand, and appropriate store stamps also appear on the face of the drop sheet. The amount received at store number 483 at Prattville, Alabama is stated to be 1,052 pumpkins, and the amount received at store number 700 at Selma, Alabama is stated to be 1,300 pumpkins. We consider this to constitute the preponderant evidence of the actual number of pumpkins contained on this load. Respondent's liability should be calculated on the basis of a total of 2,352 pumpkins with an average weight of 15 pounds, or a total of 35,280 pounds for the load. At \$.065 per pound Respondent's liability for this load was \$2,293.28. Respondent has

paid Complainant \$2,070.60, which leaves a balance still due on this load of \$222.68.

The transaction covered by Finding of Fact 10 covered a shipment of bulk pumpkins on September 30, 1997, to Walmart, in Huntsville, Alabama. Respondent submitted a drop sheet which showed that Walmart received 2,859 pumpkins. The shipment weighed 42,880 pounds, or 15 pounds average per pumpkin. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,880 pounds, or \$2,787.20, f.o.b., and Respondent has paid Complainant in full for these pumpkins.

The transaction covered by Finding of Fact 11 was shipped on September 30, 1997, to Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,740 pounds contained on the load, or \$2,843.10, f.o.b. Respondent paid Complainant \$2,295.00. Respondent did not submit a drop sheet covering this load. The bill of lading, however, has a store stamp from Walmart Store #01-0660 in Muscle Shoals, Alabama on its face, and at the bottom of the bill of lading, in handwriting different from any other thereon, is the following: "Rec' by store 2550." Respondent would have us accept this as proof that only 2,550 pumpkins were received. The statement at the bottom of the bill of lading is not signed, and may have been written by someone at Respondent's firm for submission in this proceeding. We do not think this is sufficient proof of the number of pumpkins received. We find Respondent is liable for the difference between the \$2,295.00 paid and the \$2,843.10 for which it was invoiced, or \$548.10.

The load of pumpkins covered by Finding of Fact 12 was shipped on October 1, 1997, to Walmart Stores, in Athens, Alabama, and Lawrenceburg, Tennessee. The drop sheet shows that 800 pumpkins were received and signed for at Lawrenceburg, Tennessee, and 1,443 pumpkins were received and signed for at the store in Athens, Alabama. There is also a notation that 30 were trashed. There is no way to discern if the trashed pumpkins were part of the 1,443 pumpkins, or in addition thereto. Since Respondent had the burden of proving the number of pumpkins received we will adopt the assumption most unfavorable to Respondent, and conclude that the 30 trashed pumpkins were in addition to the 1,443. The Regulations require, in the case of produce received on joint account, on consignment, or handled for or on behalf of another person, that "[a] clear and complete record shall be maintained showing justification for dumping of produce

... .<sup>7</sup> If such records are kept, a dump certificate is not necessary if the quantity dumped is not in excess of 5 percent.<sup>8</sup> Although the receipt of purchased merchandise is not covered in the regulation, we could allow the dumping of such a small quantity without inspection on the basis of an analogy to the regulation were it not for the fact that no justification for the dumping is alleged. We conclude that Respondent is liable for the 30 pumpkins dumped, and that such pumpkins were in addition to the 1,443 pumpkins received at that location. The total number of pumpkins we find to have been shipped and received for this load is 2,273. This number multiplied by the 15 pound average for which Respondent is liable under the contract yields 34,095 as the poundage for this load. Respondent is liable to Complainant for this amount at \$.065 per pound, or \$2,216.18. Respondent has paid Complainant \$1,792.00, which leaves \$424.18 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 13 was shipped on October 2, 1997, to Walmart Stores, in Tuscaloosa, Alabama, and contained 44,100 pounds. Respondent submitted a drop sheet which showed that Walmart received 2,236 pumpkins. At an average weight of 15 pounds per pumpkin the load would have weighed 33,540 pounds for which Respondent should have been liable under the contract at a rate of \$.065 per pound, or \$2,180.10. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,100 pounds, or \$2,866.50, f.o.b. Respondent paid Complainant \$1,810.50. Respondent owes Complainant a balance of \$369.60 on this load.

The transaction covered by Finding of Fact 14 was shipped on October 2, 1997, to Walmart Stores, in Newman, Georgia. Respondent did not submit a drop sheet as to this load. A note on the bill of lading states "Rec' by store 2,550." This note is in a different hand from anything else on the bill of lading, and is unsigned. We do not think that this amounts to adequate proof of the number of pumpkins received. However, CDC's "confirmation" states that the approximate count was 2,907 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load, Respondent is liable for this number multiplied by 15 pounds, or 43,605 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,834.32. Complainant invoiced Respondent for the 46,520 pounds, or \$3,023.80,

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<sup>7</sup>7 C.F.R. § 46.22.

<sup>8</sup>Ibid.

f.o.b. Respondent paid Complainant \$2,224.75. We conclude that Respondent owes Complainant the difference between \$2,834.32, and the \$2,224.75 already paid, or a balance of \$609.57 on this load.

The transaction covered by Finding of Fact 15 consisted of one bulk load of pumpkins weighing 43,100 pounds shipped on October 2, 1997, to Walmart Stores, in Sylacauga and Bessemer, Alabama. The drop sheet shows that the store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,100 pounds, or \$2,801.50, f.o.b. Respondent's liability on the basis of 2,375 pumpkins weighing an average of 15 pounds, or 35,625 pounds, is \$2,315.62. Respondent has already paid Complainant \$1,896.00, which leaves a balance still due from Respondent to Complainant of \$419.62.

Finding of Fact 16 covers a bulk load containing 42,180 pumpkins shipped September 27, 1997, to Walmart Stores, in Gainsville, Georgia. The drop sheet showed that Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,180 pounds, or \$2,741.70, f.o.b. Respondent's liability on the basis of 2,400 pumpkins weighing an average of 15 pounds, or 36,000 pounds, is \$2,340.00. Respondent has already paid Complainant \$2,107.20, which leaves the sum of \$232.80 still due from Respondent to Complainant.

The transaction covered by Finding of Fact 17 consisted of a bulk load of 44,720 pumpkins shipped on October 3, 1997, to Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. The drop sheet shows the quantity ordered for each store, and a signature beside the quantity ordered for the Tennessee store. There is no signature beside the quantity ordered for the Georgia store, and no quantity received is shown for either store. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,795 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 41,925 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,725.12. Complainant invoiced Respondent for the 44,720 pounds, or \$2,906.80, f.o.b. Respondent paid Complainant \$1,439.85. We conclude that Respondent owes Complainant the difference between \$2,725.12, and the \$1,439.85 already paid, or a balance of \$1,285.27 on this load.

Finding of Fact 18 covers a load of bulk pumpkins weighing 45,360 pounds shipped on October 4, 1997, to Walmart Stores, in Florance, Alabama. There is no drop sheet. The bill of lading has a notation on its face: "2355 cnt#." This note is in a hand different from any other on the bill of lading, and there is no signature

beside it. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,835 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 42,525 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,764.12. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,360 pounds, or \$2,948.40, f.o.b. Respondent paid Complainant \$1,944.90. We conclude that Respondent owes Complainant the difference between \$2,764.12, and the \$1,944.90 already paid, or a balance of \$819.22 on this load.

Finding of Fact 19 concerns a bulk load containing 42,900 pounds of pumpkins shipped October 4, 1997, to Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,900 pounds, or \$2,788.50, f.o.b. The drop sheet shows that Walmart received 2,252 pumpkins, and the notation is signed by a Walmart official and accompanied by the store stamp. We conclude that 2,252 pumpkins were received. The bill of lading has a notation that 21 pumpkins were rotten, and this notation is initialed with the same initials as those of the Walmart official who signed the drop sheet. Moreover, the same official signed the face of the bill of lading. We accept the representation that 21 pumpkins were rotten.<sup>9</sup> However, how are we to know whether the 21 rotten pumpkins were in addition to the 2,252 noted on the drop sheet as received, or a part of that number? Respondent's computations appear to assume that the rotten pumpkins were a part of the 2,252 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,252 pumpkins shown as received on the drop sheet did not include the rotten pumpkins. Respondent's basic liability to Complainant was for the 2,252 pumpkins at an average of 15 pounds, or 33,780 pounds at \$.065 per pound, or \$2,195.70. Respondent has paid Complainant \$1,774.00, and owes Complainant the balance of \$421.70.

The transaction covered by Finding of Fact 20 consisted of a bulk load containing 43,940 pounds of pumpkins shipped on October 7, 1997 to Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,940 pounds, or \$2,856.10, f.o.b. The drop sheet shows that Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. At an average of 15 pounds per pumpkin Respondent's basic liability was for 33,000 pounds at \$.065 per pound, or

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<sup>9</sup>See discussion above covering the transaction covered by Finding of Fact 12.

\$2,145.00. Respondent has paid Complainant \$1,707.40, and owes Complainant the balance of \$437.60.

Finding of Fact 21 covers a bulk load containing 47,340 pounds shipped to Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 47,340 pounds, or \$3,077.10, f.o.b. Respondent paid Complainant \$3,023.55, and has waived any contest as to the remainder of the invoiced amount being due. Accordingly, Respondent is liable to Complainant for the balance of \$53.55.

Finding of Fact 22 covers a bulk load of pumpkins shipped to Rome, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for 46,520 pounds, or \$3,023.80, f.o.b. The drop sheet shows that Walmart received 2,459 pumpkins. At an average weight of 15 pounds per pumpkin Respondent's liability was for 36,885 pounds at \$.065 per pound, or \$2,397.52. Respondent has paid Complainant \$2,012.10, and owes Complainant the balance of \$385.42.

The transaction represented by Finding of Fact 23 consisted of a 42,560 pound bulk load of pumpkins shipped to Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,560 pounds, or \$2,766.40, f.o.b. The drop sheet shows that Walmart Stores received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location, or a total of 2,124 pumpkins. Accordingly, Respondent's basic liability is for 2,124 pumpkins at an average of 15 pounds per pumpkin, or 31,860 pounds. At \$.065 per pumpkin this amounts to \$2,070.90. Respondent already paid Complainant \$1,642.90, which leaves a balance still due to Complainant of \$428.00.

The transaction covered by Finding of Fact 24 consisted of a bulk load of pumpkins weighing 45,900 pounds shipped to Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,900 pounds, or \$2,983.50, f.o.b. Respondent did not submit a drop sheet covering this load. The bill of lading, however, had two notations on its face, written in different hands. First, was the statement: "#745 Stockbridge 1200 pumpkins," with a signature beside it, and second, was the statement: "store #1011 Received 1446 - left 54 damaged on truck," with a different signature at the side. We consider this to be adequate evidence of the number of pumpkins received, and it seems evident that the 54 left damaged on the truck were not a part of the 1,446 received. We conclude therefore that Respondent received 2,646 pumpkins on this load. Respondent's basic liability should be computed on the basis of 2,646 pumpkins multiplied by the 15 pound average, or 39,690 pounds, at \$.065 per

pound, or \$2,579.85. Respondent paid Complainant \$2,355.00, and is, therefore, liable to Complainant for the balance of \$224.85.

Finding of Fact 25 covered a load of 45,410 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,410 pounds, or \$2,951.65, f.o.b. Respondent submitted a drop sheet showing that Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location, or a total of 2,252 pumpkins. At an average of 15 pounds per pumpkin Respondent's basic liability for this load was for 33,780 pounds at \$.065 per pound, or \$2,195.70. Respondent has paid Complainant \$1,730.50, and is liable to Complainant for the balance of \$465.20.

Finding of Fact 26 covers a bulk load of 46,780 pounds of pumpkins shipped on October 1, 1997, to Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,780 pounds, or \$3,040.70, f.o.b. Respondent submitted a drop sheet showing that Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the Decatur location, and 474 pumpkins at the Cullman location, or a total of 2,074 pumpkins. Respondent's basic liability for this number of pumpkins at 15 pounds average was for 31,110 pounds, which multiplied by \$.065 per pound yields \$2,022.15 as the amount which Respondent should have paid to Complainant. Respondent paid Complainant \$1,473.70, which leaves a balance still due of \$548.45.

The transaction represented by Finding of Fact 27 consisted of 43,220 pounds of bulk pumpkins which were shipped to Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Respondent submitted a drop sheet covering this load. However, the drop sheet shows the quantities ordered for each store (650) preprinted under the appropriate column, and then a hand drawn bracket encompassing each of these amounts with the number "2598" beside the bracket. There is no signature associated with this notation, but there are three store stamps at the bottom of the sheet, each of which is signed. We do not know who bracketed the amounts ordered and wrote in the number "2598." In the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,598. The approximate count noted on the face of CDC's "confirmation" is 2,881, which is the correct number for an approximate 15 pound average. We conclude that Respondent's basic liability for this load is the amount invoiced by Complainant, or \$2,809.30, f.o.b. Respondent paid Complainant

\$2,384.30, which leaves a balance of \$425.00 still due from Respondent to Complainant.

Finding of Fact 28 covered a load of 45,460 pounds of bulk pumpkins shipped on October 1, 1997, to Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,460 pounds, or \$2,954.90, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location, or a total of 2,724. At 15 pounds average per pumpkin Respondent's basic liability for this load was for 40,860 pounds, which at \$.065 per pound amounts to \$2,655.90. Respondent has already paid Complainant \$2,471.90, which leaves \$181.00 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 29 consisted of a load containing 45,420 pounds of bulk pumpkins shipped on October 2, 1997, to Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Respondent submitted a drop sheet covering this transaction, but it was structured in the same manner as that submitted in reference to the load covered by Finding of Fact 27, except that the store stamps were placed in the proper position on the side of the sheet and are not signed. We do not know who bracketed the amounts ordered and wrote in the number "2400." Again, in the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,400. CDC represented on the "confirmation" that the load contained 2,838 pumpkins, and we will accept this as the proper count for the shipment. Using this figure Respondent's basic liability was for 42,585 pounds at \$.065, or \$2,768.02. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,420 pounds, or \$2,952.30, f.o.b, and Respondent paid Complainant \$1,963.20. Respondent is liable to Complainant for the balance of \$804.82.

Finding of Fact 30 cover a load of 43,800 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,800 pounds, or \$2,847.00, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and that from Stone Mountain a remaining 345 pumpkins were sent to Walmart Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. At the bottom of the drop sheet it is noted that 94 pumpkins were refused and taken to a landfill. In his deposition Mr. Ratliff conceded that Respondent was

entitled to credit for these 94 pumpkins, however, there is no way to ascertain if the 94 were a part of the 345 received at Athens, or in addition to the other pumpkins on the load. Respondent's computations appear to assume that the refused pumpkins were a part of the 2,245 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,245 pumpkins shown as received on the drop sheet did not include the refused pumpkins. Respondent's basic liability for these pumpkins at 15 pounds average per pumpkin, or 33,675 pounds, and \$.065 per pound, is \$2,188.87. Respondent has paid Complainant \$1,783.67, which leaves \$405.05 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 31 consisted of a 38,500 pound load of pumpkins in 48 bins shipped on September 27, 1997 to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted the load under protest as to size, and a preponderance of the evidence indicates that the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of \$.085 per pound for the 38,500 pounds, or \$3,272.50, f.o.b. Respondent paid Complainant \$1,401.70. Complainant has agreed, in its statement in reply, to the deduction of \$1,870.80 taken by Respondent, and, in spite of the contrary position taken in Complainant's brief, we find that there is no balance due from Respondent to Complainant on this load.

Finding of Fact 32 concerns a 45,420 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Respondent did not submit a drop sheet as to this load, but the bill of lading has a notation as to the number of pumpkins received. A handwritten note on the face of the bill of lading states:

Store 653 - Total 1,130 pumpkins

Store 655 - Total 1,100 pumpkins

Jerry Bailey      driver did not help unload

In addition, there is an unsigned handwritten note in a different hand on the right margin which states: "Store rec' 2430." If we assume that Jerry Bailey wrote the first note, we still do not know who Jerry Bailey is, or what his position of responsibility was. We find that the notes on the bill of lading do not furnish sufficient evidence of the number of pumpkins received. The notation on CDC's bill of lading appears to state that approximately 3,026 pumpkins were loaded. This

closely approximates a 15 pound average. We find that Respondent is not entitled to a deduction on this load. Complainant stated that the trucker refused to invoice Respondent for the freight. Complainant, therefore, invoiced Respondent at the rate of \$.1025 per pound for the 45,420 pounds, or \$4,769.10, delivered. Respondent paid Complainant \$3,717.90. Respondent owes Complainant the balance of \$1,051.20.

Finding of Fact 33 covered a 46,120 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Bowling Green, Kentucky. Respondent submitted a drop sheet showing that Walmart Stores received 2,256 pumpkins. At 15 pounds average the weight of the pumpkins received would have been 33,840 pounds. At \$.065 per pound Respondent's basic liability for this load would have been \$2,199.60. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,120 pounds, or \$2,997.80, f.o.b. Respondent paid Complainant \$1,708.40. Respondent owes Complainant a balance on this load of \$491.20.

The transaction covered by Finding of Fact 34 consisted of a 46,320 pound load of bulk pumpkins shipped on October 9, 1997, to Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,320 pounds, or \$3,010.80, f.o.b. Respondent paid Complainant \$3,010.80, and nothing further is due on this load. The transaction covered by Finding of Fact 35 consisted of 42,600 pounds of bulk pumpkins shipped on October 4, 1997, to Walmart Stores, in Cookville, Tennessee. Respondent did not submit a drop sheet covering this load, and the bill of lading merely has an unsigned notation on the face that states: "count 2493." This is not sufficient to establish the number of pumpkins received. CDC's "confirmation" states that 2,653 pumpkins were shipped, and we will accept this number as a basis for computing Respondent's liability. The 2,653 pounds at an average weight of 15 pounds would total 39,795 pounds, which at \$.065 per pound results in a basic liability for Respondent of \$2,586.67. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,600 pounds, or \$2,769.00, f.o.b. Respondent paid Complainant \$2,222.47. Accordingly, Respondent is liable to Complainant for the balance of \$364.20.

Finding of Fact 36 covered a load of bulk pumpkins weighing 44,760 pounds shipped to Walmart Stores, in Gainsville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,760 pounds, or \$2,909.40, f.o.b. Respondent has paid Complainant in full for this load.

Finding of Fact 37 covered a 43,560 pound load of bulk pumpkins shipped on October 8, 1997, to Walmart Stores, in Gainsville, Georgia. Respondent submitted a drop sheet showing that 2,556 pumpkins were received. Respondent's basic liability for these pumpkins at an average of 15 pounds per pumpkin is for 38,340

pounds at \$.065 per pound, or \$2,492.10. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,560 pounds, or \$2,831.40, f.o.b. Respondent paid Complainant \$2,283.30, and is liable to Complainant for the balance of \$208.80.

The transaction covered by Finding of Fact 38 consisted of a load of 35,760 pounds of pumpkins in 48 bins shipped to Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of \$.085 for 35,760 pounds, or \$3,039.60. Respondent has paid Complainant \$389.12, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of \$2,650.43. We conclude that no further payment is due from Respondent to Complainant on this load.

Finding of Fact 39 covered a load containing 45,840 pounds of bulk pumpkins shipped to Walmart Stores, in Cummins, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,840 pounds, or \$2,979.60, f.o.b. Respondent paid Complainant \$2,678.78. Respondent admits that there is a balance of \$300.82 still due on this load.

The transaction covered by Finding of Fact 40 consisted of a load of pumpkins in 44 bins weighing 32,960 pounds total. The pumpkins were shipped on October 12, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color, and a federal inspection confirmed the presence of significant soft rot. The pumpkins were sent to Meeks Farm for reworking. Complainant invoiced Respondent at the rate of \$.085 for 32,960 pounds, or \$2,801.60. Respondent did not pay Complainant any amount for this load, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of the entire invoice amount on this load.

The transaction covered by Finding of Fact 41 consisted of a load pumpkins in 44 bins weighing 35,360 pounds shipped to Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 32,720 pounds, or \$2,781.20. Respondent has paid Complainant the full invoice amount for this load.

Finding of Fact 42 covered a bulk load of pumpkins weighing 44,260 pounds shipped to Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,260 pounds, or \$2,876.90, f.o.b. Respondent paid Complainant \$2,771.85. Respondent admits that there is a balance of \$105.05 still due on this load.

Finding of Fact 43 covered a load of pumpkins in 44 bins weighing 34,060 pounds total. The pumpkins were shipped on October 14, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at

the rate of \$.085 for 34,060 pounds, or \$2,895.10. Respondent has paid Complainant the full invoice amount for this load.

The total we have found due and owing from Respondent to Complainant is \$13,017.95. Respondent's failure to pay Complainant this amount is violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.<sup>10</sup> 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.<sup>11</sup> 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, \$13,017.95, with interest thereon at the rate of 10% per annum from November 1, 1997, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

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**OCEAN BREEZE EXPORT, INC. v. RIALTO DISTRIBUTING, INC.**  
**PACA Docket No. R-00-0113.**  
**Decision and Order.**  
**Filed October 1, 2001.**

**F.O.B., terms assumed – Burden of proof, accepted goods**

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<sup>10</sup>*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).

<sup>11</sup>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).

In an international shipment of grapes to Venezuela, the seller sought to prove that the contract terms were f.o.b. acceptance final, and the buyer sought to prove that the terms were f.o.b. Neither party succeeded in proving its allegations, and it was therefore assumed that the terms were f.o.b. It was also found that where goods are accepted the burden of proving a breach of contract, and resulting damages, falls upon the buyer.

George S. Whitten, Presiding Officer.

Pro se, Complainant.

Pro se, 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 \$15,843.70 in connection with a transaction in foreign commerce involving table grapes.

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

The amount claimed in the formal complaint does not exceed \$30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent filed an answering statement. Complainant did not file a statement in reply. Complainant filed a brief.

### **Findings of Fact**

1. Complainant, Ocean Breeze Export, Inc., is a corporation whose address 1342 Rocky Hill Drive, Exeter, California.
2. Respondent, Rialto Distributing, Inc., is a corporation whose address is P. O. Box 14119, Pinedale, California. At the time of the transaction involved herein Respondent was licensed under the Act.
3. On or about November 18, 1998, Complainant agreed to sell to Respondent 2,435 containers of Red Globe grapes at \$9.50 per container f.o.b.
4. On November 23, 1998, Complainant, at Respondent's direction, shipped 1,646 containers of the grapes to Respondent's customer in Venezuela. Complainant

invoiced Respondent on December 11, 1998, for the 1,646 cartons, and the invoice included charges for a temperature recorder at \$23.50, a phytosanitary certificate at \$32.00, a USDA inspection at \$64.20, Fedex overnight mail at \$15.00, and SO2 gas at \$72.00, for a total amount of \$15,843.70.

5. The grapes arrived in Venezuela on December 8, 1998, and were inspected on that date by an agency of the Venezuelan government. Respondent provided a translation of the inspection which reads as follows:

The date of December 8, 1998 in agreement with the bill of lading BL#EISU415800259001, through Evergreen shipping lines it was realized, on the inspection No. 26690 of containers EMCU5163369, sent by the shipper identified as Rialto Dist., Inc. PO Box 14119, Pinedale, CA USA 93650, and consigned to Brinceno, Uribe, & Ojeda at Mercado Mayorista de Valencia, Venezuela. It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, red globe label Ocean Breeze, packed in 19lbs styro for a total of 1646 cnts in the load.

The 60% general damage included rot and fungus; Temperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of port Cabello, Venezuela. In Valencia, Venezuela on the 11th day of the month of December in the year 1998.

6. Respondent notified Complainant of a breach of contract on December 9, 1998.

7. Respondent has not paid Complainant any part of the purchase price of the grapes.

8. The informal complaint was filed on February 8, 1999, which was within nine months after the cause of action herein accrued.

[Numbers 5,6, & 7 renumbered to 6,7, & 8, respt.. – Editor]

### **Conclusions**

Complainant, by this reparation action, seeks to recover the purchase price of a container of table grapes sold to Respondent, and shipped to Venezuela. Complainant asserts that the sale was on an f. o. b. acceptance final basis. In support of this contention Complainant's president, Richard Bennett, asserts in the informal complaint, and the sworn formal complaint, that the grapes were purchased by David Sabovich on behalf of Respondent and sold by Les Davis, salesman, on

behalf of Complainant. Mr. Bennett states further that these persons agreed at the time of the sale to f.o.b. acceptance final terms. However, Complainant nowhere submitted a statement by Les Davis, the person with direct knowledge of the contract terms. Respondent, in the answer sworn to by its president, Mike Vukovich, asserts that the terms of sale were not f.o.b. acceptance final, but were simply f.o.b. However, even though Respondent admitted that the contract was negotiated on its behalf by David Sabovich, Respondent also failed to submit a statement by Mr. Sabovich. Complainant also points to its invoice for the load which states under the heading "TERMS": "Net 14 Days / FOB Accept". The word "Accept" is at the edge of the page and gives the impression that the remainder of the phrase was intended to be present. However, the invoice was issued on December 11, 1998, or eighteen days after shipment, and two days after notice of the breach was given by Respondent. Complainant had the burden of proving that the terms of the contract were f.o.b. acceptance final, and we conclude that it has not met that burden.<sup>1</sup> While Respondent, as the proponent of the proposition that contract terms were f.o.b., failed to offer a statement by Mr. Sabovich, we nevertheless find that the applicable terms were f.o.b. We reach this conclusion because f.o.b. terms are assumed where no contract terms are mentioned,<sup>2</sup> and it is reasonable that the same rule should apply where no contract terms are proven.

The Regulations,<sup>3</sup> in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,<sup>4</sup> in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service

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<sup>1</sup> See *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975).

<sup>2</sup> See *Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, at 1225, (1983). See also UCC § 2-503, Comment 5, and J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*, § 5-2, p. 143 (1972).

<sup>3</sup> 7 C.F.R. § 46.43(i).

<sup>4</sup> 7 C.F.R. § 46.43(j).

and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.”<sup>5</sup>

Respondent accepted the grapes on arrival at destination in Venezuela, and thus became liable for the full contract price of the load less any damages resulting from any breach of contract on the part of Complainant. The burden of proving a breach and resulting damages rests upon Respondent.<sup>6</sup> Respondent asserts that the Venezuelan inspection proves that there was a breach of the contract. However, the translation of that inspection provided by Respondent gives a very unsatisfactory statement as to the damage present in the grapes. The inspection states: “It was observed, that there were general damages observed in 60% and of ripening of the product variety grapes, . . .” This does not state the nature of the damage present in the grapes, unless it is intended to classify the damage as “ripening.” However, ripening is not a recognized condition or grade factor under the United States

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<sup>5</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without *abnormal* deterioration,” or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

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

Standards for Grades of Table Grapes,<sup>7</sup> and we know of no damage or grade factor with which it could be associated. The Venezuelan inspection also states that “[t]he 60% general damage included rot and fungus.” However, since there is no statement as to the percentage of rot and fungus contained within the 60% general damages we have no way of knowing that the percentage exceeded what would be allowed under the suitable shipping condition warranty. We conclude that the inspection does not prove a breach of warranty.

Even if the inspection had shown condition problems in the grapes that exceeded what would be allowed under the suitable shipping condition warranty, Respondent would still have failed to prove a breach of that warranty. This is true because the warranty is applicable only if “the shipment is handled under normal transportation services and conditions.”<sup>8</sup> The burden of proving that transportation services and conditions were normal falls upon the buyer where a shipment is accepted.<sup>9</sup> In this case the inspection only states that “[t]emperature control of the Container EMCU5163369 posted at set point 1.05 c at the moment of arrival at the port of Cabello, Venezuela.” A statement of the setting of the temperature control is not nearly as important as a certification of the pulp temperature of the grapes. Apparently no pulp temperatures were taken by the Venezuelan inspector. This could have been overcome by Respondent if there had been an adequate temperature recorder on board the shipment. However, for some reason only an eight day recorder was placed on board. The tape from this recorder showed good temperatures during the first eight days of transit, but this leaves us without any indication as to the temperatures at which the grapes were held during the remaining seven days of transit. We conclude that Respondent failed to show that transportation services and conditions were normal, and for this additional reason has failed to show a breach of contract on the part of Complainant.

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<sup>7</sup> The United States Standards for Grades of Table Grapes (European or Vinifera Type), §51.880, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at <http://www.ams.usda.gov/standards/stanfirfv.htm>.

<sup>8</sup> 7 C.F.R. §46.43(j).

<sup>9</sup> *Mecca Farms, Inc. v. Bianchi Pre-Pack, Inc.*, 50 Agric. Dec. 1929 (1991); *O.P. Murphy Co., Inc. a/t/a Murphy & Sons v. Kelvin S. Ng d/b/a Ken Yip Co.*, 41 Agric. Dec. 772 (1982); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980).

Since Respondent accepted the grapes it became liable to Complainant for the full purchase price of \$15,843.70. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.<sup>10</sup> 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.<sup>11</sup> 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, \$15,843.70, with interest thereon at the rate of 10% per annum from January 1, 1999, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

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<sup>10</sup> *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).

<sup>11</sup> *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).

**MISCELLANEOUS ORDERS**

**In re: KIRBY PRODUCE COMPANY, INC.**  
**PACA Docket No. D-98-0002.**  
**Remand Order.**  
**Filed August 27, 2001.**

**Remand – Full compliance – “No-pay”/”Slow-pay” – Full payment.**

The Judicial Officer remanded the proceeding to Chief ALJ James W. Hunt for further proceedings in accordance with the instructions in *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

Eric Paul, for Complainant.

Paul T. Gentile, for Respondent.

Initial decision issued by James W. Hunt, 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 October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; 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. ¶¶ III-IV).

On November 12, 1997, Respondent filed an “Answer,” and on December 4, 1997, Respondent filed an “Amended Answer” denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ<sup>1</sup>] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent

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<sup>1</sup>The Secretary of Agriculture appointed James W. Hunt as Chief Administrative Law Judge on November 7, 1999.

purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (2) finding that, as of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999).

The United States Court of Appeals for the District of Columbia Circuit indicates that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that such payment would convert the “no-pay” case into a “slow-pay” case and would result in a PACA license suspension rather than a PACA license revocation. *Kirby Produce Company, Inc. v. United States Dep’t of Agric.*, 256 F.3d 830 (D.C. Cir. 2001). However, the Judicial Officer’s former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing. Cases in which a respondent had failed to pay by the date of the hearing were referred to as “no-pay” cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as “slow-pay” cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff’d*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent’s present compliance not involve credit agreements for more than 30 days.

Therefore, I remand the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences. Using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a “no-pay” or a “slow-pay” case, comports with the Judicial Officer’s “no-pay-slow-pay” policy that is applicable to this proceeding and does not adversely affect Respondent. Further, I believe, using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a “no-pay” or a “slow-pay” case, is in accord with the purpose for which the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding to the United States Department of Agriculture.

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**In re: HARTFORD PACKING CO., INC.  
PACA Docket No. D-01-0010.  
Order Granting Motion to Withdraw Appeal.  
Filed October 5, 2001.**

**Motion to withdraw appeal petition.**

The Judicial Officer (JO) granted Respondent's motion to withdraw its appeal petition. The JO stated that, while a party's motion to withdraw its own appeal petition is generally granted, a withdrawal of an appeal petition is not a matter of right. The JO stated that, based on the limited record before him, he found no basis for denying Respondent's motion to withdraw its appeal petition. Based on his granting Respondent's motion to withdraw its appeal petition, the JO concluded that Chief Administrative Law Judge James W. Hunt's Decision Without Hearing by Reason of Default filed in the proceeding on September 5, 2001, was the final decision in the proceeding.

Ruben D. Rudolph, Jr., for Complainant.  
Respondent, Pro se.

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 March 1, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 4, 1999, through October 5, 1999, Hartford Packing Co., Inc. [hereinafter Respondent], failed to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of \$535,244.36 for 309 lots of vegetables which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices, or the balances thereof, for perishable agricultural commodities that Respondent 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. ¶¶ III, IV).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on March 5, 2001.<sup>1</sup> Respondent failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On April 4, 2001, the Hearing Clerk sent a letter to Respondent informing Respondent that its answer to the Complaint had not been received within the time required in the Rules of Practice.<sup>2</sup>

On April 5, 2001, 31 days after the Hearing Clerk served Respondent with the Complaint, Respondent filed a letter dated April 2, 2001, in response to the Complaint. On August 3, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Decision Without Hearing By Reason of Default” [hereinafter Motion for Default Decision] and a proposed “Decision Without Hearing By Reason of Default” [hereinafter Proposed Default Decision]. On August 15, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Respondent filed objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.

On September 5, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a “Decision Without Hearing by Reason of Default”: (1) finding that, during the period February 4, 1999, through October 5, 1999, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of \$535,244.36 for 309 lots of vegetables which Respondent received, accepted, and sold in interstate commerce; (2) concluding that Respondent’s failures to make full payment promptly to nine sellers of the agreed purchase prices, or the balances thereof, in the total amount of \$535,244.36 for 309 lots of vegetables, which Respondent received, accepted, and sold in interstate commerce, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering the publication of the facts and circumstances set forth in the Decision Without Hearing by Reason of Default (Decision Without Hearing by Reason of Default at 2-3).

On September 18, 2001, Respondent appealed to the Judicial Officer.<sup>3</sup> On September 27, 2001, Respondent filed a letter requesting that it be allowed to

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<sup>1</sup>See United States Postal Service Domestic Return Receipt for Article Number PO93174978.

<sup>2</sup>Letter dated April 4, 2001, from Joyce A. Dawson, Hearing Clerk, to Hartford Packing Co., Inc.

<sup>3</sup>See letter dated September 14, 2001, from Robert C. Downs to the Chief ALJ.

withdraw its appeal petition [hereinafter Motion to Withdraw Appeal Petition].<sup>4</sup> On October 3, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Withdraw Appeal Petition.

A party's motion to withdraw its own appeal petition is generally granted; however, withdrawal of an appeal petition is not a matter of right. In considering whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.<sup>5</sup> Based on the limited record before me, I find no basis for denying Respondent's Motion to Withdraw Appeal Petition. Further, on October 3, 2001, Ruben D. Rudolph, Jr., Complainant's counsel, by telephone, informed the Office of the Judicial Officer that Complainant does not oppose Respondent's Motion to Withdraw Appeal Petition.

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

#### Order

Respondent's Motion to Withdraw Appeal Petition is granted. The Chief ALJ's Decision Without Hearing by Reason of Default filed September 5, 2001, is the final decision in this proceeding. The Order issued by the Chief ALJ in the Decision Without Hearing by Reason of Default filed September 5, 2001, shall become effective 14 days after service of this Order on Respondent.

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<sup>4</sup>See letter dated September 27, 2001, from Robert C. Downs to Jane E. Servais.

<sup>5</sup>See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw the petition rests in the sound discretion of the court to be exercised in light of the particular circumstances of the case); *American Automobile Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) (stating an appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have discretionary authority not to dismiss the case in appropriate circumstances); *United States v. State of Washington, Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978) (stating the court has discretionary authority to decline to grant the appellants' motion to dismiss their own appeal); *In re Vermont Meat Packers, Inc.*, 48 Agric. Dec. 158 (1989) (stating withdrawal of appeal is not a matter of right); *In re Smith Waller*, 34 Agric. Dec. 373, 374 (1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 297 (1975) (stating the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

**In re: LINDEMANN PRODUCE, L.L.C.**  
**PACA Docket No. D-01-0028.**  
**Order Dismissing the Complaint.**  
**Filed November 7, 2001.**

Charles Spicknall, for Complainant.  
Lawrence H. Meures, for Respondent.  
*Order issued by Dorothea A. Baker, Administrative Law Judge.*

Complainant's motion to dismiss the disciplinary complaint filed on August 27, 2001 against Lindemann Produce L.L.C. alleging violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §499a *et seq.*) is granted. The complaint in the above-captioned matter is dismissed without prejudice.

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**In re: JANET S. ORLOFF, MERNA K. JACOBSON, TERRY A. JACOBSON.**  
**PACA Docket No. APP- 01-0002.**  
**Order to Dismiss as to Terry A. Jacobson.**  
**Filed November 9, 2001.**

Ruben D. Rudolph, for Respondents.  
Paul T. Gentile, for Petitioners.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

The Chief, PACA Branch, Agricultural Marketing Service has withdrawn his determination that Terry A. Jacobson was responsibly connected with Jacobson Produce, Inc. during Jacobson Produce, Inc.'s repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*). Therefore, the above-encaptioned matter is hereby ordered dismissed with regard to Terry A. Jacobson.

Copies hereof shall be served upon the parties.

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**In re: JANET S. ORLOFF, MERNA K. JACOBSON, TERRY A. JACOBSON.**  
**PACA Docket No. APP- 01-0002.**  
**Order to Dismiss as to Janet S. Orloff.**

**Filed November 9, 2001.**

Ruben D. Rudolph, for Respondents.  
Paul T. Gentile, for Petitioners.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

The Chief, PACA Branch, Agricultural Marketing Service has withdrawn his determination that Janet S. Orloff was responsibly connected with Jacobson Produce, Inc. during Jacobson Produce, Inc.'s repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*). Therefore, the above-encaptioned matter is hereby ordered dismissed with regard to Janet S. Orloff.

Copies hereof shall be served upon the parties.

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**In re: KIRBY PRODUCE COMPANY, INC.**  
**PACA Docket No. D-98-0002.**  
**Order Denying Complainant's Request for Reconsideration of Remand Order.**  
**Filed November 27, 2001.**

**Reconsideration of remand order – Decision defined – Slow-pay – No-pay.**

The Judicial Officer denied Complainant's request for reconsideration of *In re Kirby Produce Co.*, 60 Agric. Dec. \_\_\_\_ (Aug. 27, 2001) (Remand Order). The Judicial Officer rejected Complainant's contention that the Court in *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001), remanded *Kirby* with a mandate that the United States Department of Agriculture adopt a new "slow-pay"/"no-pay" policy for the *Kirby* proceeding. The Judicial Officer concluded the Court in *Kirby Produce Co. v. United States Dep't of Agric.* remanded the proceeding to the United States Department of Agriculture to determine whether the case is a "no-pay" or a "slow-pay" case using the United States Department of Agriculture's "slow-pay"/"no-pay" policy adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984).

Eric Paul, for Complainant.  
Paul T. Gentile, for Respondent.  
Initial decision issued by James W. Hunt, 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 October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.

§§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151).

Complainant alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; 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. ¶¶ III-IV). On November 12, 1997, Respondent filed an "Answer," and on December 4, 1997, Respondent filed an "Amended Answer" denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ<sup>1</sup>] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of

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<sup>1</sup>The Secretary of Agriculture appointed James W. Hunt Chief Administrative Law Judge on November 7, 1999.

creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4). On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (2) finding that, as of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Co.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). On August 27, 2001, I remanded the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time of the hearing. *In re Kirby Produce Co.*, 60 Agric. Dec. \_\_\_\_ (Aug. 27, 2001) (Remand Order).

On October 5, 2001, Complainant filed a "Request for Reconsideration of Remand Order" pursuant to section 1.172 of the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act (7 C.F.R. § 1.172). On October 9, 2001, Complainant filed "Correction of Initial Page of Request for Reconsideration of Remand Order" stating Complainant erroneously submitted Complainant's Request for Reconsideration of Remand Order pursuant to the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act, which are not applicable to this proceeding, and Complainant should have filed Complainant's Request for Reconsideration of Remand Order pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146). On November 19, 2001, Respondent filed "Opposition to Request for Reconsideration of Remand Order."<sup>2</sup> On November 20, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on

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<sup>2</sup>Respondent's response to Complainant's Request for Reconsideration of Remand Order was required to be filed no later than November 19, 2001 (Informal Order dated October 30, 2001). The Hearing Clerk stamped Respondent's Opposition to Request for Reconsideration of Remand Order with a time and date stamp indicating that Respondent filed Respondent's Opposition to Request for Reconsideration of Remand Order on November 20, 2001. However, Ms. Lawuan Waring, a legal technician employed by the Office of the Hearing Clerk, informed the Office of the Judicial Officer that Respondent's Opposition to Request for Reconsideration of Remand Order reached the Hearing Clerk on November 19, 2001. Therefore, I conclude Respondent's Opposition to Request for Reconsideration of Remand Order was timely filed on November 19, 2001. See 7 C.F.R. § 1.147(g).

Complainant's Request for Reconsideration of Remand Order, as amended by Complainant's Correction of Initial Page of Request for Reconsideration of Remand Order [hereinafter Request for Reconsideration of Remand Order].

As an initial matter, I find Complainant's Request for Reconsideration of Remand Order cannot be considered pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party to a proceeding under the Rules of Practice may file a petition for reconsideration of the decision of the Judicial Officer. Section 1.132 of the Rules of Practice defines the word "decision" as follows:

**§ 1.132 Definitions.**

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

*Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

*In re Kirby Produce Co.*, 60 Agric. Dec. \_\_\_\_ (Aug. 27, 2001) (Remand Order), is not a decision and order by the Judicial Officer upon appeal of an administrative law judge's decision. Therefore, the August 27, 2001, Remand Order is not a *decision* as defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132), and section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party may file a petition for reconsideration of the Judicial Officer's *decision*, is not the proper section of the Rules of Practice under which to request reconsideration of the August 27, 2001, Remand Order. However, I find that Complainant may request reconsideration of the August 27, 2001, Remand Order pursuant to section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that any motion will be entertained other than a motion to dismiss on the pleading.

Therefore, I treat Complainant's Request for Reconsideration of Remand Order as a request made pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143).

Complainant requests that I modify the August 27, 2001, Remand Order to require the Chief ALJ to determine whether Respondent was in full compliance with the PACA on January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. Complainant contends the August 27, 2001, Remand Order, in which I remanded the proceeding to the Chief ALJ to determine whether Respondent is in compliance with the PACA at the time the hearing in this proceeding actually commences, does not comply with the mandate in *Kirby Produce Co. v. United States Dep't of Agric.* (Request for Recons. of Remand Order at 2-4.) Respondent states the August 27, 2001, Remand Order is in accordance with the United States Department of Agriculture's "slow-pay"/"no-pay" policy and nothing in *Kirby Produce Co. v. United States Dep't of Agric.* indicates the United States Court of Appeals for the District of Columbia Circuit intended to modify or reverse the United States Department of Agriculture's "slow-pay"/"no-pay" policy (Opposition to Request for Recons. of Remand Order at second unnumbered page).

I agree with Complainant that there is language in *Kirby Produce Co. v. United States Dep't of Agric.* indicating that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that under the United States Department of Agriculture's policy, which was in effect at the time, payment by the date set for a hearing would convert a "no-pay" case into a "slow-pay" case and would result in license suspension rather than license revocation, as follows:

Although the Secretary is statutorily authorized to revoke a license for flagrant violations, Department of Agriculture policy during the relevant time period permitted a licensee to avoid revocation by making full payment prior to the date set for a hearing on the violations. Such payment would convert a "no-pay" case into a "slow-pay" case, and would result in license suspension rather than revocation. *See In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999) (citing *In re Gilardi Truck & Transp.*, 43 Agric. Dec. 118 (1984)).

*Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d at 831 (footnote omitted).

However, the Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to suspend (rather than revoke) the license of a PACA licensee who made full payment and was in full compliance with the PACA *by the date of the hearing*. The cases cited by the Court establish that the United States Department of Agriculture's policy was that full payment, together with full compliance with the PACA *by the date of the hearing*, would convert a "no-pay" case into a "slow-pay" case and would result in license suspension rather than license revocation.<sup>3</sup> Moreover, Complainant cites no case in which the United States Department of Agriculture's policy was that full payment by the date set for a hearing (rather than the date of the hearing) would convert a "no-pay" case into a "slow-pay" case.

I do not read *Kirby Produce Co. v. United States Dep't of Agric.* as requiring the United States Department of Agriculture to adopt a new "slow-pay"/"no-pay" policy for this proceeding. Instead, I find the Court remanded the proceeding for the United States Department of Agriculture to determine whether this is a "no-pay" case or a "slow-pay" case using the United States Department of Agriculture's "slow-pay"/"no-pay" policy set out in *In re Gilardi Truck & Transp., Inc.*, as modified by *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987).

Complainant also contends the August 27, 2001, Remand Order would improperly allow payments made 6 and 7 years late to constitute slow payment, warranting license suspension. Complainant suggests that full payment made 6 or 7 years late constitutes "glacial" payment, warranting license revocation. Further, Complainant states it was never contemplated by the Judicial Officer in *In re Gilardi Truck & Transp., Inc.*, that a "no-pay" case could be converted into a "slow-pay" case by making full payment 6 to 7 years after a respondent violates the PACA and the Regulations by failing to make full payment promptly. (Request for Recons. of Remand Order at 5-7.)

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<sup>3</sup>See *In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1018 (1999) (stating the Judicial Officer's former policy, which is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 150 (1984) (stating the policy in future cases will be that if full payment is not made by the opening of the hearing, together with present compliance with payment provisions, the case will be treated as a "no-pay" case).

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, had been to allow the PACA licensee to avoid license revocation by paying in full and being in full compliance with the PACA by the date of the hearing. The "slow-pay"/"no-pay" policy in *Gilardi* is not limited by the time between a payment violation and the hearing. I reject Complainant's suggestion that I disregard the "slow-pay"/"no-pay" policy that was in effect at the time Complainant instituted this disciplinary proceeding and adopt a "slow-pay"/"glacial-pay"/"no-pay" policy for this proceeding.

Finally, Complainant states the United States Court of Appeals for the District of Columbia Circuit based its remand of this proceeding to the United States Department of Agriculture primarily upon a declaration made to the Court by Respondent's chief executive officer under penalty of perjury that full payment had been made to the produce sellers identified in the Complaint by January 13, 1999. Complainant contends this declaration is false. Complainant requests, based on Respondent's purportedly false declaration, that I modify the August 27, 2001, Remand Order to instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. (Request for Recons. of Remand Order at 7-8.)

I reject Complainant's request that I instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. The United States Court of Appeals for the District of Columbia Circuit remanded the proceeding to the United States Department of Agriculture to determine whether this is a "no-pay" case, warranting revocation of Respondent's PACA license, or a "slow-pay" case, warranting suspension of Respondent's PACA licence. Critical to that determination are payments that Respondent has made or will make to the produce sellers identified in the Complaint by the date of the hearing. Prohibiting Respondent from introducing evidence of payments it made or will make between January 13, 1999, and the date the Chief ALJ holds the hearing, would not only deny Respondent due process, but would also contravene the Court's explicit reasons for remanding the case to the United States Department of Agriculture for further the proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*

For the foregoing reasons and the reasons set forth in *In re Kirby Produce Co.*, 60 Agric. Dec. \_\_\_\_ (Aug. 27, 2001) (Remand Order), I deny Complainant's request for reconsideration of the August 27, 2001, Remand Order.

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**DEFAULT DECISIONS**

**In re: LYONS DISTRIBUTORS, INC.**  
**PACA Docket No. D-00-0020.**  
**Decision Without Hearing by Reason of Default.**  
**Filed February 22, 2001.**

Ruben D. Rudolph, Jr., for Complainant.  
Respondent, Pro se.  
*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 1, 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 1997 through May 1999, Respondent Lyons Distributors, Inc., (hereinafter "Respondent") failed to make full payment promptly to 14 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$1,335,444.33 for 98 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent on August 1, 2000, which Respondent has not answered. The time for filing an answer having expired, 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).

**Finding of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of Connecticut. Its business address was 184 Atlantic Street, Stamford, Connecticut 06901. Its mailing address is P.O. Box 671, Stamford, Connecticut 06904-0671.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 731359 was issued to Respondent on May 8, 1973.

This license terminated on May 8, 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 III of the Complaint, during the period October 1997 through May 1999, Respondent purchased, received, and accepted in interstate and foreign commerce, from 14 sellers, 98 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,335,444.33.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 98 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, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

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

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

Copies hereof shall be served upon parties.

[This Decision and Order became effective May 20, 2001. - Editor]

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**In re: PACKED FRESH PRODUCE, INC.**  
**PACA Docket No. D-00-0021.**  
**Decision Without Hearing by Reason of Default.**  
**Filed March 20, 2001.**

Ruben D. Rudolph, Jr., for Complainant.  
Respondent, Pro se.

*Decision issued by James W. Hunt, Administrative Law Judge.*

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 2, 2000, by the Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 1999 through January 2000, Respondent Packed Fresh Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 12 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$1,673,191.38 for 143 lots of perishable agricultural commodities which it received, accepted and sold in interstate commerce.

A copy of the Complaint was served upon Respondent on August 20, 2000, which Respondent has not answered. The time for filing an answer having expired, 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).

#### **Finding of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of New Jersey. Its business address was 115 Graham Lane, Lodi, New Jersey 07644-1622. Its mailing address is 716 Newman Springs Road, Suite 312, Lincroft, New Jersey 07738-1523.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 991181 was issued to Respondent on June 4, 1999. This license was suspended on April 4, 2000, pursuant to Section 13(a) of the PACA (7 U.S.C. § 499m), when Respondent failed to allow inspection of its records. This license subsequently terminated on June 4, 2000, 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 III of the Complaint, during the period October 1999 through January 2000, Respondent purchased, received, and accepted in interstate commerce, from 12 sellers, 143 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,673,191.38.

#### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 143 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, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

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

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

Copies hereof shall be served upon parties.

[This Decision and Order became effective May 20, 2001. - Editor]

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**In re: FRESHWAY PRODUCE, INC.**  
**PACA Docket No. D-00-0024.**  
**Decision Without Hearing by Reason of Default.**  
**Filed June 19, 2001.**

Christopher Young-Morales, for Complainant.  
Respondent, Pro se.

*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

### **Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the "Act"), instituted by a Complaint filed on August 29, 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 November 1998 through March 1999, Respondent Freshway Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 17 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$223,879.74 for 52 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

The Hearing Clerk's efforts to serve the Complaint by Certified Mail were not successful and the Complaint and accompanying data were subsequently served on Respondent in conformity with Section 1.147 of the Rules of Practice. Respondent has not answered the Complaint. The time for filing an answer having expired, 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).

#### **Finding of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of Florida. Its business address was 831 N.W. 21st Terrace, Miami, Florida 33127. Its mailing address is 15476 N.W. 77th Court, #437, Miami Lakes, Florida 33016.

2. At all times material to the allegations in the Complaint, Respondent was licensed under the provisions of the PACA. License number 981129 was issued to Respondent on April 29, 1998. This license terminated on April 29, 1999, pursuant to Section 4(a) of the PACA, when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the Complaint, during the period November 1998 through March 1999, Respondent purchased, received, and accepted in interstate and foreign commerce, from 17 sellers, 52 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$223,879.74.

#### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 52 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, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

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

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

Copies hereof shall be served upon parties.

[This Decision and Order became effective September 2, 2001. - Editor]

**In re: MAJESTIC PRODUCE CORP.  
PACA Docket No. D-01-0005.  
Decision Without Hearing by Reason of Default.  
Filed June 19, 2001.**

Kimberly Hart, for Complainant.

Respondent, Pro se.

*Decision 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 December 6, 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 June 1997 through February 1999, Respondent failed to make full payment promptly to 13 sellers in the total amount of \$676,276.81 for 209 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on January 10, 2001 in conformity with Section 1.147 of the Rules of Practice. 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, Majestic Produce Corp., is a corporation organized and existing under laws of the state of New York. Its mailing address is 402 E. 83rd Street, Brooklyn, New York, 11236.
2. At all times material herein, Respondent was either licensed under, or operating subject to, the provisions of the Act. PACA license number 961833 was issued to Respondent on June 24, 1996. This license was administratively suspended June 2, 1999, pursuant to section 13(a) of the Act, when representatives of the Secretary were refused access to Respondent's records (7 U.S.C. §499m(a)). Respondent's license subsequently terminated on June 24, 1999, 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 in paragraph III of the complaint, during the period June 1997 through February 1999, Respondent purchased, received and accepted in interstate commerce 209 shipments of perishable agricultural commodities from 13 sellers, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$676,276.81.
5. Respondent filed a Chapter Eleven Petition in the U.S. Bankruptcy Court for the Eastern District of New York on January 25, 1999. The Bankruptcy Court assigned case number 99-10971-260 to the filing. Respondent admitted in its Bankruptcy schedules that all 13 sellers listed in paragraph III of the complaint hold unsecured claims for produce debt in the total amount of \$710,941.98.

#### **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(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 effective September 2, 2001. - Editor]

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**In re: GOLDSTONE'S PRODUCE, INC.**  
**PACA Docket No. D-00-0001.**  
**Decision Without Hearing by Reason of Default.**  
**Filed July 12, 2001.**

Eric Paul, for Complainant.  
Respondent, Pro se.

*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

#### **Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act," instituted by a complaint filed on October 7, 1999, by the Associate Deputy Director, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1998 through September 1998, Respondent purchased, received and accepted in interstate and foreign commerce, from 14 sellers, 203 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$313,419.29.

Service of the complaint in this proceeding on Respondent was initially attempted at the business address set forth in the complaint, 813 N.W. 21st Terrace, Miami, FL 33127. When service could not be made at this address, a second attempt was made on December 28, 1999, by certified mail addressed to Mr. Jorge

L. Herrera, President, Goldstone's Produce, Inc., 1265 MW 22nd Street, Miami, FL 33142. This letter was returned on January 14, 2000 because the forwarding order had expired. On April 26, 2000, the complaint and transmittal letter were again re-mailed by certified mail to Mr. Jorge L. Herrera, President, Goldstone's Produce, Inc., at a third address, 13000 S.W. 197th Avenue, Miami, FL 33196. This was a forwarding address which had been obtained from the United States Postal Service, Miami, Florida. This certified mail letter was returned "unclaimed" on May 18, 2000. Accordingly, on June 8, 2000, service was made by regular mail sent to the same address in conformity with Section 1.147 of the Rules of Practice (7 C.F.R. § 1.147). The time for filing an answer admitting, denying, or explaining each of the allegations of the complaint in accordance with Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) having run, and upon the motion of the Complainant for issuance of the Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Respondent Goldstone's Produce, Inc. is a corporation organized and existing under the laws of the State of Florida. Its business mailing address was 831 N.W. 21st Terrace, Miami, FL 33127.

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number 930646 was issued to Respondent on February 10, 1993. This license was suspended on June 25, 1998, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g), for failure to pay a reparation order and subsequently terminated on February 10, 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 III of the complaint, during the period January 1998 through September 1998, Respondent purchased, received and accepted from 14 sellers in interstate and foreign commerce, 203 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$313,419.29.

#### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 203 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the

Order below is issued.

### Order

A finding be made that Respondent Goldstone's Produce, Inc. has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

This Order shall take effect on the 11th day after the Decision becomes final. Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceeding 35 days after service unless appealed to the Secretary by a party to the proceeding within 30 days after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Order shall be served upon the parties.

[This Decision and Order became effective October 14, 2001. - Editor]

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**In re: 4 SEASONS INTERNATIONAL, INC.**  
**PACA Docket No. D-01-0006.**  
**Decision Without Hearing by Reason of Default.**  
**Filed August 3, 2001.**

Christopher P. Young-Morales, for Complainant.  
Respondent, Pro se.  
*Decision issued by Jill S. Clifton, 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 January 9, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period November 1998 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 8 sellers, 97 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$638,662.90.

A copy of the Complaint was served upon Respondent; Respondent did not

answer the Complaint. The time for filing an answer having expired, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of Texas. Its business addresses were 8609 NW Plaza Drive, Suite 209, Dallas, Texas 75225 and 2501 Military Highway, Suite D-15, McAllen, Texas 78502. Its mailing address is P.O. Box 12003, Dallas, Texas 75225.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 981395 was issued to Respondent on June 16, 1998. This license terminated on June 16, 1999, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee. License number 991669 was issued to Respondent on August 16, 1999. This license terminated on August 16, 2000, when it was not renewed.

3. As more fully set forth in paragraph III of the Complaint, during the period November 1998 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 8 sellers, 97 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of \$638,662.90.

#### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 97 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), for which the Order below is issued.

#### **Order**

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the 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 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became effective September 27, 2001. -Editor]

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**In re: SCARPACI BROTHERS, INC.**

**PACA Docket No. D-00-0014.**

**Decision and Order.**

**Filed August 6, 2001.**

Eric Paul, for Complainant.

Respondent, Pro se.

*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

#### **Preliminary Statement**

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter "PACA", was initiated on April 18, 2000, by a complaint filed by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, alleging that Respondent willfully violated the PACA by failing to make full payment promptly to eighteen sellers of the agreed purchase prices in the total amount of \$599,504.49 for 134 lots perishable agricultural commodities that it purchased, received and accepted in interstate commerce during the period March 1998 through July 1999. The complaint also alleges that PACA license number 930672, which was issued to Respondent on February 17, 1993, terminated on February 17, 2000, when it was not renewed. The complaint requests that the Administrative Law Judge find that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and order that the facts and circumstances of such violations be published.

The complaint was served on Respondent by certified mail delivered to: (1) Stanley G. Makoroff, its Trustee in a Chapter 7 bankruptcy proceeding, and (2) Todd Scarpaci, its President. No answer to the allegations of the complaint has

been filed on behalf of Respondent by Mr. Makoroff. On June 5, 2000, Todd Scarpaci filed an answer admitting that Respondent had failed to pay \$599,504.49 to its wholesalers as alleged in the complaint, but denying that Respondent's failures to pay were willful.<sup>1</sup> This answer neither disputes the unpaid purchase amounts and other details of the 134 transactions that were alleged in paragraph III of the complaint, or the further allegation set forth in paragraph IV of the complaint that Respondent has admitted in a bankruptcy Schedule F-Creditors Holding Unsecured Non-Priority Claims, filed in *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM (United States Bankruptcy Court for the Western District of Pennsylvania), "that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidated Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999." Respondent admits in its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was "filed involuntarily (sic) due to pressure applied on the same day thru temporary restraining order."

A copy of the Rules of Practice which govern the conduct of these proceedings (7 C.F.R. § 1.130 - 1.151) accompanied the complaint. Respondent was required under section 1.136(b)(1) of these Rules of Practice (7 C.F.R. § 1.136(b)(1)) to clearly admit, deny, or explain each of the allegations of the complaint. Under section 1.136(c) of these Rules of Practice (7 C.F.R. § 1.136(c)) Respondent's failure to deny the above specific allegations in its answer constitutes an admission of said allegations unless the parties have agreed to a consent decision.

Complainant filed a request that official notice be taken of documents filed by Respondent in its bankruptcy proceeding, and the bankruptcy proceeding docket sheet, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by Respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the

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<sup>1</sup> Mr. Scarpaci's letter answer contains the following three statements respecting the alleged failures to make full payment promptly in the total amount of \$599,504.49:

- (1) "It is true that Scarpaci Bros was unable to make payments to wholesalers thus forcing bankruptcy and liquidation."
- (2) "Scarpaci Bros, unwilfully violated section 2(4) PACA (7 USC 499b(4) We simply were not able to pay due to uncollectable receivables which we had no control over."
- (3) "Rich Armstrong the investigator on the case told me that what he found was what you have announced, \$599,504.49."

pleadings and precedent decisions cited by Complainant<sup>2</sup>, official notice is taken of the requested bankruptcy documents and docket sheet and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### **Pertinent Statutory Provisions**

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

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

...  
(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or brought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c)(7 U.S.C. § 499e(c)) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (emphasis added).

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

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<sup>2</sup> See, *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds, Veg-Mix, Inc. v. U.S. Dept. Of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987); *In re Fava & Company, Inc.*, 44 Agric. Dec. 870 (1985)(decision), 46 Agric. Dec. 79 (1987)(ruling on certified question issued December 4, 1984).

(a) Whenever (a) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this act (7 U.S.C. § 499b), or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the fact 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.

#### **Pertinent Regulation**

Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) provides:

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

...

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

...

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided*, That the party claiming the existence of such agreement for time of payment shall have the burden of proving it.

#### **Findings of Fact**

1. Scarpaci Brothers, Inc. (hereinafter, "Respondent"), is a corporation incorporated in the state of Pennsylvania. Its business address while operating was 2100 Smallman Street, Pittsburgh, Pennsylvania, 15222. Its current addresses are c/o Stanley G. Markoroff, Trustee, 1200 Koppers Building, Pittsburgh, Pennsylvania, 15219 and c/o Todd Michael Scarpaci, 122 Judith Drive, Venetia, Pennsylvania, 15317.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. License number 930672 was issued to Respondent on February 17, 1993. This license terminated February 17, 2000, when it was not renewed.

3. Respondent, during the period March 1998 through July 1999, on or about the dates and in the transactions set forth in paragraph III of the complaint, failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$599,504.49 for 134 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce.

4. On August 18, 1999, Respondent filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101) in the United States Bankruptcy Court for the Western District of Pennsylvania. The Chapter 11 proceeding, *In re Scarpaci Brothers, Inc.*, Case No. 99-26153 MBM, was converted to a Chapter 7 proceeding on October 25, 1999.

5. Respondent filed a bankruptcy schedule, Schedule F- Creditors Holding Unsecured Non-Priority Claims, in which Respondent admitted that it owes 17 of the 18 sellers named in paragraph III of the complaint herein (Consolidation Services, Inc. is not listed as a creditor in Schedule F) amounts equal or greater than those alleged unpaid in paragraph III for inventory purchases made in 1998 and 1999.

6. By signing the Declaration that accompanied Respondent's bankruptcy schedules, Respondent's president Todd M. Scarpaci declared under penalty of perjury that Respondent owed fixed and undisputed amounts totaling \$573,089.73 to these 17 produce sellers as of September 1, 1999. The amounts alleged unpaid by Complainant in paragraph III of the complaint and admitted unpaid by Respondent's Schedule F listing to these 17 produce firms are as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Schedule F</u>
Stanley Orchard Sales, Inc.	\$26,290.08	\$26,290.00
Ron Funkhouser Sales, LTD	5,040.00	5,040.00
Wilkinson-Cooper Produce, Inc.	14,705.65	15,032.00
Walden-Sparkman, Inc.	10,650.00	10,650.00
Earl Roy Produce	8,634.32	12,594.00
Mieze Jet Air Sales, Inc.	238,764.30	253,776.00
Lane Packing Company	8,414.25	10,433.00
Main Street Produce, Inc.	10,030.83	10,030.00
C H Robinson	9,386.70	12,586.00
Williams Farm, PT.	77,822.05	78,535.00

Gallop Farms	2,360.00	2,360.00
Ohio Valley Mushroom Farm	386.75	386.00
Hearty Fresh	28,475.00	32,356.00
Thomas Produce Co.	34,802.50	38,348.00
Action Produce Company	62,171.25	84,325.00
Thomas B. Smith Farms	21,188.00	21,188.00
Lewis Taylor Farms, Inc.	<u>14,399.00</u>	<u>14,399.00</u>
	<b>\$573,089.73</b>	<b>\$628,328.00</b>

7. Respondent has admitted by Exhibit A to the Voluntary Petition filed in its bankruptcy proceeding that it had total assets of \$254,000.00 and total liabilities of \$1,004,398.00 as of August 30, 1999. Included in Respondent's total assets were accounts receivable with a current market value of \$180,000.00.

8. Respondent has admitted by its answer that the chapter 11 bankruptcy it filed on August 18, 1999 was "filed involuntarily (sic) due to the pressure applied on the same day thru temporary restraining order."

### Conclusions

Respondent's admitted failures to make full payment promptly to 18 sellers for purchases of 134 lots of perishable agricultural commodities in the amount of \$599,504.49 in interstate commerce during the period March 1998 through July 1999 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Under the controlling decisions of the Secretary of Agriculture, Respondent's admission that \$599,504.49, as specified by the complaint, remains unpaid to eighteen sellers of perishable agricultural commodities warrants a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violation be published. Although the issuance and publication of a finding that Respondent has committed flagrant and repeated violations of section 2(4) of the PACA does not require a determination of willfulness, Respondent's violations were clearly willful. Respondent's denial that its violations of section 2(4) of the PACA were willful is entirely without merit as a matter of law since the violations occurred over a sixteen month period during which Respondent must have known that it had inadequate working capital to make full payment promptly. Therefore, the full finding sought by the complaint, that Respondent committed willful, flagrant and repeated

violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) should be made and published without hearing.

The complaint alleges, and we conclude based upon Respondent's admissions, that during the period March 1998, through July 1999, Respondent failed to make full payment promptly to 18 sellers of agreed purchase prices in the total amount of \$599,504.49 for 134 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. The transaction details were set forth in a two page table in paragraph III of the complaint. The specific commodities listed were all perishable agricultural commodities under the PACA.<sup>3</sup> The eighteen sellers named were either shown to be located in another state or, if located in Pennsylvania, to have sold commodities whose out of state origins were expressly set forth. The date(s) on which the 134 lots were accepted, and the date(s) on which payments were due under the PACA were also set forth over a sixteen month plus period by specific seller. Finally, the total amount past due and unpaid was set forth for each seller. Respondent has not denied the truth and accuracy of the specific facts alleged in this paragraph III table. Respondent has expressly acknowledged in its answer: (1) that it was unable to make payment to its wholesalers; and (2) that the total amount alleged as past due and unpaid, \$599,504.49, was the same amount that the agency investigator, Rich Armstrong, identified as being unpaid during the investigation that he conducted. Respondent has not disputed that the 134 payment violations occurred as alleged, but only that these violations were willful. Respondent has further failed to deny, and, therefore, has admitted that it filed a schedule of unsecured nonpriority claims in its bankruptcy proceeding that identifies 17 of the 18 sellers listed in paragraph III of the complaint as being owed amounts equal or greater than the unpaid and past due amounts set forth in paragraph III. This admission, and the admissions made in Respondent's bankruptcy documents of which official notice has been taken pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143), establish that the \$573,089.73 produce debt that Respondent owes to these seventeen unpaid sellers for 124 transactions<sup>4</sup> is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court as a non-operating Chapter

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<sup>3</sup> Mixed fruits & vegetables, onions, watermelons, peaches, sweet potatoes, and mushrooms were listed.

<sup>4</sup> The \$26,414.76 that Consolidation Services, Inc. is owed for 10 lots of watermelons was not scheduled as an acknowledged unsecured debt on Respondent's bankruptcy Schedule F.

7 debtor. By so scheduling this produce debt, Respondent has implicitly asserted that there is no prospect of full payment of this debt at any future date.

Respondent has further admitted in the bankruptcy documents that it incurred unsecured debts totaling \$813,229, most of which is shown on its Schedule F as being owed to 17 of the 18 unpaid sellers named in the complaint. This produce debt was incurred while Respondent was in a seriously impaired financial condition.

Respondent filed a voluntary petition under chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1101) that was converted to a Chapter 7 case on October 25, 1999. Respondent listed its produce debts in its Schedule F - Creditors Holding Unsecured Nonpriority Claims as debts incurred “for the purchase of inventory in 1998” or “for the purchase of inventory in 1999” and indicated that these debts were fixed and undisputed by failing to mark each scheduled debt as “c” (contingent), “u” (unliquidated) or “d” (disputed) as is required for contested claims when completing this Official Bankruptcy Form. See West’s Bankruptcy Code, Rules and Forms, 887 (1996 Edition). Respondent’s president, Todd M. Scarpaci, declared under penalty of perjury that the information provided in Respondent’s Voluntary Petition was true and correct. He declared under penalty of perjury that the Debtor’s Schedules were true and correct to the best of his knowledge, information, and belief, in his Declaration Concerning Debtor’s Schedules, on September 1, 1999.<sup>5</sup>

Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that as of September 1, 1999, it owed fixed amounts that total \$573,089.73 to 17 of the 18 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$599,504.49 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 43 creditors named are 31 firms whose undisputed claims are noted as having been incurred for the purchase of inventory in 1998 or 1999. Seventeen of these 31 produce firms are listed as unpaid sellers in the complaint. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by Respondent are identical (except for rounding down to the last full dollar) for eight of the produce sellers, and slightly or considerably higher for nine of the produce sellers. One firm alleged to be unpaid for \$26,414.72 in the complaint, Consolidation Service, Inc.,

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<sup>5</sup> Official notice was not requested and taken of the original petition that Respondent’s answer and the bankruptcy docket report acknowledge was filed on August 18, 1999, but of the replacement petition that was executed on September 1, 1999.

is not identified as a creditor on Schedule F. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent with respect to the other seventeen produce firms are set forth in Finding of Fact No. 6, *supra*. Respondent has admitted by this Schedule F listing, that it has failed to pay these seventeen sellers at least \$573,089.73. A decision and order that relies upon such admissions may be issued in disciplinary proceedings brought under the PACA.<sup>6</sup>

We conclude that Respondent is not entitled to a hearing on its denial that its admitted failures to pay were willful. Respondent has admitted in its answer failing to pay for 134 purchases of perishable agricultural commodities totaling \$599,504.49 made in interstate commerce from 18 sellers over a 16 month period. Respondent has confirmed this produce debt by admitting in its bankruptcy Schedule F that undisputed amounts totaling \$573,089.73 are owed to 17 of these 18 produce sellers. The dollar amount, the number, and the lengthy time period make these payment violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) willful, repeated, and flagrant, as a matter of law. The violations are “repeated” because repeated means more than one. The violations are “flagrant” because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred.<sup>7</sup> The fact that they occurred over an

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<sup>6</sup>See, *In re Kirby Produce Company*, 58 Agric. Dec. 1011(1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) ; *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), *remanded on other grounds, Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987). [This footnote was cited as FN 4 - Editor]

<sup>7</sup> See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F. 2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972)(finding 26 violations involving \$19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110,115 (2d Cir. 1967)(concluding that because the 295 violations did not occur simultaneously, they must be considered “repeated” violations within the context of the PACA and finding 295 violations to be “flagrant” violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *aff'd*, 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana’s failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo’s failure to pay 6 sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least \$238,374.08 over a 11 month period were “willful, repeated, and flagrant, as a matter

(continued...)

extended period during which Respondent must have known that it did not possess sufficient funds to comply with the payment requirements of the PACA establishes that the violations were willful. It is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful. Respondent recklessly and negligently continued to make new purchases while being many months past due in making payment for prior purchases subject to the Act. Respondent's answer acknowledges that Respondent continued to make produce purchases until forced to seek relief in bankruptcy after one of its creditors obtained a temporary restraining order on August 18, 1999. Such conduct is willful.

A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.<sup>8</sup> A more stringent definition of the word "willfulness," as that word is used in 5 U.S.C. § 558(c), has been followed in the Fourth and Tenth Circuits. A willful violation has been defined in these Circuits as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed.<sup>9</sup> Even under this more stringent definition, the Department's Judicial Officer has determined that payment violations similar to the violations established by Respondent's admissions would still be willful because of a gross neglect of the express provisions of the PACA known by Respondent to require prompt payment. See, *In re Five Star Food Distributors, Inc.*, *supra*, at 897, where the Judicial Officer explained:

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(...continued)  
of law").

<sup>8</sup>See, *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 560 (1991); *Finer Foods Sales Co. v. Block*, *supra*, 708 F.2d at 777-78; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1991); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Five Star Food Distributors, Inc.*, *supra*, at 896; *In re Havana Potatoes of New York Corp., and Havpo, Inc.*, *supra*, at 1244.

<sup>9</sup>See, *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); and *Capital Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 11 month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful. *In re Hogan Distrib., Inc.*, *supra*, 55 Agric. Dec. at 630; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.)(Table), *cert. denied*, 439 U.S. 819 (1978).

The situation in the present proceeding is virtually identical to that in *Five Star*. Respondent reported in Exhibit A to its Voluntary Petition having total assets of \$254,000.00 and total liabilities of \$1,004,398.00 as of August 30, 1999. Respondent has reported in bankruptcy Schedule B-Personal Property that the "accounts receivable of the business" have a current market value of \$180,000.00. Respondent must have known at the time that it made most of the purchases of perishable agricultural commodities for which it has failed to pay that its financial condition was so impaired as to preclude compliance with the "make full payment promptly" requirement of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Under this section of the PACA and the substantive regulations that define prompt payment, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment. Respondent has not disputed in its answer, and, therefore, has admitted that payment was due in the transactions involved in this proceeding on the payment due dates asserted in the complaint, which dates were either 10 days after the relevant delivery dates or such other number of days as was set forth in writing on the unpaid sales invoices. By scheduling some \$573,089.73 of this interstate produce debt as unsecured debt in its Chapter 7 bankruptcy proceeding, Respondent has acknowledged that funds do

not exist for the full payment of these debts. Accordingly, Respondent willfully violated section 46.2(aa) of the regulations which provides:

‘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. Insofar as pertinent here, ‘Full payment promptly’ for the purpose of determining violations of the Act, means:

....

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

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”, Provided, That the party claiming the existence of such agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5),(11)

The Department’s Judicial Officer has held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and has placed the burden on the Respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985). The United States Court of Appeals for the District of Columbia Circuit in upholding the Department’s reliance upon admissions made in a bankruptcy proceeding has expressly noted that the Department’s view in *Fava* accorded with its rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. See *Veg-Mix, Inc., et al. v. USDA*, 83 F.2d 601 (1987), *reprinted* at 55 Agric. Dec. 537, 542 (1996). Respondent’s assertion that it “unwilfully violated section 2(4) of the PACA” because of “uncollectable receivables which we had no control over” does not establish the existence of a genuine dispute requiring the holding of a hearing in this proceeding. A similar denial of willfulness was rejected without hearing in *Peter DeVito Company, Inc.*, 57 Agric. Dec. 830 (1997). The Administrative Law Judge concluded that:

Respondent's failures to pay for numerous and substantial produce obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are wilful as a matter of law, and respondent's denials in its answer that "it willfully failed to promptly pay the prices therefor" and "it wilfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a *bona fide* dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.

57 Agric. Dec. at 835 (1997)

Respondent has sought to place the blame for its "unwilful," repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) on the existence of uncollectible receivables. The financial difficulties excuse that Respondent has asserted, even if established to be factually accurate, would also have no material effect on the determination of proper sanction in this proceeding. It has been the Department's sanction policy since 1991 to examine the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, as set forth in *In re S.S. Linn County, Inc.*, 50 Agric. Dec. 476 (1991). Yet, the adoption of this sanction policy has not altered the doctrine in *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989) that because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation, or a substitute finding of willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and publication of the facts and circumstances of the violation in cases where the license has terminated, where there have been repeated failures to pay a substantial amount of money over an extended period of time. *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622 (1996); and see *Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. 701 (1995), at 712, where the Judicial Officer has noted that "even though a respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being flagrant or wilful."

The Judicial Officer recently reaffirmed the Department's policy of dispensing with a hearing and relying upon clear admissions made by a Respondent in other court proceedings, noting that the undisputed facts so admitted need not prove all

the allegations in the complaint. In this case, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999), the same finding that Respondent's failures to make full payment promptly constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) would have been issued unless the proven violations had been determined to be *de minimis*. *Id.* at 1025-27.

Respondent does not currently have a valid PACA license. As a result, the proper sanction for its admitted violations is a finding that it committed willful, flagrant and repeated violations of section 2(4) of the PACA and an order that the facts and circumstances of its violations be published. See, *In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002 (1999); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1964). A civil penalty is not appropriate in lieu of a finding of the commission of willful, flagrant and repeated violations when, as herein, a Respondent has not made full payment of its produce obligations. *In re H. Schnell & Company, Inc.*, *supra* at 1010-11. A civil penalty is never appropriate in "no pay" cases. *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 570-71 (1998). Accordingly, the following Order is issued.

#### **Order**

Respondent Scarpaci Brothers, Inc. has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances set forth herein shall be published.

This order shall become final and effective without further proceeding 35 days after service thereof upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). Copies hereof shall be served upon the parties.

[This Decision and Order became effective October 6, 2001 – Editor]

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**In re: F. STEA & SON, INC.**  
**PACA Docket No. D-01-0003.**  
**Decision Without Hearing by Reason of Default.**  
**Filed August 28, 2001.**

Andrew Stanton, for Complainant.  
Respondent, Pro se.

*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the “Act”, instituted by a complaint filed on October 25, 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 September 1999 through October 1999, Respondent failed to make full payment promptly to six sellers the agreed purchase prices in the total amount of \$424,948.00 for 32 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. F. Stea & Son, Inc. (hereinafter, “Respondent”), is a corporation organized and existing under the laws of the State of Pennsylvania. Its mailing address is 3300 South Galloway Street, Unit 90, Philadelphia, Pennsylvania 19148.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981954 was issued to Respondent on September 17, 1998. This license terminated on September 17, 2000, 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 September 1999 through October 1999, failed to make full payment promptly to six sellers the agreed purchase prices in the total amount of \$424,948.00 for 32 lots of perishable agricultural commodities that Respondent 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 became effective November 11, 2001.-Editor]

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**In re: GARDEN FRESH FRUIT MARKET, INC.**  
**PACA Docket No. D-01-0011.**  
**Decision Without Hearing By Reason of Default.**  
**Filed September 6, 2001.**

Ruben D. Rudolph, Jr., for Complainant.  
Respondent, Pro se.

*Decision issued by James W. Hunt, Administrative Law Judge.*

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on March 1, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period August 23, 1998, through June 24, 1999, Respondent, Garden Fresh Fruit Market, Inc., (hereinafter "Respondent") failed to make full payment promptly to 28 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$394,961.67 for 164 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign

commerce.

A copy of the Complaint was served upon Respondent by certified mail on July 9, 2001. Respondent did not file an answer. 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 procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

#### **Finding of Fact**

1. Respondent is a corporation whose business address is 126 Valencia N.E., Suite A, Albuquerque, New Mexico 87198, and whose mailing address is 300 Airport Road, N.W., Albuquerque, New Mexico 87121.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 951755 was issued to Respondent on August 9, 1995. This license terminated on August 9, 2000, 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, during the period August 23, 1998, through June 24, 1999, Respondent failed to make full payment promptly to 28 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$394,961.67 for 164 lots of fruits and vegetables, which it received, accepted, and sold 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 Number 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.

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.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings after 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 15, 2001. - Editor]

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**In re: TWO BROTHERS WHOLESALE FRUIT & PRODUCE, INC.**  
**PACA Docket No. D-01-0004.**  
**Decision Without Hearing by Reason of Default.**  
**Filed September 25, 2001.**

Christopher P. Young-Morales, for Complainant.  
Respondent, Pro se.  
*Decision issued by James W. Hunt, Administrative Law Judge.*

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on November 15, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period February 1999 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 740 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$342,602.16.

A copy of the Complaint was served upon Respondent; Respondent did not answer the Complaint. The time for filing an answer having expired, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of Massachusetts. Its business address was 105 Second Street, Chelsea, Massachusetts 02150. Its current mailing address is 405 Mariners Hill Road, Marshfield, Massachusetts, 02050.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 971428 was issued to Respondent on May 12, 1997. This license terminated on May 12, 2000, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when it was

not renewed.

3. As more fully set forth in paragraph III of the Complaint, during the period February 1999 through January 2000, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 740 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of \$342,602.16.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 740 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

### **Order**

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations 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 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became effective November 18, 2001. - Editor]

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**In re: BOVA FRUIT CO., INC., WHOLESALE FRUITS &  
VEGETABLES.  
PACA Docket No. D-01-0008.  
Decision Without Hearing by Reason of Default.  
File September 26, 2001.**

Ruben Rudolph, for Complainant.

Respondent, Pro se.

*Decision and Order filed 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 February 1, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period September 12, 1998, through September 15, 1999, Respondent, Bova Fruit Co., Inc., Wholesale Fruits & Vegetables, (hereinafter "Respondent") failed to make full payment promptly to 79 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,935,386.99 for 604 lots of fruits and vegetables, which it received, accepted, and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent by certified mail on April 3, 2001. Respondent did not file an answer. 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 procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

### **Finding of Fact**

1. Respondent is a corporation whose business address is 342 Massachusetts Avenue, Suite 500, Indianapolis, Indiana 46204-2132.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 154994 was issued to Respondent on November 16, 1954. This license terminated on November 16, 1999, 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, during the period September 12, 1998, through September 15, 1999, Respondent failed to make full payment promptly to 79 sellers of the agreed purchase prices, or

balances thereof, in the total amount of \$1,935,386.99 for 604 lots of fruits and vegetables, which it received, accepted, and sold 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 Number 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.

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.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings after 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 effective on November 7, 2001 – Editor]

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**In re: THE CALLIF CO.  
PACA Docket No. D-01-0013.  
Motion for Decision Without Hearing.  
Filed October 3, 2001.**

Ann Parnes, 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 April 10, 2001, by the

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

The complaint alleges that during the period July 1999 through May 2000, Respondent failed to make full payment promptly to 15 sellers in the total amount of \$496,207.28 for 473 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on May 29, 2001. 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. The Callif Co., (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Ohio. Its business mailing address is 4561 East 5th Avenue, Columbus, Ohio 43219.
2. At all times material to the allegations in the complaint, Respondent was licensed under the provisions of the PACA. License number 881195 was issued to Respondent on May 13, 1988. This license terminated on May 13, 2000, 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 in paragraph III of the complaint, during the period July 1999 through May 2000, Respondent purchased, received and accepted in interstate commerce 473 lots of perishable agricultural commodities from 15 sellers, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$496,207.28.

#### **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(4)), and the facts and circumstances of the violations, 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 effective December 3, 2001 – Editor]

**CONSENT DECISIONS**

**(Not published herein - Editor)**

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

Great American Farms, Inc. PACA Docket No. D-01-0024. 8/15/01.

The Fruit Center, Inc. and Michael G. Litvin. PACA Docket No. D-01-0015.  
9/20/01.

The Herb Farm d/b/a The Greenhouse, a/k/a H.F. Liquidation Corp. PACA  
Docket No. D-99-0013. 10/17/01.