AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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 (from the beginning of the annual Volume) 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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

In re: CAPTAIN JACK'S TOMATOES, INC., AND THE FRESH GROUP, LTD., d/b/a MAGLIO AND COMPANY.
PACA Docket No. D-00-0008.
Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company.
Filed April 30, 2002.

PACA – Failure to pay – Willful, flagrant, and repeated violations – Responsibly connected – Civil penalty – Sanction policy – Sanction testimony – Settlement negotiation documents – Waiver of confidentiality – License suspension.

The Judicial Officer (JO) affirmed the Decision and Order issued by Chief Administrative Law Judge James W. Hunt: (1) concluding The Fresh Group, Ltd., d/b/a Maglio and Co. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce; (2) assessing Respondent a $150,000 civil penalty; and (3) providing for a 60-day suspension of Respondent's PACA license if the civil penalty is not paid within 90 days after service of the Order on Respondent. The Judicial Officer found that Captain Jack's Tomatoes, Inc. (CJTI), violated 7 U.S.C. § 499b(4) and Respondent was liable for these violations because Respondent exercised complete domination and control over CJTI's day-to-day operations during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for CJTI's unlawful actions. The JO rejected Respondent's contention that Complainant must establish Respondent was responsibly connected with CJTI in order to prove that Respondent violated 7 U.S.C. § 499b(4) stating that administrative proceedings to determine whether a person is "responsibly connected," as defined in 7 U.S.C. § 499a(b)(9), are instituted under 7 U.S.C. § 499h(b). The issue in these "responsibly connected" cases is whether one person is or has been responsibly connected with another person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b; or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in 7 U.S.C. § 499h(b). The JO stated the proceeding before him was not a proceeding instituted under 7 U.S.C. § 499h(b) to determine whether Respondent is responsibly connected with CJTI and barred from employment by PACA licensees. Instead, the proceeding was an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) had been committed and, if they had been committed, the identity of the entity or entities that committed the violations. The JO also rejected Respondent's contention that evidence supporting a civil penalty in excess of $22,000 was inadmissible. The JO stated that oral and documentary evidence supporting Complainant's proposed sanction was relevant and under 7 U.S.C. § 499h(e) the Secretary of Agriculture had authority to assess Respondent a civil penalty in excess of $22,000. Finally, the JO rejected Respondent's argument that Complainant's sanction witness could not testify about information in documents Respondent provided to Complainant's counsel during settlement negotiations. The JO found that Respondent filed these same documents with the Hearing Clerk as proposed exhibits and Complainant had no reason to treat Respondent's filing of proposed exhibits as confidential.

Ruben D. Rudolph, Jr., for Complainant.

Jordan B. Reich, 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

Eric M. Forman, 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 14, 2000. 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) Captain Jack's Tomatoes, Inc., under the direction, management, and control of The Fresh Group, Ltd., d/b/a Maglio and Company [hereinafter Respondent], during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of $169,029.50 for 11 lots of perishable agricultural commodities, which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce; (2) Respondent is the alter ego of Captain Jack's Tomatoes, Inc.; and (3) Captain Jack's Tomatoes, Inc., under the direction, management, and control of Respondent, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶¶ III-IV).

On April 7, 2000, Captain Jack's Tomatoes, Inc., filed "Answer of Captain Jack's Tomatoes, Inc." Captain Jack's Tomatoes, Inc.: (1) admits that it, under the direction, management, and control of Respondent, during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of $169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (2) asserts Ledlow & Cole, Inc., was paid $2,500 on March 3, 1999, and the balance due Ledlow &

Cole, Inc., and Hiatt Produce, Inc., is $2,500 less than the $169,029.50 alleged in the Complaint; (3) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (4) admits that Respondent is its alter ego; and (5) asserts that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Answer of Captain Jack's Tomatoes, Inc., ¶¶ III-IV).

On April 20, 2000, Respondent filed "Answer of Respondent, The Fresh Group, d/b/a Maglio and Company" [hereinafter Respondent's Answer]. Respondent: (1) admits that during the period December 7, 1998, through December 29, 1998, Respondent managed Captain Jack's Tomatoes, Inc.; (2) asserts Captain Jack's Tomatoes, Inc., during the period December 7, 1998, through December 29, 1998, failed to make full payment promptly to two sellers of the agreed purchase prices in the total amount of $169,029.50 for 11 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce; (3) asserts Ledlow & Cole, Inc., was paid $2,500 on March 3, 1999, and the balance due Ledlow & Cole, Inc., is $2,500 less than the $57,475.30 alleged in the Complaint; (4) denies that it violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) asserts Captain Jack's Tomatoes, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Answer ¶¶ III-IV).

On May 23, 24, and 25, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over an oral hearing in Milwaukee, Wisconsin. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. James O. Vollmar, Waukesha, Wisconsin, represented Captain Jack's Tomatoes, Inc. Jordan B. Reich, Kohner, Mann & Kailas, S.C., Milwaukee, Wisconsin, represented Respondent.

On June 15, 2001, the Chief ALJ entered a Consent Decision agreed to by Complainant and Captain Jack's Tomatoes, Inc.[1] On July 25, 2001, Respondent filed "Respondent, The Fresh Group Ltd d/b/a Maglio & Company's Motion to Dismiss, Proposed Findings of Fact and Conclusions of Law and Proposed Order" [hereinafter Respondent's Post-Hearing Brief] and Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law and Proposed Order" [hereinafter Complainant's Post-Hearing Brief]. On September 21, 2001, Respondent filed "Respondent, The Fresh Group Ltd. d/b/a Maglio and Company's Reply Brief" and Complainant filed "Complainant's Reply Brief."

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[1]*See In re Captain Jack's Tomatoes, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision as to Captain Jack's Tomatoes, Inc.).

On November 14, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities; (2) assessed Respondent a $150,000 civil penalty; and (3) provided that, in the event Respondent failed to pay the $150,000 civil penalty within 90 days after the Hearing Clerk served the Initial Decision and Order on Respondent, Respondent's PACA license would be suspended for 60 days (Initial Decision and Order at 16).

On December 21, 2001, Respondent appealed to and requested oral argument before the Judicial Officer. On January 10, 2002, Complainant filed "Complainant's Response to Respondent's Appeal Petition" and "Complainant's Response to Request for Oral Hearing." On January 14, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision and a ruling on Respondent's request for oral argument before the Judicial Officer.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, except for 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 as to The Fresh Group, Ltd., d/b/a Maglio and Company. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law 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

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

. . . .

§ 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[.]

. . . .

§ 499e. Liability to persons injured

. . . .

(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

. . . .

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association, as defined in section 1141j(a) of title 12, and its members.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

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

Except with the approval of the Secretary, no licensee shall employ

any person, or any person who is or has been responsibly connected with any person--

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

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

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

. . . .

(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.

. . . .

§ 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. §§ 499a(b)(6), (9), 499b(4), 499e(c)(2), 499h(a), (b), (e), 499p.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE:

Chapter I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

Definitions

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

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

. . . .

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

7 C.F.R. § 46.2(aa)(5).

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

Statement of the Case

In 1991, Captain Jack's Tomatoes, Inc., received a PACA license to engage in the business of buying and selling perishable agricultural commodities. Jack Santoro was the president of Captain Jack's Tomatoes, Inc. Jack Santoro owned 51 percent of the stock in Captain Jack's Tomatoes, Inc., and Mary Santoro owned 49 percent of the stock in Captain Jack's Tomatoes, Inc. Jack Santoro testified that in 1996 Captain Jack's Tomatoes, Inc., was "not in a good financial condition." Looking for a way to keep Captain Jack's Tomatoes, Inc., going, Jack Santoro contacted Sam Maglio, president and sole stockholder of Respondent, to have Respondent manage and eventually buy Captain Jack's Tomatoes, Inc. Respondent, which operates under a PACA license, is a tomato repacker and produce wholesaler. (Tr. 273, 300, 444; CX 1, CX 2.)

Sam Maglio testified that he was hesitant about acquiring a company in financial trouble. He contemplated becoming a stockholder in Captain Jack's Tomatoes, Inc., but did not contemplate becoming an officer or director. Sam Maglio proposed an arrangement to Jack Santoro whereby he could "get in and look at the company." (Tr. 446-47, 449.) Jack Santoro agreed with Sam Maglio's proposal and on June 18, 1996, they entered into the following agreement:

MANAGEMENT AGREEMENT

> **THIS AGREEMENT**, entered into this 18 day of June 1996, by and between **The Fresh Group, Ltd.** ("TFGL"), by Sam J. Maglio, Jr., its President, and **Captain Jack's Tomatoes, Inc.** ("CJTI"), by Jack J. Santoro, its President, sets forth the terms and conditions upon which TFGL will be engaged to perform certain management services for CJTI. The terms, conditions and other material provisions of this Agreement are as follows:

1. **Services provided.** In general, TFGL will provide industry specific expertise in the daily operations and long term strategic planning for CJTI. In addition, TFGL will provide all necessary support to access TFGL's Produce Pro computer software and an office support staff to handle accounting functions as well as integration of the current data systems with TFGL.

2. **Binding input.** TFGL shall have binding input in all areas of CJTI including, but not limited to, accounting, payables, receiveables [sic], stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and other such categories as may arise. In those areas and in any other which may arise, TFGL shall have the full and complete cooperation of the Stockholders in implementing methods and practices to enhance the value of CJTI.

3. **Continuation of employment.** Jack J. Santoro shall continue employment with CJTI at a salary of $1000.00 per week and benefits comparable with those he his [sic] currently receiving, consistent with the current expense statement records.

4 **Compensation**. As compensation for its services, TFGL shall be paid the sum of $52,000.00 annually, to be disbursed as determined by TFGL. In recognition of the value created by its association, TFGL shall be entitled to a bonus equal to 90% of the yearly, pre-tax operating profits of CJTI up to $150,000.00 of such yearly, pre-tax operating profits. Any yearly, pre-tax operating profits in excess of $150,000.00 in any given year may be retained by CJTI, to pay down debt.

5. **Term.** The term of this Agreement shall be from July 1, 1996 to June 30, 1999. Further, this Agreement shall be terminable upon 90 days written notice by either party. However, in the event that CJTI wishes to terminate, it must first obtain the written release of TFGL from any provider of credit to CJTI, in a form acceptable to TFGL.

6. **Indemnification.** In executing this Agreement, CJTI hereby agrees, except in cases of TFGL's willful misconduct or gross negligence, to indemnify, defend and hold TFGL, its officers, directors,

employees, agents and counsel harmless against and from any and all losses, claims, damages, liabilities, joint and several, suffered, incurred by, or asserted against, TFGL, its officers, directors, employees, agents and counsel, including any amounts paid in settlement of any action, suit or proceeding brought under any statute, at common law or otherwise, which arises in connection with the performance by TFGL of its responsibilities under this Agreement. This agreement to indemnify shall survive, for a period of five years, any termination or other cancellation of this Agreement. Further, although CJTI and TFGL have every expectation that this Agreement and the performance thereof will improve and make more profitable the business of CJTI, CJTI hereby holds harmless TFGL from any losses that it may incur as a result of this Agreement and the performance thereof.

7. **Other Agreements.** The execution, validity and performance of this Agreement is dependent upon the execution on even date herewith of an **Option to Purchase** between TFGL, Jack J. Santoro and Mary C. Santoro. Neither the Option to Purchase nor this Management Agreement shall be enforceable on its own; both Agreements **must** be executed by the parties for either one to be enforceable.

8. **Entire agreement.** Notwithstanding Paragraph 7 (above), this Agreement contains all of the provisions of the Management Agreement. By signing this Agreement, both parties acknowledge that they have read it and understand all of its terms. Any changes hereto shall be made in writing and signed by the parties hereto.

CAPTAIN JACK'S TOMATOES, INC.	THE FRESH GROUP, LTD.
By:	By
/s/ :	/s/
Jack J. Santoro, President	Sam J. Maglio, Jr., President

CX 7 at 1-2.

On June 18, 1996, Jack Santoro and Sam Maglio entered into another agreement giving Sam Maglio the option to purchase all the outstanding

stock in Captain Jack's Tomatoes, Inc. (CX 7 at 3-5).

Sam Maglio testified that, according to his understanding of the management agreement, Respondent was both to run the day-to-day operations of Captain Jack's Tomatoes, Inc., and provide the business with long-term strategic planning. He said Captain Jack's Tomatoes, Inc., had not been managed properly in the past and Respondent was to have the authority to run the business without "undue interference" from Captain Jack's Tomatoes, Inc.'s shareholders or past management. (Tr. 450-51.)

Sam Maglio then hired Barbara Maszk to serve as general manager of Captain Jack's Tomatoes, Inc. She was put on Respondent's payroll as Respondent's employee. Sam Maglio said Barbara Maszk was to work briefly at Respondent to learn how it operated under his direction and was then to "take that knowledge and, again, under my direction implement it at Captain's Jack's" where her "primary function was to oversee the operation in my stead, that she should be organizing the accounts payable and accounts receivable . . . and making it a more efficient operation." (Tr. 360, 455-56.) Barbara Maszk confirmed that she ran the day-to-day operations of Captain Jack's Tomatoes, Inc., hired and fired employees, handled accounts receivable and payable, and signed checks (Tr. 360-61).

Sam Maglio initially visited Captain Jack's Tomatoes, Inc., several times a week but less often after Barbara Maszk became general manager. Barbara Maszk, however, continued to keep Sam Maglio informed via a computer system that Sam Maglio installed to hook up Captain Jack's Tomatoes, Inc., with Respondent. Sam Maglio would also initial jackets containing invoices of produce purchases to authorize their payment and at times told Barbara Maszk what bills to pay or not to pay. Barbara Maszk would initiate and sign computer generated checks for invoices to be paid. Captain Jack's Tomatoes, Inc., and Respondent bought produce from each other as well as from others. (Tr. 319-20, 346, 380, 418, 457.)

Jack Santoro, meanwhile, retained the title of president of Captain Jack's Tomatoes, Inc., and continued to buy and sell produce. He had access to the computer to verify produce purchases but not to pay for them or to have access to the computer for accounts payable or receivable. Jack Santoro was allowed to attend management meetings but the record does not indicate whether he provided any input. Despite Jack Santoro's protest, Barbara Maszk fired Jack Santoro's son-in-law. (Tr. 270-73, 279, 281-82, 305, 320-21, 457.) Jack Santoro testified he was only a figurehead (Tr. 277). One of Captain Jack's Tomatoes, Inc.'s perishable agricultural commodity

suppliers, Brian Hiatt, testified that he "felt that The Fresh Group was the one running Captain Jack's" (Tr. 111).

The relationship between Jack Santoro and Sam Maglio became contentious, and in 1997, Jack Santoro attempted to terminate the management agreement (Tr. 293, 451-52). Sam Maglio, in turn, sought to exercise his option to purchase Captain Jack's Tomatoes, Inc.'s stock followed by a lawsuit for specific performance (Tr. 460-61). In May 1998, Respondent's attorney advised Captain Jack's Tomatoes, Inc., that the shareholders of Captain Jack's Tomatoes, Inc. (Jack Santoro and Mary Santoro), did not have the power to assign assets and assume liabilities without Respondent's "binding input" (CX 6 at 1). On December 1, 1998, Sam Maglio told Jack Santoro that "The Fresh Group, Ltd. management will immediately take over the purchasing of all produce, packaging materials and supplies, and transportation services. You are not to make any purchases without the written consent of Dana Summer, [Respondent's general manager], or Sam Maglio, Jr." (CX 5).

Beginning on December 7, 1998, and continuing through December 29, 1998, Captain Jack's Tomatoes, Inc., failed to make full payment promptly to two produce sellers, Ledlow & Cole, Inc., and Hiatt Produce, Inc., for 11 lots of perishable agricultural commodities Captain Jack's Tomatoes, Inc., had purchased, received, and accepted from them (CX 25-CX 36). Complainant alleges that the amount owed Ledlow & Cole, Inc., was $57,475.30 and the amount owed Hiatt Produce, Inc., was $111,554.20 for a total amount owed of $169,029.50 (Compl. ¶ III). Captain Jack's Tomatoes, Inc., and Respondent admit Captain Jack's Tomatoes, Inc., had failed to make full payment promptly as alleged, but contend Captain Jack's Tomatoes, Inc., owed Ledlow & Cole, Inc., $54,975.30 rather than $57,475.30 (Answer of Captain Jack's Tomatoes, Inc. ¶¶ III-IV; Respondent's Answer ¶¶ III-IV).

From November 1998 through March 1999, Barbara Maszk issued checks to Respondent in the approximate amount of $455,000. Barbara Maszk could not recall the purpose of the payments but just that they were for "payment of bills." (Tr. 369-70.) Sam Maglio indicated that these payments to Respondent included payments for perishable agricultural commodities Captain Jack's Tomatoes, Inc., had purchased from Respondent (Tr. 483).

Sam Maglio testified "money was very tight" at the end of 1998 and into 1999 and he had Barbara Maszk fax him a list of all bills, including those for

produce. Sam Maglio said he was trying to work out a plan to make payments to Ledlow & Cole, Inc., and Hiatt Produce, Inc., and that "any monies that were left over were provided pro rata between those two vendors." (Tr. 458-59, 462-63.) Sam Maglio indicated that he directed Barbara Maszk to have Captain Jack's Tomatoes, Inc., pay Respondent before it paid Ledlow & Cole, Inc., and Hiatt Produce, Inc., because, unless Respondent sold perishable agricultural commodities to Captain Jack's Tomatoes, Inc., it would have no other source of supply (Tr. 475-76). However, Sam Maglio told Brian Hiatt in February 1999 that Captain Jack's Tomatoes, Inc., had enough money to pay Hiatt Produce, Inc.'s invoices (Tr. 122-23).

In February 1999, Jack Santoro resigned as an officer of Captain Jack's Tomatoes, Inc. In March 1999, Captain Jack's Tomatoes, Inc., ceased as a business. (Tr. 302, 461-62; CX 24-A at 3; Answer of Captain Jack's Tomatoes. Inc. ¶ II(a); Respondent's Answer ¶ II.)

Hiatt Produce, Inc., instituted a PACA trust suit against Captain Jack's Tomatoes, Inc., and Respondent in the United States District Court for the Eastern District of Wisconsin (Tr. 110-11; CX 8). In a March 31, 2000, decision, the Court found that "[b]ecause of the complete control which Fresh Group exercised over Captain Jack's, it is clear that The Fresh Group, in addition to Captain Jack's, was a fiduciary of the PACA trust. The Fresh Group breached its fiduciary duty by self dealing and by refusing to pay certain PACA creditors when funds were available apparently to do so" (CX 8 at 10).

Discussion

The failure of Captain Jack's Tomatoes, Inc., to pay promptly for the purchase of 11 lots of perishable agricultural commodities totaling approximately $169,029.50 constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Complainant contends Respondent should also be held liable for the violations on the grounds that the violations were committed "while [Respondent was] acting for or employed by [Captain Jack's Tomatoes, Inc.,] within the scope of its employment" and Respondent dominated and controlled Captain Jack's Tomatoes, Inc., to the extent that Respondent became Captain Jack's Tomatoes, Inc.'s alter ego (Complainant's Post-Hearing Brief at 10-19).

Respondent moves to dismiss the Complaint on the ground that Complainant has failed to state a claim upon which relief can be granted. Respondent argues that it cannot be held liable because it was not "responsibly connected" with Captain Jack's Tomatoes, Inc., as a partner, officer, or director, or as a holder of more than 10 per centum of the stock of Captain Jack's Tomatoes, Inc. (Respondent's Post-Hearing Brief.) This argument is not relevant to this proceeding. Whether a person is responsibly connected arises in proceedings instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether a person is barred from employment by a PACA licensee because of his or her connection with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack's Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent further argues, citing *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239 (1995), the alter ego theory of liability applies only when the alleged alter ego is a stockholder of the entity that committed the violations. In this case, Respondent points out, Respondent did not own any stock of Captain Jack's Tomatoes, Inc. (Respondent's Post-Hearing Brief at 5th through 7th unnumbered pages.) *Midland*, however*,* also held that a person, whether a stockholder or not, who exercises day-to-day direction, management, and control over an entity which buys or sells perishable agricultural commodities is itself a "dealer" as that term is defined in the PACA. *Midland*, 54 Agric. Dec. at 1303.

Midland went on to hold "[i]n determining whether an order should be made applicable to an individual respondent, the Department examines the totality of the circumstances surrounding the violation rather than the form of the business entity involved in order to effectuate the purposes of the statutes it administers." *Midland*, 54 Agric. Dec. at 1261. In this case, Respondent, through its agents Barbara Maszk and Sam Maglio, was clearly

responsible for decisions relating to Captain Jack's Tomatoes, Inc.'s purchases of and payments for perishable agricultural commodities. As its manager, Respondent exercised complete domination and control over the day-to-day operations of Captain Jack's Tomatoes, Inc., during the time the violations occurred. Respondent was therefore a dealer and bore responsibility for Captain Jack's Tomatoes, Inc.'s unlawful actions. Accordingly, I find Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for perishable agricultural commodity purchases.

Complainant seeks a $150,000 civil penalty or, if Respondent does not pay the $150,000 civil penalty, a 60-day suspension of Respondent's PACA license (Complainant's Post-Hearing Brief at 19-24). Respondent contends that, even assuming it committed a violation, there is no evidentiary basis for any sanction (Respondent's Post-Hearing Brief at 7th unnumbered page).

The factors to consider in imposing a sanction were set forth in *In re Scamcorp, Inc.,* 57 Agric. Dec. 527, 569 (1998): "(1) the length of time during which a respondent was in violation of the payment requirements of the PACA; (2) the number of a respondent's violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that an appropriate civil penalty, large enough to be an effective deterrent to future violations of the PACA, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA."

Basil Coale, a United States Department of Agriculture senior marketing specialist, testified that the dollar amount of Respondent's violations was over $160,000; that one of the violative produce transactions was paid over 570 days late; that the average violative produce transaction was paid 480 days late; that, concerning the impact on the industry, Captain Jack's Tomatoes, Inc., has been forced out of business, Hiatt Produce, Inc., can no longer sell to Captain Jack's Tomatoes, Inc., and Hiatt Produce, Inc., was forced to file suit to obtain relief; and that no roll-over debt was incurred. Basil Coale was of the opinion that the recommended sanction was necessary to be an effective deterrent to future violators and that the sanction would not risk Respondent's future payments to its produce sellers (Tr. 537-41).

I find two additional factors significant. First, Respondent failed to pay Captain Jack's Tomatoes, Inc.'s produce sellers promptly despite apparently having the money to do so. Second, Respondent used the money, which it was required by section 5(c)(2) of the PACA (7 U.S.C. § 499e(c)(2)) to hold in trust for the benefit of perishable agricultural commodity sellers, to pay itself. As for evidence on whether Complainant's proposed civil penalty may affect Respondent's financial condition, the burden was on Respondent to present evidence that a $150,000 civil penalty would substantially increase the risk that Respondent's future produce sellers would not be paid in accordance with the PACA. *Scamcorp*, 57 Agric. Dec. at 569 n.20. Respondent presented no evidence on its financial condition.

Considering all the circumstances, I find Complainant's recommended $150,000 civil penalty and 60-day suspension of Respondent's PACA license appropriate. The 60-day suspension of Respondent's PACA license will not be imposed if James Frazier receives Respondent's payment of the $150,000 civil penalty within 90 days after the Order in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, is served on Respondent.

Findings of Fact

1. Captain Jack's Tomatoes, Inc., was a corporation organized and existing under the laws of the State of Wisconsin. Captain Jack's Tomatoes, Inc.'s mailing address was S83 W18890 Saturn Drive, Muskego, Wisconsin 53150. Captain Jack's Tomatoes, Inc., ceased doing business on March 12, 1999.

2. At all times material to this proceeding, Captain Jack's Tomatoes, Inc., was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 920157 was issued to Captain Jack's Tomatoes, Inc., on November 6, 1991.

3. At all times material to this proceeding, Jack Santoro was the president of Captain Jack's Tomatoes, Inc. At all times material to this proceeding Jack Santoro and Mary Santoro were the stockholders of Captain Jack's Tomatoes, Inc.

4. Respondent is a corporation organized and existing under the laws of the State of Wisconsin. Respondent's business mailing address is 4287 N. Port Washington Road, Milwaukee, Wisconsin 53212.

5. At all times material to this proceeding, Respondent was engaged in the business of buying and selling perishable agricultural commodities and was licensed under the PACA. PACA license number 950744 was issued to Respondent on February 14, 1995. Respondent's PACA license has been renewed on an annual basis and is next subject for renewal on February 14, 2003.

6. At all times material to this proceeding, Sam Maglio was the president and owner of Respondent.

7. On June 18, 1996, Captain Jack's Tomatoes, Inc., and Respondent entered into a management agreement through which Respondent managed Captain Jack's Tomatoes, Inc.'s business operations and had binding input in all areas of the operation of Captain Jack's Tomatoes, Inc., including, but not limited to: accounting, payables, receivables, stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, packaging, taxes, transportation, utilities, and any other categories as may arise. The management agreement also provides Respondent was to have full and complete cooperation of the stockholders of Captain Jack's Tomatoes, Inc.

8. The management agreement directed that Respondent would be entitled to 90 percent of the yearly pre-tax operating profits of Captain Jack's Tomatoes, Inc.

9. Under the management agreement, Respondent was paid $52,000 per year for its management of Captain Jack's Tomatoes, Inc.

10. Respondent hired Barbara Maszk in August 1996 for the purpose of managing Captain Jack's Tomatoes, Inc. At all times material to this proceeding, Barbara Maszk was Respondent's employee and worked on site at Captain Jack's Tomatoes, Inc., with the specific responsibility of managing Captain Jack's Tomatoes, Inc.'s day-to-day business operations.

11. Barbara Masz exercised the authority to issue and sign Captain Jack's Tomatoes, Inc.'s checks to pay for perishable agricultural commodities.

12. In May 1998, Respondent's attorney, citing the management agreement, informed Captain Jack's Tomatoes, Inc., that the stockholders of Captain Jack's Tomatoes, Inc. (Jack Santoro and Mary Santoro), no longer had the power to assign assets and assume liabilities without Respondent's binding input.

13. On December 1, 1998, Respondent, operating under the management agreement, removed Jack Santoro's responsibility for produce

sales at Captain Jack's Tomatoes, Inc., and required Jack Santoro to obtain Respondent's written approval for any produce purchases.

14. From November 1998 through March 1999, Barbara Maszk issued checks from Captain Jack's Tomatoes, Inc., payable to her employer, Respondent, in the approximate amount of $455,000 while debts for perishable agricultural commodities were owed to other perishable agricultural commodity suppliers.

15. While operating under its management agreement with Respondent, Captain Jack's Tomatoes, Inc., failed, during the period December 7, 1998, through December 29, 1998, to make full payment promptly to two sellers (Ledlow & Cole, Inc., and Hiatt Produce, Inc.) of the agreed purchase prices in the total amount of approximately $169,029.50 for 11 lots of perishable agricultural commodities that Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

16. One of the violative produce transactions was paid over 570 days late. The average violative produce transaction was paid 480 days late.

17. The United States District Court for the Eastern District of Wisconsin in a PACA trust hearing over the same debts owed to Hiatt Produce, Inc., by Captain Jack's Tomatoes, Inc., in this case found that Respondent was in complete control of the business operations of Captain Jack's Tomatoes, Inc.

18. At all times material to this proceeding, Respondent dominated and controlled all aspects of the day-to-day management of Captain Jack's Tomatoes, Inc.'s business operations and controlled the timing and amount of payments that Captain Jack's Tomatoes, Inc., made to Respondent and other perishable agricultural commodity suppliers.

Conclusion of Law

Respondent, beginning on December 7, 1998, and continuing through December 29, 1998, committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in its "Appeal Petition to the Judicial

Officer" [hereinafter Appeal Petition] and "Brief of the Respondent, The Fresh Group Ltd. d/b/a Maglio & Company, In Support of Its Appeal Petition to the Judicial Officer" [hereinafter Appeal Brief]. First, Respondent contends the Chief ALJ's conclusion that Respondent can be held liable for the failures of Captain Jack's Tomatoes, Inc., to pay for perishable agricultural commodities in accordance with the PACA, is contrary to the facts and law (Respondent's Appeal Pet. at 1; Respondent's Appeal Brief at 4-8). Specifically, Respondent contends the record contains no evidence to establish that it was "responsibly connected," as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Captain Jack's Tomatoes, Inc., and Complainant must prove Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to establish that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Brief at 5).

I disagree with Respondent's contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Administrative proceedings to determine whether a person is "responsibly connected," as that term is defined in section 1a(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), are instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)). The issue in these "responsibly connected" cases is whether one person is or has been responsibly connected with any person: (1) whose PACA license has been revoked or is currently suspended; (2) who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b); or (3) against whom there is an unpaid reparation award issued within 2 years. A person found to be responsibly connected is barred from employment by PACA licensees, except as provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

This proceeding is not a proceeding instituted under section 8(b) of the PACA (7 U.S.C. § 499h(b)) to determine whether Respondent is responsibly connected with Captain Jack's Tomatoes, Inc., and barred from employment by PACA licensees. Instead, this proceeding is an administrative disciplinary proceeding instituted under the PACA to determine whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations.

Respondent cites *Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir.

1997), *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966), *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995), and *Shepard v. K.B. Fruit & Vegetable, Inc.*, 868 F. Supp. 703 (E.D. Pa. 1994), to support its contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Brief at 5). I have reviewed each of these cases. None of the cases cited by Respondent supports Respondent's contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Hart, Bell, and *Birkenfield*, are "responsibly connected" cases. The issue in *Hart* and *Bell* is the connection between persons alleged to be responsibly connected with PACA licensees found to have flagrantly and repeatedly violated section 2 of the PACA (7 U.S.C. § 499b). The issue in *Birkenfield* is the connection between a person alleged to be responsibly connected with a PACA licensee against which there was an unpaid reparation award. *Hart, Bell*, and *Birkenfield* do not concern the issues in this proceeding; namely, whether willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) have been committed and, if they have been committed, the identity of the entity or entities that committed the violations. None of these "responsibly connected" cases supports or even addresses Respondent's contention that Complainant must establish Respondent was responsibly connected with Captain Jack's Tomatoes, Inc., in order to prove that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bronia is a PACA trust case involving private litigants in which the United States District Court for the Southern District of New York held that unpaid sellers of perishable agricultural commodities properly preserved their trust claims against a corporate produce purchaser and held that the sole shareholder, director, and president of the corporate produce purchaser was personally liable for the corporate produce purchaser's breach of the PACA statutory trust. The Court does not discuss or mention the term "responsibly connected." Similarly, *Shepard* is a PACA trust case involving private litigants in which the United States District Court for the Eastern District of Pennsylvania held that, based on their active involvement in the business operations of a PACA licensee and their failure to supervise the person who actually ran the PACA licensee, the owners, officers, and

directors of a PACA licensee were personally liable for a PACA licensee's failure to pay a produce supplier.

Respondent also contends the record does not support a finding that Respondent is Captain Jack's Tomatoes, Inc.'s alter ego (Respondent's Appeal Brief at 5-7). Even if I were to agree with Respondent, I would not find the Chief ALJ erred because the Chief ALJ did not base his conclusion that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) on a finding that Respondent was Captain Jack's Tomatoes, Inc.'s alter ego. Instead, the Chief ALJ found that, during the time the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred, Respondent completely dominated and controlled the day-to-day operations of Captain Jack's Tomatoes, Inc., including decisions related to the purchases of and payments for perishable agricultural commodities. The Chief ALJ concluded that: (1) Respondent was a "dealer," as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent bore direct responsibility for the failures to pay for perishable agricultural commodities that are the subject of this proceeding; and (3) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Initial Decision and Order at 11.)

I agree with the Chief ALJ's conclusions. Even if a person is not an owner of an entity, that person may still be found responsible for willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the entity. The person's liability may attach because: (1) the person is subject to the PACA; (2) the person is the day-to-day manager of the violating entity; (3) the person exercises direction, management, and control of the violating entity; and (4) the person is the one most responsible for the entity's violations. As discussed in this Decision and Order as to The Fresh Group, Ltd., d/b/a Maglio and Company, *supra*: (1) Respondent was a "dealer," as defined in section 1(b)(6) of the PACA (7 U.S.C. § 499a(b)(6)), in connection with the payment violations that are the subject of this proceeding; (2) Respondent was the day-to-day manager of Captain Jack's Tomatoes, Inc., during the period the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred; (3) Respondent exercised direction, management, and control of Captain Jack's Tomatoes, Inc., during the period the violations of section 2(4) of the PACA occurred (7 U.S.C. § 499b(4)); and (4) Respondent was the one most responsible for the violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) that are the

subject of this proceeding.

Second, Respondent contends the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of $22,000.00" and erroneously denied Respondent's motion during the hearing to place a $22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Respondent contends the assessment of a civil penalty against Respondent in excess of $22,000 is contrary to law. (Respondent's Appeal Pet. at 3; Respondent's Appeal Brief at 8-9.)

I reject Respondent's contention that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of $22,000.00" and erroneously denied Respondent's motion to place a $22,000 limit on the civil penalty that Complainant's sanction witness could recommend. Even if I agreed with Respondent's contention that the assessment of a civil penalty against Respondent in excess of $22,000 is contrary to law (which I do not), I would not find that the Chief ALJ erroneously denied Respondent's "Motion in Limine Barring the Complainant From Offering or Introducing Any Evidence to Support a Civil Penalty in Excess of $22,000.00" and erroneously denied Respondent's motion during the hearing to place a $22,000 limit on the civil penalty that Complainant's sanction witness could recommend.

The Administrative Procedure Act provides, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .

> (h) *Evidence.* (1) *In general.*
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

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 recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA 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. Therefore, oral or documentary evidence introduced by Complainant to support a recommended sanction is relevant and may be received. Moreover, even if Complainant introduced evidence in an attempt to support a sanction that is not warranted in law or administrative officials testified in support of a sanction that is not warranted in law, neither the Administrative Procedure Act nor the Rules of Practice prohibits the introduction and receipt of such evidence. Complainant's

recommended sanction is not controlling,[2] and an administrative law judge may and should reject a sanction recommended by administrative officials, if the recommended sanction is not warranted in law.

Moreover, assessment of a civil penalty against Respondent in excess of $22,000 is not contrary to law, as Respondent contends. The record supports the Chief ALJ's conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay promptly for 11 lots of perishable agricultural commodities which Captain Jack's Tomatoes, Inc., purchased, received, and accepted in interstate commerce. Respondent argues that section 8(e) of the PACA (7 U.S.C. § 499h(e)) provides that the Secretary of Agriculture may assess a civil penalty not to exceed $2,000 for each of Respondent's 11 violative transactions (Respondent's Appeal Brief at 9). However, section 8(e) of the PACA (7 U.S.C. § 499h(e)) clearly provides that the Secretary of Agriculture may assess a civil penalty not to exceed $2,000 for each violative transaction *or* each day the violation continues. Complainant proved by a preponderance of the evidence that Respondent's violative transactions were past due for an average of 480 days before they were paid and there was one transaction that was paid over 570 days late (Tr. 539). Applying the average number of days for each of Respondent's 11 violative

[2]*In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. ___, slip op. at 35 (Jan. 4, 2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *appeal docketed*, No. 02-3006 (6th Cir. Jan. 2, 2002); *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 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, No. 01-3508 (6th Cir. Apr. 17, 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *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), *appeal docketed*, No. 01-6214 (2d Cir. Oct. 9, 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); *I*n 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).

transactions, Respondent could be assessed a $10,560,000 civil penalty.[3] Therefore, I reject Respondent's contention that the assessment of a civil penalty against Respondent in excess of $22,000 is contrary to law.

Third, Respondent contends the Chief ALJ's assessment of a $150,000 civil penalty against Respondent and the Chief ALJ's imposition of a 60-day suspension of Respondent's PACA license are not supported by relevant and credible evidence. Specifically, Respondent contends the civil penalty assessed by the Chief ALJ is based on Complainant's sanction witness' recommended sanction which in turn is based upon documents Respondent provided to Complainant's counsel during settlement negotiations. (Respondent's Appeal Pet. at 1-2; Respondent's Appeal Brief at 10-13.)

The record supports Respondent's contention that Basil Coale, Complainant's sanction witness, based his civil penalty recommendation on, among other things, Respondent's financial condition and that his knowledge of Respondent's financial condition was based on documents obtained from Complainant's counsel, who obtained the documents from Respondent during settlement negotiations, as follows:

> [BY MR. RUDOLPH:]
>
> Q. In calculating this sanction how did the agency know Fresh Group's financial information to make all these determinations?
>
> [BY MR. COALE:]
>
> A. They had submitted copies of financial statements.
>
> Q. They being the Fresh Group?
>
> A. Yes.
>
> MR. REICH: Your Honor, at this time I'd like to voir dire the witness, because I have some -- maybe a specific objection as to how

[3] I calculate this $10,560,000 civil penalty by multiplying the average number of days each violation continued times the number of violative transactions times the maximum civil penalty that may be assessed for each day a violation continues. (480 x 11 x $2,000 = $10,560,000.)

they obtained that financial information and when they obtained that financial information and under what circumstances they did.

JUDGE HUNT: Do you need it on voir dire or cross-examination?

MR. RUDOLPH: Your Honor, I would object to that.

JUDGE HUNT: Do you need to do that by voir dire or by cross-examination?

MR. REICH: I would do it by voir dire because then I might have an evidentiary objection.

JUDGE HUNT: All right. I'll allow him to voir dire on that one point.

VOIR DIRE

BY MR. REICH:

Q. When did you obtain this financial information?

A. I believe it was in March of this year?

Q. How did you obtain it?

A. From -- it came to me through Mr. Rudolph.

Q. Do you know how he obtained it?

A. Yes, I do.

Q. How did he obtain it?

A. From Fresh Group counsel.

MR. REICH: Your Honor, let me raise this objection. During the course of settlement discussions we provided certain financial information to try to reach a settlement. I'm sure the Court realizes that under the federal rules of evidence any materials, any discussions held in regards to settlement cannot be used in a court of law as far as evidence, and I find this to be both extremely objectionable -- and I'll be very frank with counsel for the department -- extremely unethical.

He was aware of the fact that this information was submitted on the basis of settlement discussions. If they had wanted financial information they had ways of obtaining it.

JUDGE HUNT: Did you obtain that in the course of settlement discussions?

MR. RUDOLPH: Yes, Your Honor, we did. We'd been asking for that information for many months prior, and the agency routinely asks for this information to come up with a sanction that we can discuss. It happens in every case.

JUDGE HUNT: I know, but you did obtain it though through -- as part of the settlement discussion.

MR. RUDOLPH: As part of the overall settlement discussion. That was part of it as well, but the agency does this routinely in –

JUDGE HUNT: Not routinely using material from settlement -- in litigation, do they?

MR. RUDOLPH: I believe they do. Yes, Your Honor.

JUDGE HUNT: I'm not familiar with that.

I sustain Mr. Reich's objection to relying on information obtained as part of the settlement proceeding. I'll sustain it. You're referring to their financial statement, financial situation. That's provided -- if you know about it only through your settlement discussion I find that inappropriate.

MR. REICH: Then I would ask that this witness's entire testimony be stricken and that the Government is unable to prove a sanction amount, and then their case has to be dismissed.

JUDGE HUNT: Well, I'll deny the motion to strike, but to the extent that he's relying on information obtained through settlement in recommending a sanction I'll not consider that.

MR. REICH: If that's –

JUDGE HUNT: To that extent –

MR. REICH: -- if that's the only basis for his –

JUDGE HUNT: I don't know if it is. I'll allow Mr. Rudolph to pursue that further.

MR. REICH: I was going to ask as part of the voir dire, is that the sole basis for your determination as to what the sanction is?

JUDGE HUNT: Well, you can do that on cross-examination.

MR. REICH: Okay. Thank you, Your Honor.

JUDGE HUNT: And I would take exception to the ruling on this. The department believes that in most of its negotiations and discussions with Respondents it's quite common that they share information with regards to the financial situation of a firm, and they may do that, but to use that information, that's rather -- it is confidential. At that point, that's -- well, go -- if you think the -- if that's the department's policy I'm not aware of that --

MR. RUDOLPH: All right.

JUDGE HUNT: -- but if the department uses it then that's not for me to take up apart from this case. Go ahead.

MR. RUDOLPH: Thank you.

. . . .

CROSS EXAMINATION
BY MR. REICH:

. . . .

Q. Let me go on then, assuming there are no Jencks materials. Is the sole basis of your questioned [sic] sanction based on the financial documents provided to you by Mr. Rudolph?

A. That is the how monetary penalty assessed was calculated.

Q. And that's the sole basis?

A. Yes, sir.

Q. You had no other financial information?

A. Not that I'm aware of.

Q. Without that financial information you could not have arrived at any type of penalty. Correct?

A. That's correct.

MR. REICH: Again, I'm going to move to strike the entire line of testimony if that is the sole basis, because the material -- we want to use it in the criminal sense -- is ill-gotten fruit.

MR. RUDOLPH: Your Honor, on redirect -- I think we should be allowed to redirect before you make any kind of ruling.

JUDGE HUNT: All right. I'm going to deny the motion to strike.

BY MR. REICH:

Q. How would you arrive at a penalty if you didn't have financial information?

A. If we didn't have financial information and we could not find out adequate information to meet the requirements of the judicial officer as he set out in Scamcorp then we could not go down the road of a monetary penalty and we would have to look then at suspension.

. . . .

REDIRECT EXAMINATION

BY MR. RUDOLPH:

Q. Mr. Coale, with regards to the financial information through which you based your decision isn't it true that as part of the Respondent's litigation -- in preparation for this litigation you shared with the department as part of this proposed exhibits copies of the financial information of the Fresh Group?

MR. REICH: Your Honor, again, I'm going to object. They have not been introduced into evidence. They are again the initial offering was part of the settlement. The only reason they were put in as potential evidence was to refute any sanctions. If in fact they're unavailable -- I'm not intending to use them nor do I think the department can use them.

MR. RUDOLPH: Your Honor –

JUDGE HUNT: He's referring to pretrial exhibits.

MR. RUDOLPH: But the idea is that we had this information anyway as part of the litigation. The department had this information.

JUDGE HUNT: I haven't sustained the objection. Proceed further on. I don't know what this information is or how you obtained it.

MR. RUDOLPH: All right. But the point being that we had it already as part of the litigation if not settlement.

JUDGE HUNT: Well, I don't know how you obtained it.

MR. RUDOLPH: All right. I understand.

JUDGE HUNT: That's the key here, how did you obtain that information?

MR. RUDOLPH: All right. I have nothing further on redirect.

Tr. 541-45, 551-53, 557-58.

Complainant responds that Respondent filed with the Hearing Clerk a copy of the documents Basil Coale used as a basis for his testimony regarding Respondent's financial condition. Complainant contends once Respondent voluntarily filed these documents with the Hearing Clerk, Complainant's sanction witness was free to testify regarding the contents of Respondent's documents despite Respondent's earlier provision of the documents in connection with settlement negotiations. (Complainant's Response to Respondent's Appeal Petition at 22.)

The record establishes that on April 20, 2001, Respondent filed with the Hearing Clerk Respondent's proposed witness list, Respondent's proposed exhibit list, and Respondent's proposed exhibits. Respondent states in the cover letter transmitting these documents to the Hearing Clerk that, under separate cover, copies are being provided to Complainant's counsel and Captain Jack's Tomatoes, Inc.'s counsel. Respondent's proposed exhibits include Respondent's December 31, 2000, balance sheet and income statement. Basil Coale's testimony regarding Respondent's financial condition is consistent with the information contained in the December 31, 2000, balance sheet and income statement filed with the Hearing Clerk by Respondent. Respondent's April 20, 2001, filing was not supplied in the context of settlement negotiations, and Complainant had no reason to treat Respondent's April 20, 2001, filing as confidential. Therefore, I agree with Complainant's contention that once Respondent filed the December 31, 2000, balance sheet and income statement with the Hearing Clerk, Complainant's sanction witness could testify regarding their contents and base his sanction recommendation on their contents. Therefore, I reject Respondent's contention that the sanction imposed by the Chief ALJ is not supported by admissible evidence.

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

ORDER

Respondent, The Fresh Group, Ltd., d/b/a/ Maglio and Company, is assessed a $150,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

James Frazier
United States Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Division
PACA Branch
Room 2095 South Building
1400 Independence Avenue, SW
Washington, DC 20250-0242

Respondent's payment of the civil penalty shall be forwarded to, and received by, James Frazier within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-00-0008. In the event James Frazier does not receive a certified check or money order in accordance with this Order, Respondent's PACA license shall be suspended for 60 days beginning 91 days after service of this Order on Respondent.

_____

MISCELLANEOUS ORDERS

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition for Reconsideration and Petition for New Hearing on Remand.
Filed February 14, 2002.

PACA -- Petition for reconsideration – Petition for new hearing – Failure to pay – Discharge of official duties – Agreement to extend payment – Burden of proof – Publication of facts and circumstances.

The Judicial Officer (JO) denied Respondent's petition for a new hearing because it was filed after the date the JO issued the Decision and Order on Remand. The Rules of Practice (7 C.F.R. § 1.146(a)(2)) require that a petition to reopen the hearing must be filed prior to the issuance of the JO's decision. The JO also denied Respondent's petition for reconsideration. The JO rejected Respondent's contention that Administrative Law Judge Edwin S. Bernstein (ALJ) did not consider the record before issuing the November 17, 1999, oral decision. The JO stated in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties. An administrative law judge must consider the record in a proceeding prior to the issuance of a decision in that proceeding and an administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. The JO rejected Respondent's contention that, because of the similarity between one of Complainant's filings and the ALJ's decision, the ALJ should not be presumed to have properly discharged his duty to consider the record. The JO also rejected Respondent's contention that Complainant had the burden of proving the non-existence of an agreement between Respondent and its creditors. The JO found that Respondent, as the party with the better knowledge of the purported agreement and the party which affirmatively asserts the existence of the agreement, has the burden of proving the existence of the agreement. The JO stated the record does not establish that Respondent entered into written agreements with its creditors electing to use different times of payment than those set forth in 7 C.F.R. § 46.2(aa)(1)-(10) before entering into the perishable agricultural commodities transactions that are the subject of the proceeding. The JO stated he could find no basis and Respondent cited no basis for Respondent's contention that the agreement Respondent entered into with its creditors after the transactions that are the subject of the Complaint precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint.

Ruben D. Rudolph, Jr., for Complainant.
Paul T. Gentile, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, 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.[1] Paul T. Gentile, Gentile & Dickler, New York, New York,

[1]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).

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 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.

On November 26, 2001, I issued a "Decision and Order on Remand:" (1) finding that, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) finding that a 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 during the time period set forth in the Complaint; (3) concluding that 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 specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (4) ordering publication of the facts and circumstances set forth in the Decision and Order on Remand; and (5) denying Respondent's petition for a new hearing. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 788, 796, 798 (2001) (Decision and Order on Remand).

On January 10, 2002, Respondent filed a "Petition to Reconsider." On February 1, 2002, Complainant filed "Complainant's Response to Respondent's Petition for Reconsideration." On February 4, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the November 26, 2001, Decision and Order

on Remand.

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).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in Respondent's Petition to Reconsider. First, Respondent requests a new hearing. Respondent contends the November 17, 1999, hearing is flawed because the ALJ denied Respondent's request to submit proposed findings of fact and proposed conclusions of law prior to the ALJ's issuance of the oral decision, the ALJ ignored some of the evidence, and the ALJ issued an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order. Respondent asserts "[a] new hearing would permit the presentation of evidence that was generated by litigation in the Federal District Court case, including evidence that has been developed after the initial decision by the ALJ in 1999." (Respondent's Pet. to Reconsider at 1-2.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, 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 issued the Decision and Order on Remand on November 26, 2001. Respondent did not file the Petition to Reconsider containing a petition for a new hearing until January 10, 2002, 1 month 15 days after I issued the Decision and Order on Remand. Therefore, Respondent's petition for a new hearing is untimely and is denied.[2]

Moreover, even if Respondent's petition for a new hearing had been timely filed, I would deny it because Respondent has not stated the nature and purpose of the evidence to be adduced, as required by section 1.146(a)(2) of the Regulations (7 C.F.R. § 1.146(a)(2)). Respondent merely states how the evidence to be adduced was generated and the date after which some of the evidence to be adduced was developed. Finally, the purported flaws in the initial hearing cited by Respondent do not provide a basis for reopening the

[2]*In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen hearing because the respondent filed the petition to reopen hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer's decision, it cannot be considered).

hearing to adduce additional evidence.

The ALJ's failure to permit Respondent to submit proposed findings of fact and proposed conclusions of law would not be corrected by holding a new hearing to adduce evidence, but instead would be corrected by providing Respondent with the opportunity to file proposed findings of fact and proposed conclusions of law. On April 6, 2001, I remanded the proceeding to the Chief ALJ with an instruction that he was to provide Respondent with an opportunity to submit for consideration proposed findings of fact, proposed conclusions, a proposed order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order). The Chief ALJ provided Respondent with the opportunity to make such a filing, and on May 17, 2001, Respondent took advantage of that opportunity. Therefore, I find no basis for holding a new hearing, as Respondent requests, to provide Respondent with another opportunity to file proposed findings of fact and proposed conclusions of law.

The ALJ's purported failure to consider some of the evidence would not be corrected by holding a new hearing, as Respondent requests, but instead could be corrected by Respondent's appeal to the Judicial Officer requesting consideration of the evidence that the ALJ purportedly ignored. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted 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. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the evidence in the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing, as Respondent requests, because the ALJ purportedly ignored some of the evidence.

The ALJ's issuance of an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order would not be corrected by holding a new hearing, as Respondent requests, but instead any error in the ALJ's oral decision could be corrected on appeal to the Judicial Officer. In this proceeding, after the ALJ issued a decision orally at the close of the November 17, 1999, hearing, the Chief ALJ reviewed the record (Initial Decision and Order on Remand at 2) and adopted 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. Moreover, after Respondent's October 22, 2001, appeal, I carefully considered the record and I adopted, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand). Therefore, I find no basis for holding a new hearing, as Respondent requests, because the ALJ issued an oral decision that was verbatim from Complainant's Proposed Findings of Fact, Conclusions, and Order.

Second, Respondent contends the ALJ should not have received the benefit of the presumption that he considered the record prior to the issuance of the November 17, 1999, oral decision. 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. (Respondent's Pet. to Reconsider at 2.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[3] Administrative law

[3]*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

(continued...)

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Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or 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. 406, 435-36 (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), appeal docketed, No. 01-6214 (2d Cir. Oct. 9, 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 supporting acts

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judges must consider the record in a proceeding prior to the issuance of a decision in that proceeding.[4] 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. Therefore, I reject Respondent's contention that I should not presume the ALJ properly discharged his duty to consider the record before he issued the November 17, 1999, oral decision because the ALJ's oral decision is similar to Complainant's Proposed Findings of Fact, Conclusions, and Order.

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 assertion that the ALJ did not consider the record prior to the issuance of the oral decision. Therefore, I reject Respondent's assertion that the ALJ did not consider the record before issuing the oral decision at the close of the November 17, 1999, hearing.

Third, Respondent contends I incorrectly determined that Respondent failed to prove that Respondent and its creditors entered into an agreement for payment that precludes Complainant from a statutory interest in the transactions that are the subject of the Complaint. Respondent states: (1) I misconstrued the Regulations regarding extension of payment terms which permits the parties to extend the time for payment by written agreement; (2) it introduced credible evidence of an agreement; and (3) Complainant had the burden to identify and prove the non-existence of an agreement or set forth the true nature of the agreement that would permit Complainant to retain an interest in the transactions that are the subject of the Complaint. (Respondent's Pet. to Reconsider at 2-3.)

Generally, the burden of proof rests with the party having the best

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

[4]*See* 5 U.S.C. § 556(d).

knowledge of the particular disputed facts.[5] Further, generally, the burden of proof rests with the party asserting the affirmative of an issue.[6] Respondent has

[5]*See United States v. New York, New Haven & Hartford R.R.*, 355 U.S. 253, 256 n.5 (1957) (stating the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary); *Greenleaf's Lessee v. Birth,* 31 U.S. (6 Pet.) 302, 312 (Jan. Term 1832) (stating, while the rule is not universal, in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies); *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (stating, all else being equal, the burden of proof is better placed on the party with easier access to the relevant information); *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 990 (2d Cir.) (stating burden shifting where one party has superior access to evidence on a particular issue is a common feature of our law), *cert. denied sub nom. Scianna v. United States*, 519 U.S. 932 (1996); *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir. 1985) (stating one factor that is usually considered in the allocation of the burden of proof between parties is which side has the best knowledge of the particular disputed facts); *Browzin v. Catholic University of America*, 527 F.2d 843, 849 (D.C. Cir. 1975) (stating ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973) (stating when certain material lies particularly within the knowledge of a party he is ordinarily assigned the burden of adducing the pertinent information and this assignment of burden to a party is fully appropriate when the other party is confronted with the often formidable task of establishing a negative averment); *United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966) (stating it is well-settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the latter); *Mangaoang v. Boyd*, 186 F.2d 191, 195 (9th Cir. 1950) (stating the burden of showing a fact falls upon the one who has peculiar knowledge thereof); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947) (stating it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant); *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185, 186 (5th Cir.) (stating the litigant who has control of the proof must produce it), *cert. denied*, 305 U.S. 641 (1938).

[6]*Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1878) (stating, beyond question, the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue); *United States v. Linn*, 42 U.S. (1 How.) 104, 111 (Jan. Term 1843) (stating the general rule is that he who holds the affirmative must prove it); *National Communications Ass'n v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001) (stating, all else being equal, courts should avoid requiring a party to shoulder the more difficult burden of proving a negative; the general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.) (stating normally the party asserting the affirmative of a proposition should bear the burden of proving that proposition), *cert. denied*, 444 U.S. 866 (1979); *Marcum v. United States*, 452 F.2d 36, 39 (5th Cir. 1971) (stating the burden of proving disputed facts rests on the one affirming their existence and claiming rights and benefits therefrom); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965) (stating it is fundamental that the burden of proof in any cause rests upon the party who, as determined by the pleadings or nature of the case, asserts the affirmative of an issue and remains there until the termination of the action); *Florida Fruit Canners, Inc. v. Walker*, 90 F.2d 753, 758 (5th Cir.) (stating the burden of proof rests primarily on him who has the affirmative of the issue), *cert. denied*, 302 U.S. 738 (1937); *Barnett v. Kunkel*, 259 F. 394, 401 (8th Cir. 1919) (stating an affirmative claim must be proven by the

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better knowledge than Complainant of any agreement Respondent has with its creditors and Respondent affirmatively asserts that it has an agreement with its creditors. 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. § 46.2(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. Therefore, I reject Respondent's contention that Complainant has the burden of proving the non-existence of an agreement Respondent purportedly has with its creditors. Instead, I hold that Respondent has the burden of proving the existence of any agreement that it has with its creditors.

Respondent did not carry its burden of proving that it has an agreement with its produce sellers that was reduced to writing before Respondent and its produce sellers entered the transactions that are the subject of the Complaint. 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. § 46.2(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. § 46.2(aa)(1)-(10)) (Tr. 27).

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party who seeks its benefit).

Finally, while 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), Respondent provides no basis for its contention that such an agreement "precludes the Complainant from having a 'statutory interest' in the transactions that are the subject of the Complain[]t." Moreover, I cannot find any basis in the PACA, the Regulations, or case law that supports Respondent's position that such an agreement precludes Complainant from a "statutory interest" in the transactions that are the subject of the Complaint.

For the foregoing reasons and the reasons set forth in *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[7] Respondent's Petition to Reconsider was timely filed and automatically stayed the November 26, 2001, Decision and Order on Remand. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in the Decision and Order on Remand filed November 26, 2001, is reinstated: except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration and Petition for New Hearing on Remand.

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

ORDER

[7]*In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

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 *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780 (2001) (Decision and Order on Remand) and this Order Denying Petition for Reconsideration and Petition for New Hearing on Remand shall be published, effective 60 days after service of this Order on Respondent.

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In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
and
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Order Lifting Stay as to JSG Trading Corp
Filed March 4, 2002.

PACA—Lift stay.

Judicial Officer lifted the Stay Order imposed on the outcome of the proceedings after Respondent's appeals were denied.

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

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license, effective 61 days after service of the Order on Respondent. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.),

58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], requested a stay of the November 29, 1999, Order pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay. *In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the November 29, 1999, Decision and Order on Remand. *JSG Trading Corp. v. United States Dep't of Agric.*, 235 F.3d 608 (D.C. Cir. 2001). Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied. *JSG Trading Corp. v. United States Dep't of Agric.*, 122 S. Ct. 458 (2001).

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. [hereinafter Stay Order] and reinstate the November 29, 1999, Decision and Order on Remand, except that Complainant requests that the revocation of Respondent's PACA license be effective 7 days after service of the reinstated Order on Respondent.

On February 7, 2002, the Hearing Clerk served Respondent with Complainant's Motion to Lift Stay.[1] Respondent failed to file a response to Complainant's Motion to Lift Stay within 20 days after service, as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)). On February 28, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Proceedings for judicial review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), are concluded. Therefore, I grant Complainant's January 29, 2002, request that I reinstate the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). However, I deny Complainant's January 29, 2002, request that I modify the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), to make the revocation of Respondent's PACA license effective 7 days after service of the reinstated Order on

[1]Domestic Return Receipt for Article Number 70993400001388058492.

Respondent. The Order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), revoking Respondent's PACA license was to be effective 61 days after service of the Order on Respondent. Complainant provides no basis for modifying the time after which the revocation of Respondent's PACA licence is effective. Therefore, I issue an Order revoking Respondent's PACA license, effective 61 days after service of the Order on Respondent.

The Stay Order issued January 27, 2000, is lifted and the Order issued in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), is effective, as follows:

ORDER

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

In re GLACIER DISTRIBUTION COMPANY, INC.,
PACA Docket No. D-00-0026.
Supplemental Order Revoking Respondent's License.
Filed March 5, 2002.

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

PACA – Sanctions – Agreement, breach of payment terms.

Parties entered into a Compliance Agreement whereby civil money penalties were agreed to be paid by the Respondent upon a date certain. Respondent failed to fully comply with the payment terms therein. Under the terms of the agreement, a breach of the payment terms would, upon unilateral request by the Complainant, result in the revocation of the Respondent's license without further administrative action.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), instituted by a complaint filed on September 7, 2000, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA by failing to make full payment promptly of $208,089.80 to 10 sellers for 17 lots of perishable agricultural commodities sold in interstate commerce from July 1999 through February 2000. The complaint requested the issuance of an order finding that Respondent had committed willful, flagrant and repeated violations of the PACA and ordering Respondent's violations published.

On May 3, 2001, a Decision Without Hearing By Reason of Consent was issued in this case whereby Respondent Glacier Distribution Company, Inc. (hereinafter Respondent) was found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA. The order required Respondent to pay a civil penalty of $75,000 and to comply with all the terms of an Understanding Regarding Civil Penalty and Compliance Agreement, entered into by Respondent and Complainant on May 1, 2001.

The Understanding Regarding Civil Penalty and Agreement required, *inter alia*, that Respondent pay the civil penalty in two separate payments. The first payment in the amount of $30,000 was to be paid immediately upon receipt and signature of the Decision Without Hearing By Reason of Consent, and the second payment of $45,000 "shall be made no later than May 31st by check or money order payable to the United States Treasury." The first payment in the amount of $30,000 was received by USDA, PACA Branch on May 15, 2001. A check for the second payment in the amount of $45,000 was received by USDA, PACA Branch on June 13, 2001. On August 23, 2001, USDA, PACA Branch received notice from USDA, National Finance Center that Respondent's check for the second payment in the amount of $45,000 had been returned by Respondent's financial institution for Non-Sufficient Funds.

Complainant has filed a motion for a Supplemental Order Revoking Respondent's license and implementation of all sanctions prescribed by the Act following such revocation, stating that the civil penalty has not been paid in accordance with the Understanding Regarding Civil Penalty and Agreement or the Decision Without Hearing By Reason of Consent. Complainant points to The Understanding Regarding Civil Penalty and Agreement which provides that "in the event the payment required to be made by Respondent . . . is not made, Respondent's license and the license of it's successors or assigns will be revoked without further administrative proceedings, . . . and all of the sanctions prescribed by the Act following such revocation or publication will be in effect."

The Understanding Regarding Civil Penalty and Agreement did not state the

year in which the second payment in the amount of $45,000 was to be paid. I find that the parties intended that the second payment was to be made by May 31, 2001. Respondent indicated it believed that this was the deadline for making the payment by sending a check to Complainant dated May 31, 2001, and it did not file objections to Complainant's Motion for Supplemental Order in which Complainant stated that Respondent failed to make the required second payment by May 31, 2001.

Therefore, as Respondent has failed to pay the $45,000 portion of the civil penalty by the date agreed to in the Understanding Regarding Civil Penalty and Agreement, Respondent is in violation of both the Understanding Regarding Civil Penalty and Agreement and the Decision Without Hearing By Reason of Consent.

Accordingly, Respondent's license is hereby revoked, and all of the sanctions prescribed by the Act following such revocation will be in effect. This Decision and Order will become final without further proceedings upon its issuance, pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138).

Copies of this order shall be served upon the parties.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
and
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction.
Filed May 1, 2002.

PACA – Pardon, granting of, not appropriate in civil proceeding – Reopen, motion to, late filed – Perjury, suggestion of, not compelling.

The Judicial Officer (JO) denied each of JSG Trading Corp.'s (Respondent) motions and requests. The JO rejected Respondent's contention that *Finer Foods, Inc. v. United States Dep't of Agric.*, 274 F.3d 1137 (7th Cir. 2001), compelled vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), because the Court in *Finer*

Foods found that a factual inquiry was necessary to determine whether Joan Colson committed perjury in a declaration filed in *Finer Foods*. The JO stated the accuracy of Joan Colson's declaration filed in *Finer Foods*, a case which has no connection with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), is not relevant to Joan Colson's credibility in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). The JO denied Respondent's motion to reopen the hearing because it was not filed before the JO issued the Decision and Order on Remand as to JSG Trading Corp., as required by 7 C.F.R. § 1.146(a)(2). The JO denied Respondent's motion for a stay pending further proceedings against Ms. Colson pursuant to *Finer Foods* stating the Court in *Finer Foods* did not order further proceedings against Ms. Colson. The JO denied Respondent's request for a pardon or a lesser sanction stating Respondent's request was a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), which was not filed within 10 days after Respondent was served with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), as required by 7 C.F.R. § 1.146(a)(3). The JO stated that even if the petition for reconsideration had not been late-filed, he would have rejected Respondent's request for a pardon. The JO, citing *United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833), stated a pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed. The JO stated Respondent has not been convicted of a crime. Further, the JO stated Respondent raised no meritorious basis for its request for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

Andrew Y. Stanton, for Complainant.
John M. Himmelberg and Gary C. Adler, for Respondent.
Rulings issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], requested a stay of the

[1]*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

November 29, 1999, order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay.[2]

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp.[3] Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied.[4]

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. and reinstate the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. Respondent failed to file a timely response to Complainant's Motion to Lift Stay, and on March 4, 2002, I issued an Order Lifting Stay as to JSG Trading Corp.[5]

On March 4, 2002, subsequent to my issuing the Order Lifting Stay as to JSG Trading Corp., Respondent filed a letter requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). On March 22, 2002, Respondent filed "Respondent JSG Trading Corp.'s Motion to Vacate the Decision and Order, To Reopen the Hearing or to Stay the Decision and Order, or In the Alternative to Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter March 22, 2002, Motions]. On April 10, 2002, Complainant filed "Complainant's Opposition to JSG Trading Corp.'s Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.'s Request for Pardon or to Impose a

[2]*In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

[3]*JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001).

[4] *JSG Trading Corp. v. Department of Agric.*, 122 S. Ct. 458 (2001).

[5]*In re JSG Trading Corp.*, 61 Agric. Dec. ___ (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.).

Lesser Sanction" [hereinafter Response to March 22, 2002, Motions]. On April 17, 2002, Respondent filed "Respondent JSG Trading Corp.'s Reply to Complainant's Opposition to Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter Reply to Complainant's Response].[6] I did not order Respondent to file Respondent's Reply to Complainant's Response. Therefore, I do not consider Respondent's Reply to Complainant's Response. On April 25, 2002, Complainant filed "Complainant's Response to JSG Trading Corp.'s Reply."[7] On April 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for rulings on Respondent's March 22, 2002, Motions.

RULING DENYING RESPONDENT'S MOTION TO VACATE

Joan Colson, an auditor for the United States Department of Agriculture, audited Respondent. Ms. Colson appeared as a witness on behalf of Complainant during the hearing in this proceeding and testified regarding her audit of Respondent. Complainant introduced into evidence a number of documents that Ms. Colson obtained and prepared during the course of her audit of Respondent.[8]

Respondent asserts that in *Finer Foods, Inc. v. United States Dep't of Agric.*, 274 F.3d 1137 (7th Cir. 2001), "the United States Court of Appeals for the Seventh Circuit made the extraordinary finding that a factual inquiry is

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[6]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], which are applicable to this proceeding, provide no right to reply to a response to a motion or request, as follows:

> **§ 1.143 Motions and requests.**
>
> . . . .
>
> (d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

I did not order Respondent to file Respondent's Reply to Complainant's Response. Therefore, I do not consider Respondent's Reply to Complainant's Response.

[7]Since the Rules of Practice provide no right to reply to a response to a motion or request (7 C.F.R. § 1.143(d)) and I do not consider Respondent's Reply to Complainant's Response, I also do not consider Complainant's Response to JSG Trading Corp.'s Reply.

[8]*See In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (describing Ms. Colson's audit of Respondent, referencing Ms. Colson's testimony, and referencing the documents Ms. Colson obtained and prepared during her audit of Respondent).

warranted as to whether Joan Colson, a Department of Agriculture auditor, committed perjury and fraud on the Court" (Respondent's March 22, 2002, Motions at 1). Respondent moves to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that *Finer Foods* "compels vacating the Decision and Order against JSG in the instant case which was based on Ms. Colson's testimony" (Respondent's March 22, 2002, Motions at 2).

In *Finer Foods*, a perishable agricultural commodity distributor, Finer Foods, Inc. [hereinafter Finer Foods], sought a stay pending judicial review of a United States Department of Agriculture order suspending Finer Foods' PACA license, effective beginning November 16, 2001. The United States Department of Agriculture opposed the stay arguing that Finer Foods could not show irreparable harm because it went out of business before November 16, 2001. To support this contention, the United States Department of Agriculture filed a declaration of Ms. Colson which states that she had visited Finer Foods' business premises and found the premises locked and abandoned and that Finer Foods' former customers and suppliers said they are now doing business with Mid West Institutional Food Distributors. In response, Finer Foods accused Ms. Colson of perjury and filed an affidavit of Finer Foods' corporate secretary, Mary Ann Fitzgerald, stating that Finer Foods had operated without interruption until November 16, 2001, when the United States Department of Agriculture suspended Finer Foods' PACA license. These inconsistent statements drew the following response from the Court:

> Someone is not telling this court the truth. *Who* is trying to deceive the court we do not know–though the fact that Finer Foods is paying counsel in an effort to have its license reinstated supports an inference that the status of the license matters (which it does only if Finer Foods remains in business). Going deeper into this dispute requires a factual inquiry that appellate courts are not set up to conduct. Perhaps it will prove necessary for this court to appoint a special master to hold an evidentiary hearing, or refer the dispute to the United States Attorney General for a criminal perjury investigation. For now, however, the Fitzgerald affidavit supplies an adequate basis to adjudicate the current request on the merits. If as the Department believes Finer Foods is defunct, then an order restoring its license will have no effect and cannot harm the public interest. But if the Department is wrong, and Finer Foods remains a viable concern, then allowing the suspension to

> continue may kill it–and the United States does not afford a damages remedy to firms put out of business by administrative high-handedness.

Finer Foods, Inc., 274 F.3d at 1140.

I do not find the Seventh Circuit's response to Ms. Colson's and Ms. Fitzgerald's statements a "finding that a factual inquiry is warranted as to whether Joan Colson . . . committed perjury and fraud on the Court" as Respondent contends. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson's or Ms. Fitzgerald's statement accurately reflects Finer Foods' status on November 16, 2001. In any event, the accuracy of Ms. Colson's statement filed in *Finer Foods*, a case which has no connection with the instant proceeding, is not relevant to Ms. Colson's credibility in this proceeding. Moreover, Ms. Colson's credibility in this proceeding is supported by documentary evidence introduced in this proceeding. Therefore, I reject Respondent's contention that *Finer Foods* compels vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), and I deny Respondent's motion to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

RULING DENYING RESPONDENT'S MOTION TO REOPEN THE HEARING

Respondent moves to reopen the hearing to allow Respondent "to pursue evidence and testimony concerning Ms. Colson's credibility" (Respondent's March 22, 2002, Motions at 2). Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, 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 issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on November 29, 1999. Respondent filed its petition to reopen the hearing to allow Respondent "to pursue evidence and testimony concerning Ms. Colson's credibility" on March 22, 2002, 2 years 3 months 21 days after I issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Therefore, Respondent's petition to reopen the hearing is untimely and is denied.[9]

RULING DENYING RESPONDENT'S MOTION FOR A STAY

Respondent requests that I stay *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999),

[9]*See In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. ___, slip op. at 11-12 (Feb. 14, 2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 1 month 15 days after the Judicial Officer issued the decision on remand); *In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer's decision, it cannot be considered).

"pending further proceedings against Ms. Colson pursuant to the Seventh Circuit's decision" (Respondent's March 22, 2002, Motions at 2). The Seventh Circuit did not order further proceedings against Ms. Colson in *Finer Foods*. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson's or Ms. Fitzgerald's statement accurately reflects Finer Foods' status on November 16, 2001. Further, even if a proceeding were instituted against Ms. Colson in connection with the her declaration filed in *Finer Foods*, that proceeding would not be relevant to the instant proceeding. Therefore, I deny Respondent's motion for a stay of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

RULING DENYING RESPONDENT'S REQUEST FOR A PARDON OR LESSER SANCTION

Respondent requests that I consider Respondent's previously-filed request for a pardon or lesser sanction (Respondent's March 22, 2002, Motions at 5).

On January 29, 2002, Complainant filed Complainant's Motion to Lift Stay. The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay on February 7, 2002.[10] Respondent's response to Complainant's Motion to Lift Stay was required to be filed within 20 days after the Hearing Clerk served Respondent with Complainant's Motion to Lift Stay.[11] Respondent failed to file a timely response to Complainant's Motion to Lift Stay. On March 4, 2002, at 10:39 a.m., I filed an Order Lifting Stay as to JSG Trading Corp. granting Complainant's Motion to Lift Stay.[12] On March 4, 2002, at 10:56 a.m., Respondent filed a letter dated February 14, 2002, in response to Complainant's Motion to Lift Stay requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (Letter from Steven Goodman to Judicial Officer dated February 14,

[10]*See* Domestic Return Receipt for Article Number 70993400001388058492.

[11]*See* 7 C.F.R. § 1.143(d).

[12]*See* the Hearing Clerk's time and date stamp on Order Lifting Stay as to JSG Trading Corp. at 1.

2002).[13] Since Respondent's letter dated February 14, 2002, was a late-filed response to Complainant's Motion to Lift Stay filed after I issued the Order Lifting Stay as to JSG Trading Corp., I did not consider Respondent's March 4, 2002, filing in connection with Complainant's Motion to Lift Stay.

However, based on Respondent's March 22, 2002, Motions, I now consider Respondent's request for a pardon or a lesser sanction. After examining Respondent's March 4, 2002, filing, I find that it is a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

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

7 C.F.R. § 1.146(a)(3).

The Hearing Clerk served Respondent with the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on December 6, 1999.[14] Respondent filed its request that I reconsider the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading

[13]*See* the Hearing Clerk's time and date stamp on Respondent's letter to the Judicial Officer dated February 14, 2002, at 1st unnumbered page.

[14]*See* Domestic Return Receipt for Article Number Z 599 734 371.

Corp.), 58 Agric. Dec. 1041 (1999), on March 4, 2002, 2 years 2 months 26 days after the date the Hearing Clerk served the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on Respondent. Accordingly, Respondent's petition for reconsideration was late-filed and is denied.[15]

[15]*See In re Jerry Goetz*, 61 Agric. Dec. ___ (Jan. 17, 2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

Moreover, even if Respondent's request for reconsideration of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would deny it. As an initial matter, Respondent's request for a pardon is inapposite to this proceeding. A pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed.[16] This proceeding is not a criminal proceeding and Respondent has not, in this proceeding, been convicted of a crime.

Further, Respondent raises no meritorious basis for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Respondent raises six issues in support of its request for a lesser sanction. First, Respondent contends that Anthony Gentile and Albert Lomoriello, Jr., were independent agents or independent brokers and not employed purchasing agents; hence, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery (Letter from Steven

[16] *See United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833) (stating a pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (per curiam) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Garfinkel*, 166 F.2d 887, 889 n.2 (3d Cir. 1948) (stating the definition of *pardon* in *United States v. Wilson* is the one usually quoted); *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir.) (stating a pardon does nothing more than abolish all restrictions upon the liberty and civil rights of the pardoned one that follow a felony conviction and sentence), *cert. denied,* 308 U.S. 614 (1939); *Lettsome v. Waggoner*, 672 F. Supp. 858, 863 (D. V.I. 1987) (per curiam) (citing with approval the definition of *pardon* in Black's Law Dictionary (5th ed.): an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed); *Petition of De Angelis*, 139 F. Supp. 779, 780 (E.D.N.Y. 1956) (stating a pardon is an act of grace, exempting the individual on whom it is bestowed from the punishment the law has inflicted for a crime he has committed); *Gerrish v. State of Maine*, 89 F. Supp. 244, 245 (D. Maine 1950) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Hughes*, 175 F. 238, 242 (W.D. Pa. 1892) (stating pardons are granted to individual criminals by name); *In re De Puy*, 7 F. Cas. 506, 510-11 (S.D.N.Y. June Term 1869) (No. 3814) (citing with approval the definition of *pardon* in *United States v. Wilson*).

See also Black's Law Dictionary 1137 (7th ed. 1999):

> **pardon**, *n*. The act or an instance of officially nullifying punishment or other legal consequences of a crime.

Goodman to Judicial Officer dated February 14, 2002, at 2nd unnumbered page).

Respondent's March 4, 2002, filing is not the first time Respondent has raised the issue of Mr. Gentile's and Mr. Lomoriello's status. I previously rejected Respondent's contention that Respondent's payments to Mr. Gentile and Mr. Lomoriello could not have violated the PACA because Messrs. Gentile and Lomoriello were partners in L&P and American Banana, respectively, or independent brokers, as follows:

> **V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.**
>
> Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)
>
> Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).
>
> Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with

salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for a profit. An essential element of partnership is sharing of profit and losses and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership. However, the fact that an individual shares profits and losses is not dispositive of partnership status and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business,

> making capital investment, and possessing an ownership interest in the partnership.
>
> The party alleging the existence of a partnership bears the burden of proof on the issue. The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1091-94 (1999) (footnotes omitted).

Similarly, the United States Court of Appeals for the District of Columbia Circuit rejected Respondent's contention that Messrs. Gentile and Lomoriello were principals in L&P and American Banana or independent brokers and Respondent's payments to them could not have violated the PACA, as follows:

> **C. Status of the Payees**
>
> The essence of the commercial bribery offense, as defined by *Goodman* and *Tipco,* is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or a principal. Nor could it, as payments made to the produce buyer itself, as opposed to its agents or employees, do not possess the requisite secrecy. If Mr. Gentile and Mr. Lomoriello were principals in L&P and American Banana, then JSG did not commit commercial bribery.
>
> We agree with the Judicial Officer that they were not principals. They were purchasing agents. *See* 58 Agric. Dec. at 1051 (characterizing Mr. Gentile and Mr. Lomoriello as purchasing agents). Mr. Gentile's and Mr. Lomoriello's joint account arrangements with L&P and

American Banana do not alter the basic fact that these companies hired them to buy and sell tomatoes on the companies' behalf. Although each man shared profits and losses on his tomato transactions, there is no evidence that either became a full partner in his respective firm. Mr. Gentile, for instance, shared 15 percent of the profits and losses on his tomato sales for L&P. Nothing indicates he shared in profits and losses on any firm activity other than that which he was specifically engaged to perform, whereas full partners in a business typically share profits and losses in all the firm's activities. *See, e.g.,* UNIF. P'SHIP ACT § 202(a) (1997) (defining partnership as "the association of two or more persons to carry on as co-owners a business for profit"). Likewise, Mr. Lomoriello shared 40 percent of the profits and losses on his produce transactions for American Banana, but nothing indicates he shared in American Banana's overall profits and losses or otherwise became a co-owner. Far from indicating co-ownership, the limited profit- and loss-sharing arrangements were a performance-based compensation mechanism fully consistent with Mr. Gentile's and Mr. Lomoriello's status as agents or employees. *See* 58 Agric. Dec. at 1093-94; *see also* UNIF. P'SHIP ACT § 202(c)(2) & (3) (1997) (Stating that "the sharing of gross returns does not by itself establish a partnership," and that "a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation to an employee.").

JSG nonetheless contends that Mr. Gentile and Mr. Lomoriello were independent brokers and argues, without citation, that "payments to independent brokers are permissible under the PACA." *See* Final Brief of Petitioner at 46- 48. JSG apparently believes that independent brokers are principals because they are subject to PACA. The statute itself belies this claim. Brokers by definition negotiate "for or on behalf of the vendor or the purchaser." 7 U.S.C. § 499a(b)(7). Agents, not principals, act on another's behalf. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) ("Agency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act."). Nor does the requirement in 7 U.S.C. § 499c(a) that brokers obtain licenses make them principals. A broker's status as a principal, an agent,

> or an employee depends on its relationship to other parties in a transaction, not its possession of a license.

JSG Trading Corp. v. Department of Agric., 235 F.3d 608, 615-16 (D.C. Cir. 2001) (footnotes omitted).

I agree with the Court's findings concerning Mr. Gentile's status and Mr. Lomoriello's status, and I reject Respondent's contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers and not employed purchasing agents. Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers.

Second, Respondent contends its PACA license expired on January 19, 2002, and I cannot revoke a PACA license that has already expired (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 2nd and 3rd unnumbered pages).

Respondent's timely petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that Respondent's PACA license expired may have been a basis for changing the form of the sanction from revocation of Respondent's PACA license to publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, this change in the form of the sanction would not be a reduction of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Publication of the facts and circumstances of Respondent's violations and revocation of Respondent's PACA license would have the same effect on Respondent and persons responsibly connected[17] with

[17]The term "responsibly connected" is defined in section 1a(b)(9) of the PACA, as follows:

> **§ 499a. Short title and definitions**
> . . . .
> **(b) Definitions**
>
> For purposes of this chapter:
> . . . .
> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an

(continued...)

Respondent.

Section 4(b) of the PACA places identical licensing restrictions on an applicant who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on an applicant whose PACA license has been revoked, as follows:

> **§ 499d. Issuance of license**
> . . . .
> **(b) Refusal of license; grounds**
>
> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—
>
> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]
>
> (B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision

(...continued)

owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

> shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499d(b)(A)-(B).

Similarly, section 8(b) of the PACA places identical employment restrictions on persons responsibly connected with any person who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on persons responsibly connected with any person whose PACA license has been revoked, as follows:

> **§ 499h. Grounds for suspension or revocation of license**
>
> . . . .
>
> **(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties**
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary; [or]
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499h(b)(1)-(2).

Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as

to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that its PACA license expired on January 19, 2002.

Third, Respondent contends that any sanction imposed on Respondent, Jill Goodman, or Steven Goodman must be effective on January 19, 2002, the day Respondent's PACA license expired because Respondent failed to pay its PACA license fee[18] (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent cites no basis for its contention that a sanction imposed under the PACA must become effective on the date a PACA licensee chooses to allow its PACA license to expire by failing to pay the PACA license fee. Moreover, I can find no basis in the PACA that supports Respondent's contention.

Respondent contends Jill Goodman and Steven Goodman will receive a sanction greater than the sanction "intended by PACA" if the effective date of the revocation of Respondent's PACA license is after January 19, 2002. Jill Goodman and Steven Goodman are not parties to this proceeding, and no sanction is imposed on Jill Goodman or Steven Goodman in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). However, I infer Respondent contends that Jill Goodman and Steven Goodman are, and at all times material to this proceeding were, responsibly connected with Respondent and that pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), no PACA licensee may employ Jill Goodman and Steven Goodman after the order revoking Respondent's PACA license becomes effective on May 8, 2002.[19]

Pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), the Secretary of Agriculture may approve employment of a person responsibly connected with any person whose license has been revoked after 1 year following the PACA license revocation. Respondent appears to contend that since Jill Goodman and Steven Goodman have not been employed by a PACA licensee since January 19, 2002, the revocation of Respondent's PACA license must become

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[18]Section 3(b)(2) of the PACA (7 U.S.C. § 499c(b)(2)) requires PACA licensees to pay license fees annually or at such longer interval as the Secretary of Agriculture may prescribe.

[19]The order revoking Respondent's PACA license is effective 61 days after the Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. *See In re JSG Trading Corp.*, 61 Agric. Dec. ___, slip op. at 4 (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.). The Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. on March 8, 2002. *See* Domestic Return Receipt for Article Number 70993400001388101433. Therefore, the order revoking Respondent's PACA license becomes effective May 8, 2002.

effective January 19, 2002, so that the Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman beginning January 20, 2003, 1 year after Jill Goodman and Steven Goodman ceased being employed by a PACA licensee. Respondent contends, if the revocation of Respondent's PACA license is effective after January 19, 2002, Jill Goodman and Steven Goodman would be barred from employment by a PACA licensee for a period longer than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

I disagree with Respondent's contention. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), does not prohibit a PACA licensee from employing Jill Goodman or Steven Goodman until the Order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), becomes effective on May 8, 2002. Thus, no employment bar applied to Jill Goodman and Steven Goodman beginning January 19, 2002, as Respondent contends. Instead, Jill Goodman and Steven Goodman apparently voluntarily ceased employment with PACA licensees beginning January 19, 2002. Respondent has confused Jill Goodman's and Steven Goodman's voluntary decision not to continue employment by a PACA licensee beginning on January 19, 2002, with an employment bar. The Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman 1 year after PACA licensees are prohibited from employing Jill Goodman and Steven Goodman. The effect of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on Jill Goodman and Steven Goodman is not greater than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)). Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not change the effective date of the order revoking Respondent's PACA license, as Respondent requests.

Fourth, Respondent requests that I review the United States Department of Agriculture's "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform Act" (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent provides no reference to the portion of the extensive record in this proceeding in which the United States Department of Agriculture "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform Act," and I cannot locate the purported admission. Therefore, I am not

able to review the admission Respondent contends the United States Department of Agriculture made.

Fifth, Respondent contends that its violations of the PACA "cannot possibly be considered willful in any standard except per-se [sic]" (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

In *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), I did not apply a per se test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[20] Instead, I applied the following test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)):

> Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.
>
> The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent's principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999).

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[20]*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1052 n.8 (1999).

Applying this test to the facts in the instant proceeding, I concluded that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[21] The United States Court of Appeals for the District of Columbia Circuit concluded that I did not use the wrong legal standard to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the Court agreed with my conclusion that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[22]

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.[23] In light of the need to

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[21]*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

[22]*See JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 612-17 (D.C. Cir. 2001).

[23]*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (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.), *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 PMD Produce Brokerage, Inc.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 n.5 (2001), *appeal docketed* No. 02-3006 (6th Cir. Jan 3, 2002); *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 (2d Cir. 1998) (Table), 1998 WL 863340, *cert. denied*, 526 U.S. 1098 (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.), *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*ain *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' 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.'")

prove intent to induce, I cannot now conceive of a situation in which a respondent would be found to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) using the test I applied in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999), and not be found to have willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent has not provided any basis for its contention that its violations of the PACA "cannot possibly be considered willful in any standard except per-se [sic]" and I reject Respondent's contention. Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that its violations of the PACA "cannot possibly be considered willful in any standard except per-se [sic]."

Sixth, Respondent requests that I reduce the sanction against Respondent based on its 1993 transformation into a model produce company (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are extremely serious and warrant revocation of Respondent's PACA license. The United States Court of Appeals for the District of Columbia Circuit found the United States Department of Agriculture acted well within its discretion in revoking Respondent's PACA licence, as follows:

D. License Revocation

> Section 8(a) of PACA permits license revocation for "flagrant or repeated" violations of § 2 (7 U.S.C. § 499b). *See* 7 U.S.C. § 499h(a). The Judicial Officer found JSG's bribes "willful, flagrant, and repeated violations of section 2(4) of the PACA" (7 U.S.C. § 499b(4)) and revoked its license. *See* 58 Agric. Dec. at 1094. We will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge

> of the industry PACA regulates. *See Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (Upholding Department of Agriculture suspension order under the Packers and Stockyards Act and reasoning that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] 'the relation of remedy to policy is peculiarly a matter for administrative competence'."); *County Produce, Inc. v. United States Dep't of Agric.,* 103 F.3d 263, 267 (2d Cir. 1997) (courts "must defer to the agency's judgment as to the appropriate sanctions for PACA violations" because the Department of Agriculture "is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA").
>
> Nothing in the record persuades us that JSG's payments to the Gentiles and Albert Lomoriello were anything but flagrant and repeated. The bribes in this case were as flagrant as those in *Goodman* and *Tipco*. The Department revoked the defendants' licenses in both cases, providing ample notice that commercial bribes may result in revocation. The only difference from those cases is that JSG apparently did not surcharge its customers to pay for the bribes. That distinction does not diminish the wilfulness of JSG's conduct or the corruption it worked on its buyers' purchasing agents. The Department acted well within its discretion in revoking JSG's license.

JSG Trading Corp. v. Department of Agric., 235 F.3d at 616-17 (footnote omitted).

Revocation of Respondent's PACA license is necessary to deter not only Respondent from future violations of the PACA, but also other potential PACA violators. Although Respondent may not have committed any PACA violations since 1993, when Respondent states it transformed into a model produce company, and may not commit future violations of the PACA, revocation of Respondent's PACA license is necessary to deter other potential violators from future violations of the PACA. Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on

Respondent's contention that since 1993 Respondent has been a model produce company.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
and
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Ruling Denying JSG Trading Corp.'s April 9, 2002, Motion for Stay.
Filed May 1, 2002.

PACA – Lift stay denied.

Judicial Officer denied Respondent's motion for Stay because Respondent stated that it may seek appeal.

Andrew Y. Stanton, for Complainant.
John M. Himmelberg and Gary C. Adler, for Respondent.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

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

On January 13, 2000, Respondent filed a petition for review of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States

[1] *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

Department of Agriculture [hereinafter Complainant], requested a stay of the November 29, 1999, order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay.[2]

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision affirming the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp.[3] Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied.[4]

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. and reinstate the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. Respondent failed to file a timely response to Complainant's Motion to Lift Stay, and on March 4, 2002, I issued an Order Lifting Stay as to JSG Trading Corp.[5] Pursuant to the Order Lifting Stay as to JSG Trading Corp., the order revoking Respondent's PACA license becomes effective on May 8, 2002.[6]

On April 9, 2002, Respondent filed "JSG Trading Corp.'s Motion for a Stay" [hereinafter April 9, 2002, Motion for Stay]. On April 22, 2002, Complainant filed "Complainant's Opposition to JSG Trading Corp's Motion for a Stay." On April 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's April 9, 2002, Motion for Stay.

Respondent requests that I stay the order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), for two reasons. First, Respondent states subsequent to my March 4, 2002, issuance of the Order Lifting Stay as to JSG Trading Corp., Respondent

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[2]*In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

[3]*JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001).

[4] *JSG Trading Corp. v. Department of Agric.*, 122 S. Ct. 458 (2001).

[5]*In re JSG Trading Corp.*, 61 Agric. Dec. ___ (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.).

[6]The order revoking Respondent's PACA license is effective 61 days after the Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. *See In re JSG Trading Corp.*, 61 Agric. Dec. ___, slip op. at 4 (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.). The Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. on March 8, 2002. *See* Domestic Return Receipt for Article Number 70993400001388101433. Therefore, the order revoking Respondent's PACA license becomes effective May 8, 2002.

filed "Respondent JSG Trading Corp.'s Motion to Vacate the Decision and Order, To Reopen the Hearing or to Stay the Decision and Order, or In the Alternative to Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter March 22, 2002, Motions]. Respondent contends it is quite possible that I will not rule on Respondent's March 22, 2002, Motions before May 8, 2002. Respondent further contends that, if I do not grant Respondent's April 9, 2002, Motion for Stay and I grant the relief requested in Respondent's March 22, 2002, Motions, Respondent's PACA license would be revoked for a period of time when it should not have been revoked. (Respondent's April 9, 2002, Motion for Stay at 1-2.)

Earlier today, May 1, 2002, I denied Respondent's March 22, 2002, Motions.[7] Therefore, I reject Respondent's first basis for its April 9, 2002, request for a stay of the order revoking Respondent's PACA license.

Second, Respondent states that, if I deny Respondent's March 22, 2002, Motions, Respondent "is likely to seek judicial review of that decision" and Respondent requests a stay pending the outcome of proceedings for judicial review of that decision (Respondent's April 9, 2002, Motion for Stay at 2). As stated in this Ruling Denying JSG Trading Corp.'s April 9, 2002, Motion for Stay, *supra*, I previously denied Respondent's March 22, 2002, Motions. Nevertheless, I do not grant Respondent's request for a stay based on Respondent's speculation that it may seek judicial review of *In re JSG Trading Corp.* 61 Agric. Dec. ___ (May 1, 2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) because, if Respondent were to elect not to seek judicial review, a stay of the order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), would serve no purpose.

For the foregoing reasons, Respondent's April 9, 2002, Motion for Stay is denied.

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[7]*In re JSG Trading Corp.* 61 Agric. Dec. ___ (May 1, 2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction).

DEFAULT DECISIONS

In re: REBECCA A. BALLARD, d/b/a RUDY BROKERAGE CO.
PACA Docket No. D-01-0019.
Decision Without Hearing by Reason of Default.
Filed November 9, 2001.

PACA – Default – Payment, failure to make, prompt --Late payment of sellers.

David A. Richman, 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 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 June 20, 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 1999 through July 2000, Respondent Rebecca A. Ballard, d/b/a Rudy Brokerage Co., (hereinafter "Respondent") failed to make full payment promptly to 20 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $634,902.10 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 July 9, 2001, 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 an individual organized and existing under the laws of the state of Texas. Its business mailing address is 3100 Produce Row, #104, Houston, Texas 77023.

2. At all times material herein, Respondent was licensed under the

provisions of the PACA. License number 981257 was issued to Respondent on May 19, 1998. This license terminated on January 2, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent was discharged from debt in bankruptcy.

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 November 1999 through July 2000, Respondent purchased, received, and accepted in interstate commerce, from 20 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 $634,902.10.

Conclusions

Respondent's failure to make full payment promptly with respect to the 143 transactions set forth in Finding of Fact No. 4 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 final February 9, 2002.-Editor]

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In re: DIAMOND FRUIT & VEGETABLE EXCHANGE, INC.
PACA Docket No. D-01-0033.
Decision Without Hearing by Reason of Default.
Filed January 18, 2002.

PACA – Default – Payment, failure to make, prompt – Late payment of sellers.

Clara Kim, 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" or "PACA") , instituted by a complaint filed on September 21, 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 June 2000 through February 2001, Respondent Diamond Fruit & Vegetable Exchange, Inc., (hereinafter "Respondent") failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $ 419,418.00 for 113 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent 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).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Florida. Its business address while operating was Plant City State Farmers Market, 1307 West Martin Luther King, Jr., Boulevard, Plant City, Florida 33566. Its mailing address was P.O. Box 5126, Plant City, Florida 33564. Its current address is c/o Shari S. Jansen, Trustee, P.O. Box 49974, Sarasota, Florida 34230.

2. At all times material herein, Respondent was licensed under the

provisions of the PACA. License number 991398 was issued to Respondent on August 6, 1999. This license terminated on August 8, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period June 2000 through February 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, from 30 sellers, 113 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 $ 419,418.00.

Conclusions

Respondent's failure to make full payment promptly with respect to the 113 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(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 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 the parties.

[This Decision and Order became final March 12, 2002.-Editor]

In re: SHAMROCK TRADING, L.L.C.
PACA Docket No. D-01-0030.
Decision Without Hearing By Reason of Default.
Filed January 18, 2002.

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Clara Kim, 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" or "PACA") , instituted by a complaint filed on August 30, 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 1999 through October 2000, Respondent Shamrock Trading, L.L.C., (hereinafter "Respondent") failed to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of $ 1,068,064.74 for 274 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent 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).

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of Washington. Its business address while operating was 1630 North Wenatchee Avenue, Suite 2, Wenatchee, Washington 98801. Its current address is c/o Mary T. Wynne, Trustee, P.O. Box 1218, Okanogan, Washington 98840-1218.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 981670 was issued to Respondent on July 27, 1998. This license terminated on July 27, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period November 1999 through October 2000, Respondent purchased, received, and accepted in interstate and foreign commerce, from 32 sellers, 274 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, 068,064.74.

Conclusions

Respondent's failure to make full payment promptly with respect to the 274 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2(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 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 the parties. [This Decision and Order became final March 12, 2002.-Editor]

In re: GEORGIA MUSHROOM, INC.
PACA Docket No. D-01-0020.
Decision Without Hearing By Reason of Default.
Filed January 18, 2002.

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Ann K. Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Chief 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 June 21, 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 1999 through November 2000, Respondent Georgia Mushroom, Inc., (hereinafter "Respondent") failed to make full payment promptly to four sellers in the total amount of $232,730.29 for 168 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent on July 3, 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. Respondent is a corporation organized and existing under the laws of the state of Georgia. Its business mailing address is P.O. Box 1225, Forest Park, Georgia 30298.

2. Respondent never applied for and never received a license under the provisions of the PACA, but has operated subject to the PACA at all times material to this proceeding.

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

4. During the period November 1999 through November 2000, Respondent purchased, received, and accepted in interstate commerce 168 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $232,730.29.

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, 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(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 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.

[Note: This decision became final April 15, 2002]

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In re: DEMMA FRUIT COMPANY.
PACA Docket No. D-01-0029.
Decision Without Hearing By Reason of Default.
Filed March 7, 2002.

PACA – Default – Payment, failure to make, prompt -- Late payment of sellers.

Charles Spicknall, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.)* hereinafter referred to as "the Act," instituted by a complaint filed on August 30, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that from October 24, 1999 through October 1, 2000, Demma Fruit Company, Ltd. (hereinafter "Respondent") purchased, received and accepted, in interstate and foreign commerce, from 59 sellers, 1577 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

$4,397,950.91.

A copy of the complaint was mailed to Respondent by certified mail and was refused or unclaimed. Therefore, pursuant to section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. § 1.147), the complaint was served on Respondent on September 19, 2001 by regular mail. The complaint has not been answered. The time for filing an answer having run, and upon Complainant's motion 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, Demma Fruit Company, Ltd., is a corporation organized and existing under the laws of the State of Nebraska. Respondent's business mailing address is 11235 John Gault Boulevard, Omaha, Nebraska 68137.

2. At all times material herein, Respondent was licensed under the Act. License number 890859 was issued to Respondent on March 14, 1989. This license terminated on March 14, 2001, 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. During the period from October 24, 1999 through October 1, 2000, Respondent failed to make full payment promptly to 59 sellers for 1577 lots of fruits and vegetables that it purchased, received and accepted in interstate and foreign commerce in the total amount of $4,397,950.91.

Conclusions

Respondent's failure to make full payment promptly with respect to the 1577 transactions described 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 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 thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final June 11, 2002.-Editor]

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CONSENT DECISIONS

(Not published herein – Editor)

Robert C. Downs. PACA Docket No. APP-01-0003. 3/12/02.

Stanley Orchards Sales, Inc. PACA Docket No. D-01-0001. 5/3/02.

Weatherhead Potato Corp. PACA Docket No. D-01-0025. 6/5/02.

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