

# AGRICULTURE DECISIONS

**Volume 62**

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UNITED STATES DEPARTMENT OF AGRICULTURE

## AGRICULTURE DECISIONS

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

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

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

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

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

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**COURT DECISION**

**PMD PRODUCE BROKERAGE CORP. v. USDA.**

**No. 02-1134.**

**Decided May 13, 2003.**

**(Cite as: 2003 WL 21186047 (D.C.Cir.))**

**PACA – Untimely filing.**

**Respondent filed his petition for review 2 days later than permitted under the Administrative hearing rules. Respondent's contention of timeliness of filing based upon a nice calculation of presumed mailing date plus an "average" number of days to deliver certified mail is inadequate to show compliance with the rules.**

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

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

**JUDGMENT**

PER CURIAM.

This cause was considered on the record from the United States Department of Agriculture and on the briefs of counsel. It is

ORDERED that the petition for review be dismissed for lack of jurisdiction. Under the Hobbs Act, an aggrieved party must file a petition for review of a final agency order "within 60 days after its entry." 28 U.S.C. § 2344. Here, the order at issue is date-stamped February 14, 2002. Respondents' Appendix (RA) 1. Although PMD Produce Brokerage Corp. (PMD) did not file its petition for review until sixty-two days later, on April 17, 2002, its petition was timely under the Hobbs Act, it maintains, because the date of "entry" is the date on which the Department of Agriculture (USDA) mailed the order, which it "verily believe[s] was on or about February 22, 2002." Br. for Pet'r at 11.

Even assuming that the date of "entry" is the date on which a final order is mailed, however, PMD has failed to demonstrate the timeliness of its petition. To support its belief that the order at issue was mailed "on or about February 22, 2002," PMD relies solely upon the date on which it received the final



order-February 25, 2002-and the declaration of its counsel that an employee of the United States Postal Service informed him via telephone that "certified mail with return receipt requested takes, on average, from one to three days to deliver from Washington, D.C. to New York City." RA 24. PMD's assertions are plainly insufficient to establish February 22, 2002 as the final order's date of entry, particularly in light of the documentary evidence submitted by the USDA, which uniformly supports the conclusion that the final order was entered and mailed on February 14, 2002. *See* RA 9-22. PMD's petition is therefore dismissed as untimely. *See* 28 U.S.C. § 2344.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

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**PERISHABLE AGRICULTURAL COMMODITIES ACT****DEPARTMENTAL DECISIONS**

**In re: JANET S. ORLOFF, MERNA K. JACOBSON, AND TERRY A. JACOBSON.**

**PACA-APP Docket No. 01-0002.**

**Decision and Order as to Merna K. Jacobson.**

**Filed January 7, 2003.**

**PACA-APP – Perishable agricultural commodities – Failure to make full payment promptly – Responsibly connected – Active involvement in activities resulting in violations – Personal commission of prohibited activity not required.**

The Judicial Officer (JO) affirmed Administrative Law Judge Clifton's decision affirming the Chief of the PACA Branch's determination that Petitioner was *responsibly connected* with Jacobson Produce, Inc. at the time Jacobson Produce, Inc. violated the PACA. The JO found that Petitioner held more than 10% of the stock of Jacobson Produce, Inc. during the period that Jacobson Produce, Inc. violated the PACA. Thus, Petitioner met the first sentence of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9), and the burden was on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc. The JO stated that 7 U.S.C. § 499a(b)(9) provides a two-pronged test which Petitioner had to meet to demonstrate that she was not responsibly connected. First, Petitioner had to demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), Petitioner's failure to meet the first prong of the statutory test resulted in the Petitioner's failure to demonstrate that she was not responsibly connected, without recourse to the second prong. A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. See *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand). Petitioner was the buyer of, or was responsible for buying, produce from produce suppliers which Jacobson Produce, Inc. did not pay in accordance with the PACA. The JO found Petitioner's purchase of, or responsibility for the purchase of, this produce was active involvement in activities that resulted in Jacobson Produce, Inc.'s violations of the PACA. Moreover, the JO found Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of produce was limited to the performance of ministerial functions only. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make produce purchases on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA. The JO rejected Petitioner's argument that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must

actually commit the PACA violation stating a petitioner's failure to make full payment promptly is not the only activity that can result in a PACA licensee's failure to make full payment promptly in accordance with the PACA.

Ruben D. Rudolph, Jr., for Respondent.

Paul T. Gentile, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

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

### PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson<sup>1</sup> [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].<sup>2</sup> On March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc. during the period Jacobson Produce, Inc. violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On November 30, 2001, Petitioner filed "Petitioner's Brief and Proposed

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<sup>1</sup>Respondent's February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as "Myrna K. Jacobson." Petitioner's name is "Merna K. Jacobson" (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

<sup>2</sup>During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order) (CARX 15).

Finding of Fact.” On January 31, 2002, Respondent filed “Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order.”

On August 13, 2002, the ALJ issued a “Decision” [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent’s determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA (Initial Decision and Order at 12).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed “Respondent’s Response to Petitioner’s Appeal Petition.” On November 18, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with many of the ALJ’s findings of fact and conclusions of law and the ALJ’s affirming Respondent’s determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ’s Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ’s conclusions of law, as restated.

Petitioner introduced no exhibits. Respondent introduced 17 exhibits admitted into evidence at the July 12, 2001, hearing. The 15 Certified Agency Record exhibits introduced by Respondent are designated by “CARX.” Two additional exhibits introduced by Respondent are designated by “AX.” Transcript references are designated by “Tr.”

#### APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

#### TITLE 7—AGRICULTURE

....

#### CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

#### § 499a. Short title and definitions

....

#### (b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

**§ 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; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

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

.....

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

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

is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

**§ 499h. Grounds for suspension or revocation of license**

.....

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

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

- (1) whose license has been revoked or is currently suspended by order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the

nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499h(b).

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

**Decision Summary**

Based on the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

**Issue**

Did Petitioner prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.'s PACA violations during the period June 1999 through January 2000?

**Findings of Fact**

1. Before his death, Sidney Jacobson was an equal owner with Aaron ("Eddie") Gisser of Jacobson Produce, Inc. Each owned 50 percent of Jacobson Produce, Inc. and together they ran the business. (AX 1; Tr. 164.)



2. After Sidney Jacobson died in 1980, the responsibility for running Jacobson Produce, Inc. fell to Aaron Gisser alone. Aaron Gisser assumed the joint roles of chief financial officer and chief executive officer and served as president and secretary, the only two corporate offices, until the business closed in April 2000. (AX 1, AX 2; Tr. 67-68, 123-24.)

3. None of Sidney Jacobson's heirs assumed his management role in the business: not Petitioner, his surviving spouse, nor any of his three children, Kenneth D. Jacobson, Janet S. Orloff, and Terry A. Jacobson (AX 1; Tr. 122-23).

4. Petitioner worked for Jacobson Produce, Inc. from 1971 until the business closed in April 2000 (Tr. 142, 166).

5. After Sidney Jacobson died, Petitioner did not become more of a participant in the decision-making of Jacobson Produce, Inc. and did not change what she did for Jacobson Produce, Inc. which was to manage the frozen foods department. During the period June 1999 through January 2000, Petitioner was a buyer for and managed Jacobson Produce, Inc.'s frozen foods department. (AX 1, CARX 7, CARX 8; Tr. 132, 143, 168.)

6. Petitioner was Aaron Gisser's sister-in-law, which accounts in large part for his testimony that he considered her as "a partner" rather than "his" employee and his feeling that he did not have the authority to fire her if she were not doing a good job (Tr. 132-33).

7. Petitioner never exercised control over Jacobson Produce, Inc. as a whole; her management authority was limited to the frozen foods department (AX 1; Tr. 149).

8. Petitioner was never an officer of Jacobson Produce, Inc. (Tr. 66, 149).

9. Petitioner was never a director of Jacobson Produce, Inc. (Tr. 66, 149).

10. Petitioner did not hire or fire employees for Jacobson Produce, Inc. (Tr. 143).

11. Petitioner had no responsibilities regarding payroll for Jacobson Produce, Inc. (Tr. 125-26, 146).

12. Petitioner was a listed signatory on one Jacobson Produce, Inc. bank account for the purpose of having someone available to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26).

13. During June 1999 through January 2000, Petitioner wrote no checks and signed no checks on behalf of Jacobson Produce, Inc. (Tr. 126).

14. During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural

commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce (CARX 2 at 3-8, CARX 15).

15. Jacobson Produce, Inc. entered into a Consent Decision and Order filed in January 2001 in PACA Docket No. D-00-0023, admitting its failure to make full payment promptly with respect to the transactions described in Finding of Fact 14 (CARX 2 at 3-8, CARX 15).

16. Jacobson Produce, Inc.'s failures to make full payment promptly with respect to the transactions described in Finding of Fact 14 constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and resulted in the revocation of Jacobson Produce, Inc.'s PACA license (CARX 2 at 3-8, CARX 15).

17. Approximately 15, 16, or 17 percent of the business of Jacobson Produce, Inc. was frozen foods (Tr. 129).

18. Of the \$584,326.83 for perishable agricultural commodities that Jacobson Produce, Inc. failed to pay in violation of the PACA, approximately \$127,000 of that was failure to pay for frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52).

19. Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid \$12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

20. Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

21. Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

22. Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 6; Tr. 51-52).

23. Petitioner made no decisions regarding what payments Jacobson Produce, Inc. would make (Tr. 123-24, 130-31).

24. Petitioner's participation in the payment process for the purchases

she made for Jacobson Produce, Inc. was limited to the performance of ministerial functions only, because, when Jacobson Produce, Inc. received an invoice requesting payment for frozen foods, Petitioner merely verified the correctness of the prices on the invoice and delivered the invoice to the bookkeeper (Tr. 131-32, 144-45).

25. On or before December 29, 1989, Sidney Jacobson's 50 percent ownership of Jacobson Produce, Inc. was divided among his heirs, with each of his heirs receiving 12.63 percent of Jacobson Produce, Inc., except for Petitioner, who received 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 31-32). (The remaining 0.16 percent of Jacobson Produce, Inc. is not relevant to this proceeding.)

26. During the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.)

27. Initially, Respondent found that each of the four stockholders identified in Finding of Fact 26 was responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review; Amended Motion to Dismiss as to Janet S. Orloff; Amended Motion to Dismiss as to Terry A. Jacobson; Tr. 9, 78-80, 89-91).

28. Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc. until March 16, 1994, when he became a 9.9 percent shareholder (CARX 1 at 29).

29. Janet S. Orloff continued to own 12.63 percent of Jacobson Produce, Inc. until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-5, 8).

30. Terry A. Jacobson continued to own 12.63 percent of Jacobson Produce, Inc. until approximately March 23, 2000, when he wrote to the PACA Branch to advise that he had officially surrendered his shares back to the corporation (CARX 1 at 4-5, 10).

31. Petitioner continued to own 11.95 percent of Jacobson Produce, Inc. until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-6).

32. Aaron Gisser was responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, and he did not deny it (AX 1, AX 2, CARX 1 at 12-13, 15-16, CARX 6).

33. Petitioner, Janet S. Orloff, and Terry A. Jacobson denied being

responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review).

34. Based on additional information provided regarding Janet S. Orloff and Terry A. Jacobson, Respondent withdrew his determinations that they were each responsibly connected with Jacobson Produce, Inc. (Amended Motion to Dismiss as to Terry A. Jacobson; Amended Motion to Dismiss as to Janet S. Orloff; Order to Dismiss as to Janet S. Orloff; Order to Dismiss as to Terry A. Jacobson).

35. Janet S. Orloff and Terry A. Jacobson were not responsibly connected with Jacobson Produce, Inc. during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000.

36. Department managers of Jacobson Produce, Inc. included Petitioner, who handled frozen foods; Larry Gisser, who handled potatoes, onions, cabbage, and turnips; Michael Brewington, who handled "western commodities" and Florida, Mexico, and southern vegetables; Howard Orloff, who handled citrus and deciduous fruits; and Ken Jacobson, who handled the institutional line (CARX 8; Tr. 68-69).

37. Petitioner was sometimes excluded from meetings the managers would have. When asked why she was excluded, she answered that it was perhaps because she was busy, "and they just didn't bother with me. Because, I was a lady, maybe. Who knows?" (Tr. 164.)

38. Petitioner's salary from Jacobson Produce, Inc. was comparable to that of other department managers, and also of the salesmen, Aaron Gisser, the foreman, and with their overtime, most of the drivers and half of the porters (Tr. 139-40, 147).

39. Jacobson Produce, Inc. paid Petitioner no salary for about the last 6 months that Jacobson Produce, Inc. was in business, but Petitioner continued to work (Tr. 166-68).

40. Jacobson Produce, Inc. leased a car that Petitioner, and at times, her co-workers, were permitted to drive. Petitioner personally paid some of the car lease payments in or about late 1999. The car was turned back to the lease company in or about late 1999. (Tr. 148, 165, 168.)

41. Jacobson Produce, Inc. permitted Petitioner the use of one company credit card, a Mobil credit card for gasoline, on an account that was originally opened for the use of her late husband (CARX 12; Tr. 147-48).

42. In or about July or August 1999, Petitioner loaned \$100,000 to Jacobson Produce, Inc. to pay its bills. Petitioner was never repaid for this loan. Petitioner also owed Jacobson Produce, Inc. \$6,000 in October 1999. (CARX 10; Tr. 46-47, 133-37, 148, 151-54, 165.)

43. Petitioner spoke with some produce suppliers when these suppliers

called requesting payment for produce that was due and owing from Jacobson Produce, Inc. Petitioner directed these unpaid produce suppliers to Aaron Gisser or Jacobson Produce, Inc.'s bookkeeping department. (Tr. 145-46, 148, 162-63.) Petitioner knew Jacobson Produce, Inc. was "a little strapped for cash," but "felt it was just a temporary thing." (Tr. 153.)

44. Petitioner is distinguished from other Jacobson Produce, Inc. produce buyers in that she owned more than 10 percent of Jacobson Produce, Inc. (CARX 1 at 12-13, 15-16.)

### **Conclusions of Law**

1. Petitioner failed to prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during June 1999 through January 2000.

2. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

Petitioner raises one issue in her appeal of the ALJ's Initial Decision and Order. Petitioner asserts her involvement with Jacobson Produce, Inc. was not sufficient to result in her being found responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, the period during which Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Appeal Pet. at 1).

Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. during the period that Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the

activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a petitioner’s failure to meet the first prong of the statutory test results in the petitioner’s failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners. Petitioner failed to meet the first prong of the statutory test.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand) as follows:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

Petitioner was the manager of and a buyer for Jacobson Produce, Inc.’s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc. failed to pay 28 sellers the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.’s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce

suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid \$12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.) Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period that Jacobson Produce, Inc. violated the PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA.<sup>3</sup>

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<sup>3</sup>Petitioner asserts she was not aware of Jacobson Produce, Inc.'s PACA violations (Appeal Pet. at 2). I disagree. I find Petitioner knew or should have known Jacobson Produce, Inc. was not paying produce sellers for perishable agricultural commodities based on the loan Petitioner made to Jacobson Produce, Inc. in July or August 1999, in order to pay Jacobson Produce, Inc.'s bills (Tr. 133-37, 148, 151-54, 165) and the telephone calls Petitioner received from produce sellers requesting payment that was due and owing from Jacobson Produce, Inc. for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Moreover, even if I found Petitioner did not know or have

(continued...)

Petitioner asserts frozen foods accounted for less than 18 percent of Jacobson Produce, Inc.'s business; Petitioner was never an officer or director of Jacobson Produce, Inc.; Petitioner had no authority to hire or fire Jacobson Produce, Inc.'s employees; Petitioner had no authority to engage professionals; and Petitioner had no authority to secure insurance on behalf of Jacobson Produce, Inc. (Appeal Pet. at 2).

I agree with Petitioner. However, Petitioner's limited authority within Jacobson Produce, Inc. does not, by itself, demonstrate that she was not actively involved in activities that resulted in Jacobson Produce, Inc.'s violations of the PACA. The issue of limited authority is addressed in *Norinsberg*, as follows:

I do not agree that an alleged responsibly connected individual's demonstration by a preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA. An individual who exercises authority over only one limited area of corporate activities could be responsibly connected due to his or her active involvement in activities resulting in a violation of the PACA.

*In re Michael Norinsberg*, 58 Agric. Dec. 604, 615 (1999) (Decision and Order on Remand).

Petitioner was the buyer of produce or responsible for buying produce for which Jacobson Produce, Inc. failed to make prompt payment in accordance with the PACA. Therefore, despite the limits on Petitioner's authority within Jacobson Produce, Inc. she was actively involved in an activity resulting in Jacobson Produce, Inc.'s violations of the PACA.

Petitioner asserts she had no authority to pay bills and did not participate in any management decisions (Appeal Pet. at 2).

The record does not support Petitioner's assertion that she had no authority to pay bills. To the contrary, the record establishes that she was a signatory on one Jacobson Produce, Inc. bank account and authorized to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26). Moreover, the record does not support Petitioner's assertion that she did not participate in any management

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<sup>3</sup>(...continued)

reason to know that Jacobson Produce, Inc. was not paying produce sellers for perishable agricultural commodities in accordance with the PACA, I would still find that she was actively involved in activities resulting in Jacobson Produce, Inc.'s violations of the PACA. See *In re Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).



decisions. Instead, while the record establishes that Petitioner did not exercise control over Jacobson Produce, Inc. as a whole, Petitioner was the manager of Jacobson Produce, Inc.'s frozen foods department (AX 1, CARX 7, CARX 8; Tr. 149).

Petitioner asserts "[t]he activity that resulted in violation of the PACA by Jacobson consisted solely in not promptly paying for produce that had been purchased and received. Purchasing produce is not a violation of the PACA, only failing to pay promptly." (Appeal Pet. at 2 (emphasis in original).)

I agree with Petitioner's assertions that Jacobson Produce, Inc.'s purchases of perishable agricultural commodities during June 1999 through January 2000 were not violations of the PACA and that Jacobson Produce, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce during June 1999 through January 2000. However, I reject what I find to be Petitioner's argument: that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must actually commit the PACA violation.

A petitioner's failure to make full payment promptly is not the only activity that can result in a PACA licensee's failure to make full payment promptly in accordance with the PACA. For example, a petitioner's embezzlement or theft of funds from a PACA licensee is an activity that could leave the PACA licensee unable to make full payment promptly in accordance with the PACA. In such a case, a petitioner's embezzlement or theft of funds from the PACA licensee would constitute active involvement in an activity resulting in the PACA licensee's violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), but the petitioner would not have actually committed the act of failing to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, I specifically addressed the issue presented in the instant proceeding, a petitioner's purchase of perishable agricultural commodities resulting in a PACA licensee's failure to pay in accordance with the PACA, as follows:

Thus, if a petitioner buys produce from a seller who is not paid by the partnership, corporation, or association, in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA . . . .

*In re Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner purchased, or was responsible for the purchase of, 31 lots or perishable agricultural commodities from four produce suppliers that Jacobson Produce, Inc. [and] failed to pay in accordance with the PACA. Thus, Petitioner was actively involved in the activities resulting in some of Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Finally, Petitioner contends “[t]he ALJ has misapprehended and misapplied *In re: Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999). In *Norinsberg* the J.O. decided that the Petitioner was not responsible [sic] connected even though he was an officer and wrote checks and his involvement was greater than the Petitioner herein.” (Appeal Pet. at 2 (emphasis in original).)

I disagree with Petitioner’s contention that application of the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), to the facts in this proceeding would result in a conclusion that Petitioner was not *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, Michael Norinsberg, an individual determined by the Chief of the PACA Branch to be responsibly connected with a PACA licensee during a period when the PACA licensee failed to make full payment promptly to produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), signed 14 checks drawn on the violating PACA licensee’s checking accounts. These checks were payable to three persons who had not sold produce to the violating PACA licensee. I found that Michael Norinsberg’s activities (signing checks) enabled persons who presented the checks for payment to receive payment and resulted in a substantial reduction of the resources available to the violating PACA licensee to pay produce sellers in accordance with the PACA. I concluded that Michael Norinsberg participated in activities that resulted in the PACA licensee’s violations of the PACA. However, I did not conclude that Michael Norinsberg was responsibly connected with the violating PACA licensee because he demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. I described the ministerial nature of his activities, as follows:

[Michael Norinsberg] demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. The checks were presented to [Michael Norinsberg] for signature with the checks already made out as to payee and amount. [Michael Norinsberg] signed the checks presented to him when the president of [the violating PACA

licensee] was not available and at the direction of the president of [the violating PACA licensee]. . . . I find, under these circumstances, that [Michael Norinsberg] did not exercise judgment or discretion with respect to, or control over, the check signing and that [Michael Norinsberg] performed only a ministerial function.

*In re Michael Norinsberg*, 58 Agric. Dec. 604, 618 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner failed to demonstrate by a preponderance of the evidence that her activities (buying frozen foods and managing the frozen foods department) were ministerial acts. Petitioner was the buyer of, or was responsible for buying, 31 lots of frozen foods from four produce suppliers which Jacobson Produce, Inc. failed to pay, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to show that she exercised no judgment, discretion, or control with respect to these produce purchases.

#### ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

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**In re: JANET S. ORLOFF, MERNA K. JACOBSON, AND TERRY A. JACOBSON.**  
**PACA-APP Docket No. 01-0002.**  
**Order Denying Petition for Reconsideration as to Merna K. Jacobson.**  
**Filed April 24, 2003.**

**PACA-APP – Petition for reconsideration – Perishable agricultural commodities – Failure to make full payment promptly – Responsibly connected – Nominal partner – Nominal manager – Knowledge of violations – Active involvement in activities resulting in violations.**

The Judicial Officer (JO) on April 24, 2003, the JO denied Petitioner's petition for reconsideration. The JO held Petitioner's contention that she was only nominally a partner was irrelevant because there was no finding that she was a partner in the violating PACA licensee. Instead, the evidence established that Petitioner was a holder of more than 10 per centum of the outstanding stock of the violating PACA licensee. The JO also held Petitioner's contention that she was only nominally a manager was irrelevant because the second prong of the two-pronged statutory test to show she was not responsibly connected does not require that she show she was only nominally a manager of the violating PACA licensee. The JO rejected Petitioner's contention that the finding that Petitioner knew or should have known that the violating PACA licensee was not paying its bills, was error. The JO also rejected Petitioner's contention that she was not actively involved in the activities resulting in the PACA violations.

Ruben D. Rudolph, Jr., for Respondent.

Paul T. Gentile, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

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

### PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson<sup>1</sup> [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].<sup>2</sup> On March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc. during the period Jacobson Produce, Inc.

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<sup>1</sup>Respondent's February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as "Myrna K. Jacobson." Petitioner's name is "Merna K. Jacobson" (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

<sup>2</sup>During June 1999 through January 2000, Jacobson Produce, Inc. failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order) (CARX 15).

violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

Petitioner and Respondent filed post-hearing briefs. The ALJ then issued a “Decision” [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent’s determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, when Jacobson Produce, Inc. violated the PACA (Initial Decision and Order at 12).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed a response to Petitioner’s appeal petition. On January 7, 2003, I issued a “Decision and Order as to Merna K. Jacobson” in which I adopted the ALJ’s Initial Decision and Order with minor modifications. *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. \_\_\_ (Jan. 7, 2003).

On February 7, 2003, Petitioner filed “Petitioner’s Petition for Reconsideration.” On April 17, 2003, Respondent filed “Respondent’s Response to Petitioner’s Petition for Reconsideration.” On April 18, 2003, the Hearing Clerk transferred the record to the Judicial Officer for reconsideration of the January 7, 2003, Decision and Order as to Merna K. Jacobson.

## APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

#### CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

##### § 499a. Short title and definitions

##### (b) Definitions

For purposes of this chapter:

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per

centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

**§ 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; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

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

...

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

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

section 499h(b) of this title.

**§ 499h. Grounds for suspension or revocation of license**

...

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

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

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

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

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

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an



increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499h(b).

#### **CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION**

Petitioner raises three issues in Petitioner's Petition for Reconsideration. First, Petitioner contends she was a manager and partner of Jacobson Produce, Inc. in name only (Pet. for Recons. at 1-2).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as affiliated with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. during the period when Jacobson Produce, Inc. violated the PACA (CARX 1 at 13-16). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) *the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license*; or (2) *the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners*.

Petitioner was not a partner in Jacobson Produce, Inc. and Jacobson

Produce, Inc. was not a partnership.<sup>3</sup> Instead, the evidence establishes Jacobson Produce, Inc. was a New York corporation and that, at the time Jacobson Produce, Inc. violated the PACA, Petitioner held 11.95 per centum of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 13-16, CARX 2 at 4). Thus, for the second prong of the statutory test, Petitioner must show by a preponderance of the evidence that she was only nominally a shareholder of Jacobson Produce, Inc. Since Petitioner was not a partner in Jacobson Produce, Inc., Petitioner's contention that she was only nominally a partner in Jacobson Produce, Inc. is not relevant to this proceeding. Moreover, Petitioner's contention that she was only nominally a manager of Jacobson Produce, Inc. is also irrelevant to this proceeding. Even if Petitioner were to demonstrate that she was only *nominally a manager* of Jacobson Produce, Inc., she would not meet the second prong of the statutory test.

Petitioner points out that other shareholders of Jacobson Produce, Inc. such as Ken Jacobson and Larry Gisser, managed Jacobson Produce, Inc.[']s departments, but Respondent did not determine they were responsibly connected with Jacobson Produce, Inc. Even if I were to find that Respondent erroneously failed to make a determination that other persons affiliated with or connected with Jacobson Produce, Inc. were responsibly connected with Jacobson Produce, Inc. (which I do not so find), that finding would not be relevant to Petitioner's affiliation or connection with Jacobson Produce, Inc. or to the disposition of this proceeding.

Moreover, in order to meet the first sentence of the definition of *responsibly connected*, a shareholder must hold more than 10 per centum of the outstanding stock of the corporation. During the period when Jacobson Produce, Inc. violated the PACA, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.) The record contains no evidence that either Kenneth D. Jacobson or Larry Gisser was a holder of more than 10 per centum of the outstanding stock of Jacobson

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<sup>3</sup>Aaron Gisser, the 50 percent owner, chief financial officer, chief executive officer, president, and secretary of Jacobson Produce, Inc. testified that he considered Petitioner a "partner" rather than his "employee" and that he did not have authority to fire Petitioner (Tr. 132-33). However, Petitioner is Aaron Gisser's sister-in-law and Petitioner's relationship by marriage to Aaron Gisser appears to account for Aaron Gisser's testimony characterizing their business relationship a partnership. The record contains no other evidence that Petitioner was a partner or that Jacobson Produce, Inc. was a partnership.

Produce, Inc. during the relevant period. To the contrary, the record establishes that Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc. until March 16, 1994, when he became a 9.9 percent shareholder (CARX 1 at 29), and Larry Gisser did not own more than 10 per centum of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 12, 13, 15).

Second, Petitioner contends my finding that Petitioner knew or should have known that Jacobson Produce, Inc. was not paying its bills, is error (Pet. for Recons. at 2).

I disagree with Petitioner's contention that a finding that Petitioner knew or should have known that Jacobson Produce, Inc. was not paying its bills, was error. The record establishes Petitioner knew or should have known Jacobson Produce, Inc. was not paying its bills. Petitioner received telephone calls from produce sellers requesting payments that were due and owing from Jacobson Produce, Inc. for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Petitioner loaned Jacobson Produce, Inc. \$100,000 in July or August 1999, because Jacobson Produce, Inc. was not able to pay its bills (Tr. 133-37, 148, 151-54, 165), and Petitioner testified that she knew Jacobson Produce, Inc. needed the loan because it was unable to pay its bills, as follows:

[BY MR. RUDOLPH:]

Q. Did he tell you what the money was going to go for?

[BY MS. JACOBSON:]

A. Well, it was obvious, you know, that we needed a little influx of money so that we -- we needed money to operate.

Q. Why was it obvious that you needed some money, your company needed some money?

A. Because, I guess, of the bills that were coming in.

Q. You knew that the bills weren't being paid?

A. Well, I heard them -- I heard the bookkeeper make excuses, you know, whatever, and so in that way I knew that they were really late.

Q. What did you think about the bookkeeper making excuses, the bills not coming up?

A. I didn't make any judgments. I just felt that my -- we were a little strapped for cash, which happens, you know, at different times a year. You have more money at certain times and less money at other times. I felt it was just a temporary thing.

Tr. 153.

Petitioner also contends she had no authority to pay Jacobson Produce, Inc.'s debts (Pet. for Recons. at 2). The record does not support Petitioner's contention that she had no authority to pay bills. To the contrary, the record establishes Petitioner was a signatory on one Jacobson Produce, Inc. bank account and authorized to sign checks if Aaron Gisser was not available (CARX 7; Tr. 125-26).

Third, Petitioner contends she was not actively involved in Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), as follows:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

Petitioner was the manager of, and a buyer for, Jacobson Produce, Inc.'s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc. failed to pay 28 sellers the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc. purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.'s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid \$12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc. was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc. was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.) Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period when Jacobson Produce, Inc. violated the PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc. and chose to do so even though she knew or should have known that Jacobson Produce, Inc. was not paying produce suppliers for perishable agricultural

commodities in accordance with the PACA.

For the foregoing reasons and the reasons set forth in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. \_\_\_\_ (Jan. 7, 2003), Petitioner's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.<sup>4</sup> Petitioner's Petition for Reconsideration was timely filed and automatically stayed the January 7, 2003, Decision and Order as to Merna K. Jacobson. Therefore, since Petitioner's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. \_\_\_\_ (Jan. 7, 2003), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration as to Merna K. Jacobson.

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

#### ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc. during June 1999 through January 2000, a period during which Jacobson Produce, Inc. violated the PACA.

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<sup>4</sup>*In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. 389, 404 (2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand); *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.).

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

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**In re: NICK PENACHIO CO., INC.**  
**PACA Docket No. D-01-0022.**  
**Decision and Order by Reason of Failure to Appear.**  
**Filed November 22, 2002.**

Christopher P. Young-Morales, for Complainant.  
Respondent, Pro se.  
*Decision and Order by Dorothea A. Baker, Administrative Law Judge.*

**PACA – Default, failure to appear at hearing – Payment, failure to make, prompt – Fraud – Bid rigging.**

#### Preliminary Statement

This is an administrative proceeding. It was initiated by a Notice to Show Cause and Complaint filed July 26, 2001, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. §§ 499a *et seq.*), hereinafter sometimes referred to as the PACA, and the regulations issued pursuant thereto as well as the Rules of Practice Governing Former Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*).

The Complaint constituted a disciplinary proceeding against Respondent Nick Penachio Co., Inc. alleging that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). There is also a Notice to Show Cause why Respondent Nick Penachio Co., Inc. should not be denied a license pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Among the allegations of the Complaint, are that, during the period October, 2000 through June, 2001, Respondent violated section 2(4) of the PACA by failing to make full payment promptly to 32 sellers of the agreed purchase prices or balances thereof, in the total amount of \$268,915.00, for 162 lots of perishable agricultural commodities which were purchased, received, and accepted in interstate and foreign commerce.

It is further alleged that on May 7, 2001, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100 *et seq.*) in the United States Bankruptcy Court for the Southern District of New York, being designated Case No. 01-12668-CB.

Additionally, it is alleged that on February 20, 2001, Respondent and its president Nicholas A. Penachio waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy, and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, among other things, conspiring to defraud through a kickback and fraud scheme using the United States Mail, conspiring to defraud the I.R.S. by filing false and fraudulent federal tax returns, and obstruction of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury.

Respondent had a license pursuant to the provisions of the PACA [Number 741326] from March, 1974 until March 4, 2001 when it was terminated because Respondent failed to pay the required annual renewal fee.

An Answer to said Complaint was filed by Respondent on August 8, 2001.

The case was set for hearing to commence on March 6, 2002, in New York City. On February 20, 2002 the Judge was notified for the first time that a Petition for Review had been filed by Tony Penachio with respect to a determination dated January 4, 2002 by the PACA Branch Chief that Tony Penachio is responsibly connected with Nick Penachio Co., Inc. (the Respondent). As a result of a conference call it was agreed that there would be a consolidation of the cases and a postponement of the scheduled oral hearing date of March 6 and 7, 2002. Subsequently, the parties agreed that the oral hearing would take place on June 19, 2002. The case was subsequently rescheduled for hearing for June 20, 2002, in New York City.

On February 4, 2002, Tony Penachio filed a Petition for Review in regards to a letter of determination dated January 4, 2002 by the PACA Branch Chief that he was responsibly connected with Nick Penachio Co., Inc. during the period October, 2000 through June, 2001 during which period there was a failure to pay 32 vendors \$268,915.00 for perishable agricultural commodities.

The Petition for Review was consolidated with the present proceeding and an oral hearing on both cases was scheduled for June 20-21, 2002. Under date of June 12, 2002, Tony Penachio withdrew his Petition for Review and consented to the determination of the PACA Branch Chief. The Government accepted said withdrawal and the Judge granted the withdrawal and removed



"Tony Penachio, Petitioner" from the caption of the proceeding. On October 15, 2002, a letter was filed by Tony Penachio which stated, in part:

I have received your letter to William A. Hrabsky, Esq. of October 1, 2002 today. Please be advised that Mr. Hrabsky, who had been representing me in the matter of PACA Docket No. APP-02-0003, passed away in late July, 2002 and therefore Mr. Hrabsky has not filed a brief on my behalf in this matter.

I will now be representing myself, pro se, in the remainder of this action.

In lieu of my requesting to file a brief on my behalf I am respectfully requesting the mercy of the court in the decision of my appeal in this matter; please be so kind as to advise the Administrative Law Judge accordingly.

The matter of Tony Penachio, PACA Docket No. APP-02-0003, was concluded with his withdrawal of his Petition for Review.

A hearing in this matter was held on June 20, 2002, in New York City, New York before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Christopher Young-Morales, Esquire, Office of the General Counsel, Department of Agriculture. Respondent and its counsel failed to appear at the scheduled hearing on June 20, 2002. In all matters prior to the date of the hearing, Respondent was represented by Harry D. Jones, Esquire, of Gersten, Savage & Kaplowitz, New York, New York. The hearing was conducted in Respondent's absence pursuant to § 1.141(e)(1) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice"). The Complainant presented its evidence in the absence of Respondent. The parties were given until November 6, 2002, within which to file simultaneous briefs. The Complainant did so; the Respondent did not.

#### Pertinent Statutory Provisions

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

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

....

(4) For any commission merchant, dealer, or broker to make, for a

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

#### **§ 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.

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

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal Court, or (b)

whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee of the applicant. If after investigation, the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing, the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer or broker because the applicant or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal Court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

7 C.F.R. 1.141(e)(1) of the Rules of Practice provides in part:

A [R]espondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the [R]espondent shall also constitute an admission of all the material allegations of fact contained in the complaint.

Pursuant to 7 C.F.R. § 1.141(e)(1), Respondent's failure to appear at the hearing constitutes an admission of all the material allegations of fact in the Complaint. In addition, the Respondent did not file any brief in this matter. A careful consideration of the evidence adduced by the Government indicates that the Complainant has borne its burden of proof by more than a preponderance of the evidence and that the following findings of fact are justified thereby.

#### **Findings of Fact**

1. Nick Penachio Co., Inc. is a corporation organized and existing under the laws of the State of New York. Its business and mailing address is 240 Food

Center Drive, Bronx, New York.

2. Pursuant to the licensing provisions of the PACA, license number 741326 was issued to Respondent on March 4, 1974. Respondent's license was renewed annually until March 4, 2001, when it was terminated pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) because Respondent failed to pay the required annual renewal fee.

3. Nicholas A. Penachio is the president and thirty-five percent stockholder of Respondent. (CX 1; Tr. 60).

4. During the period of October, 2000 through June, 2001, Respondent Nick Penachio Co., Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of \$268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce. (CX 11-44; Tr. 6, 32.)

5. Follow-up investigation revealed that as of June 7, 2002, more than 120 days after the Complaint was served, Respondent still owed over \$62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38, 44, 57.)

6. On February 20, 2001, Respondent and its president, Nicholas A Penachio, waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassau County Department of General Services, and the Newark Public Schools. These charges included, *inter alia*, conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction of justice by causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX 6-7; Tr. 61-74.)

7. Respondent has engaged in practices of a character prohibited by the PACA and is therefore unfit to engage in the business of a commission merchant, dealer, or broker pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)). (CX 5-7; Tr. 61-74.)

### **Conclusions**

The PACA requires full payment promptly, and persons subject to the provisions of the PACA as commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547. As the Judicial Officer held in *Scamcorp*: "In any PACA disciplinary proceeding

in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a 'no-pay' case." *Scamcorp* at 548-549. In the case at hand, Respondent failed to pay in accordance with the PACA, and was not in full compliance as of the date of the hearing on June 20, 2002, well over 120 days after the Complaint was served on Respondent. Evidence presented at hearing established that Respondent had not made full payment over 330 days after the Complaint was served.

Marketing Specialist Josephine Jenkins testified at the hearing that between June 5 and June 7, 2002, she conducted a follow-up investigation to ascertain whether or not the unpaid creditors listed in the Complaint had been paid any monies since the initial investigation had been conducted. At the hearing, Ms. Jenkins testified that after detailed investigation conducted in June of 2001, she was able to document from Nick Penachio Co., Inc.'s own records that between October, 2000 and June, 2001, Respondent failed to pay 32 sellers \$268,915.00 for produce sold in interstate and foreign commerce. That follow-up investigation revealed that as of June 7, 2002, Respondent still owed over \$62,000.00 to at least 6 sellers listed in the Complaint. (Tr. 37-38.) Further, two industry witnesses, creditor produce suppliers listed in the Complaint, corroborated Ms. Jenkins' findings. Juana Landestoy, credit manager for Doral Finest, stated that as of the date of the hearing, 30 percent of the debt listed in the Complaint as owed by Respondent to Doral Finest was still owed; Joel Fierman, owner of Fierman Produce Exchange, stated that as of the date of the hearing, Respondent still owed Fierman Produce Exchange over \$9,000.00. Accordingly, this case should be treated as a "no-pay" case, pursuant to the policy set forth in *Scamcorp*.

"In any no pay case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked." In the case at hand, as Respondent's PACA license has terminated, publication of the facts and circumstances surrounding Respondent's PACA violation would be the appropriate sanction. *Scamcorp* at 549. Here, Respondent's violations of section 2(4) of the PACA are willful, flagrant and repeated, as a matter of law. Willfulness is reflected by a Respondent's violations of express requirements of the PACA, the length of time during which the violations occurred, and the number and dollar amount of violative transactions involved. *Scamcorp* at 553; *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *See, Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774,781-82 (D.C. Cir. 1983). Respondent's violations are "repeated" because repeated means more than one, and Respondent's

violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred." *Scamcorp* at 551; *See, Farley & Calfee v. U. S. Department of Agriculture*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025,1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000.00 to be frequent and flagrant violations of the payment provisions of the PACA).

Further, in the case at hand, Senior Marketing Specialist Basil Coale testified that the violations committed by Nick Penachio Co., Inc. were willful, flagrant, and repeated, as Respondent "actively went out and incurred this debt over this time period, that they had failed to pay . . . and there was more than one violation . . . over this time period . . . [s]pecifically . . . between October, 2000 and June of 2001". (Tr. 71.) Mr. Coale testified that Respondent's failure to pay 32 suppliers over \$268,000.00 over this time period adversely affected both the individual suppliers listed in the Complaint as well as on the industry as a whole." (Tr. 71.) Both industry witnesses called at the hearing corroborated Mr. Coale's testimony. Juana Landestoy, credit manager of Doral Finest, testified that: "we were very affected because those particular invoices were very high." (TR 57.) Joel Fierman, owner of Fierman Produce Exchange, testified that Respondent's failure to pay: "obviously is a financial burden on our business that can hinder us in our payment of our own shippers in a prompt fashion." (Tr. 43.) Here, as when such factors are present, the only appropriate sanction is revocation, or publication in the case at hand, where Respondent's license terminated on March 4, 2001 for failure to pay the required annual renewal fee.

Respondent has been shown to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, and is deemed to have admitted those violations by failing to appear at hearing. Further, Respondent has been shown to be unfit to be licensed under the PACA. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that a PACA license can be refused an applicant if it is shown that: the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in the case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than ten per centum of the stock, prior to the date of the filing of the application engaged in any practices of the character prohibited by this Act or was convicted of a felony in any State or Federal Court.

On February 20, 2001, Respondent and its president, Nicholas A Penachio,

waived indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and pled guilty to an eight count Superseding Information which charged them with participating in schemes to rig bids of frozen food, produce, dairy, and other products supplied to the New York City Board of Education, the Department of Citywide Administrative Services, the Nassu County Department of General Services, and the Newark Public Schools. These charges included, *inter alia*, conspiring to defraud through a kickback and fraud scheme using the U.S. Mail; conspiring to defraud the I.R.S. by filing false and fraudulent tax returns; and obstruction of justice for causing the destruction of incriminating documents that had been subpoenaed by the Grand Jury. (CX 6-7; Tr. 61-74.) Such fraudulent activity constitutes acts of a character prohibited by the Act. Further, conspiracy to defraud and obstruction of justice, to which Respondent and its president pled guilty, are felonies under the United States Code.

For the foregoing reasons, this case warrants: (1) a finding that Respondent engaged in willful, flagrant and repeated violations of section 2(4) of the PACA and publication of the facts and circumstances surrounding that violation and (2) a finding that Respondent is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA.

#### **Order**

1. Respondent Nicholas Penachio Co., Inc. committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of October, 2000 through June, 2001, by failing to make full payment promptly to 32 sellers of the agreed purchase prices in the total amount of \$268,915.00 for 162 lots of perishable agricultural commodities that Respondent purchased, received and accepted in interstate commerce; and
2. The facts and circumstances surrounding this violation shall be published; and
3. Respondent Nicholas Penachio Co., Inc. is unfit to be licensed under the PACA pursuant to section 4(d) of the PACA because Respondent engaged in practices of a character prohibited under section 4(d) of the PACA (7 U.S.C. § 499(d)), and because Respondent was convicted of a felony in Federal Court on February 20, 2001. (CX 6-7; Tr. 61-74.) Respondent's application for a PACA license is denied.

This Decision and Order will become final and effective thirty-five (35) days after service upon the Respondent unless appealed within thirty (30) days

as provided by the Rules of Practice and Procedure, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[Note: This Decision and Order became effective on January 13, 2003.]

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**In re: ROBERT A. ROBERTI, JR., d/b/a PHOENIX FRUIT CO.  
PACA Docket No. D-03-0006.  
Ruling on Certified Question.  
Filed February 14, 2003.**

Ruben D. Rudolph, Jr., for Complainant.

Charles Hultstrand, for Respondent.

*Ruling issued by William G. Jenson, Judicial Officer.*

**PACA – License application, USDA may withhold, if incomplete – Certified question, ruling.**

The Judicial Officer (JO) ruled in response to a question certified by Chief Judge James W. Hunt: Is Respondent entitled to a PACA license, pursuant to 7 U.S.C. § 499d(d), because the Secretary of Agriculture did not conclude her investigation of Respondent's fitness for a PACA license within 30 days of the date Respondent filed his PACA license application? The JO concluded the Secretary of Agriculture completed the investigation of Respondent's fitness for a PACA license no later than December 4, 2002, 29 days after Respondent filed a valid PACA license application, as required by 7 C.F.R. § 46.4. The JO concluded the term "full or complete answers to all the questions," as used in 7 C.F.R. § 46.4(d), indicates that Respondent's answers to questions must not be lacking in any essential and must have all the necessary parts, elements, or steps. The JO found Respondent's October 10, 2002, and October 29, 2002, PACA license applications were not complete. Further, the JO concluded the Respondent's October 10, 2002, and October 29, 2002, PACA license applications were not inaccurate, but rather were incomplete; therefore, 7 C.F.R. § 46.4(f) was not applicable to the proceeding.

On January 14, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] certified a question to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(e)). On January 31, 2003, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Brief Regarding Question Certified to the Judicial Officer" [hereinafter Complainant's Brief] addressing the issue raised in the Chief ALJ's January 14, 2003, certified question. On February 6, 2003, Robert A. Roberti, Jr., d/b/a Phoenix Fruit Co. [hereinafter Respondent], filed "Responding Brief Regarding Question Certified to the Judicial Officer" [hereinafter Respondent's Brief]. On



February 7, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Chief ALJ's January 14, 2003, certified question.

The Chief ALJ poses the following certified question:

**Query:** Is Respondent entitled to a license because Complainant did not conclude its investigation within thirty days of the application?

Certification of Question to the Judicial Officer at 3.

The Perishable Agricultural Commodities Act, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], provides the Secretary of Agriculture may withhold the issuance of a PACA license to an applicant, pending an investigation of the applicant's fitness for a PACA license or the accuracy and completeness of the PACA license application, for a period not exceeding 30 days, as follows:

**§ 499d. Issuance of license**

. . . .

**(d) Withholding license pending investigation**

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . , prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . , prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains any materially false or misleading statement made by the applicant or by its

representative on its behalf, or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

7 U.S.C. § 499d(d).

Based on the limited record before me, I find Respondent did not file a complete PACA license application until November 5, 2002.<sup>1</sup> I also find Complainant completed the investigation of Respondent's fitness for a PACA license no later than December 4, 2002, 29 days after Respondent filed a complete PACA license application.<sup>2</sup> I, therefore, conclude the Secretary of Agriculture is not required to issue Respondent a PACA license based on the time limitation for withholding the issuance of a PACA license in section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Respondent asserts he filed a complete PACA license application on October 10, 2002.<sup>3</sup> I disagree with Respondent's assertion.

Section 46.4(b)(1)-(7) of the regulations issued under the PACA (7 C.F.R. § 46.4(b)(1)-(7)) specifies the information an applicant for a PACA license must furnish to obtain a PACA license. Section 46.4(b)(8) of the regulations issued under the PACA (7 C.F.R. § 46.4(b)(8)) provides, in addition to the information specified in 7 C.F.R. § 46.4(b)(1)-(7), the applicant must furnish "[a]ny other information the Director<sup>4</sup> deems necessary to establish the identity and eligibility of the applicant to obtain a license."

The record establishes that Respondent's October 10, 2002, PACA license application was not complete. Specifically, Respondent failed to submit a copy of the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by

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<sup>1</sup>See letter dated November 4, 2002, from Charles Hultstrand to John A. Koller and Affidavit of Jane E. Servais ¶ 6 (Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 1 and Attach. 6)).

<sup>2</sup>See Notice to Show Cause filed December 4, 2002.

<sup>3</sup>See Response to Notice to Show Cause ¶¶ 1, II(b), V, VIIIa; Response to Motion for Expedited Hearing; Reply Re: Date of Application for PACA License; Respondent's Brief.

<sup>4</sup>"Director" means the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. 7 C.F.R. § 46.2(d), (f)-(g).

Respondent's affirmative response to question 9 on the PACA license application form.<sup>5</sup> Moreover, on September 26, 2002, David N. Studer, an employee of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, informed Respondent's counsel that, due to Respondent's involvement in bankruptcy proceedings within the last 3 years, Respondent would be required to submit additional information when applying for a PACA license.<sup>6</sup> Respondent's October 10, 2002, PACA license application did not include the information which David N. Studer stated would be required to be submitted as part of Respondent's PACA license application.

Section 46.4(d) of the regulations issued under the PACA (7 C.F.R. § 46.4(d)) provides that an incomplete PACA license application is not a valid license application and the 30-day period in section 4(d) of the PACA (7 U.S.C. § 499d(d)) for the Secretary of Agriculture's completion of an investigation does not commence until a valid PACA license application is received, as follows:

**§ 46.4 Application for license.**

....  
(d) The application and fees shall be forwarded to the Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, or to his representative. *An application which does not contain full or complete answers to all the questions . . . shall not be considered a valid application for license. The "period not to exceed 30 days" as prescribed in section 4(d) of the Act shall commence on the day a valid application for license is received by the Director or his representative.*

7 C.F.R. § 46.4(d) (emphasis added).

Respondent asserts his October 10, 2002, PACA license application contains full and complete answers to all of the questions on the PACA license

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<sup>5</sup>See Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 2 at 2).

<sup>6</sup>See Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 3).

application form.<sup>7</sup> The term *full or complete answers to all the questions*, as used in section 46.4(d) of the regulations issued under the PACA (7 C.F.R. § 46.4(d)), indicates that answers to questions must not be “lacking in any essential” and must have “all necessary parts, elements, or steps.”<sup>8</sup> I find Respondent’s failure to provide the documents required by Respondent’s affirmative response to question 9 on the PACA license application form is a failure to provide a “full or complete” answer to question 9 on the PACA license application form. Moreover, Respondent’s failure to provide the information which David N. Studer informed Respondent’s counsel would be required to be submitted with Respondent’s PACA license application is a failure to provide “full or complete answers to all the questions.” As Respondent’s PACA license application was not complete on October 10, 2002, I conclude Respondent did not file a valid PACA license application on October 10, 2002, as Respondent asserts.

The Chief ALJ tentatively decided Respondent submitted a complete PACA license application on October 29, 2002; Complainant did not show he concluded his investigation within 30 days of October 29, 2002; and the Secretary of Agriculture must issue Respondent a PACA license pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).<sup>9</sup> I disagree with the Chief ALJ’s tentative decision.

The Chief ALJ bases his tentative determination that Respondent’s application was complete on October 29, 2002, on section 46.4(f) of the regulations issued under the PACA, which provides, as follows:

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<sup>7</sup>See Reply Re: Date of Application for PACA License at 2; Respondent’s Brief at 2.

<sup>8</sup>See definitions of *complete* and *full* in Merriam-Webster’s Collegiate Dictionary 235, 471 (10th ed. 1997). See also *Hoyt v. Daily Mirror, Inc.*, 31 F. Supp. 89, 90 (S.D.N.Y. 1939) (stating the adjective *complete* is defined in Funk & Wagnalls Standard Dictionary as “having all needed or normal parts, elements, or details; lacking nothing; entire, perfect; full”); *Town of Checotah v. Town of Eufaula*, 119 P. 1014, 1017 (Okla. 1911) (citing with approval the definition of *complete* in Webster’s New International Dictionary: filled up, with no part, item, or element lacking; free from deficiency; entire; perfect; consummate); *Quinn v. Donovan*, 85 Ill. 194, 195 (Ill. Jan. Term 1877) (stating one of Webster’s definitions of the word *full* is “complete, entire, without abatement, -- mature, perfect”); *Wood v. Los Angeles City School Dist.*, 44 P.2d 644, 646 (Cal. Dist. Ct. App. 1935) (citing with approval the definition of *complete* in Webster’s New International Dictionary: filled up, with no part, item, or element lacking; free from deficiency; entire; perfect; consummate; and citing with approval the definition of *complete* in Webster’s Dictionary: free from deficiency, entire, absolutely finished).

<sup>9</sup>See Certification of Question to the Judicial Officer at 2-3.

**§ 46.4 Application for license.**

. . . .

(f) If the Director has reason to believe that the application contains inaccurate information, he may afford the applicant an opportunity to submit a corrected application or verify or explain information contained in the application. If the applicant submits a corrected application, the original application shall be considered withdrawn. If the applicant, in response to the Director's request, submits additional or corrected information for consideration in connection with his original application, the original application plus such information shall be considered as constituting a new application.

7 C.F.R. § 46.4(f).

Specifically, the Chief ALJ tentatively found Respondent's October 29, 2002, submission, together with Respondent's original PACA license application of October 10, 2002, constitutes a new and complete application, as provided in section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)).<sup>10</sup>

Section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) applies to circumstances in which the Director has reason to believe a PACA license application contains inaccurate information. Based on the limited record before me, I do not find that the Director had reason to believe Respondent's October 10, 2002, PACA license application contained inaccurate information. Therefore, section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) is not applicable to this proceeding, and Respondent's October 10, 2002, PACA license application plus the information Respondent provided on October 29, 2002, cannot "be considered as constituting a new application" filed on October 29, 2002, in accordance with section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)).<sup>11</sup>

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<sup>10</sup>See Certification of Question to the Judicial Officer at 2.

<sup>11</sup>Complainant contends Respondent's PACA license "application was incomplete and inaccurate in that it did not contain the required information relative to previous bankruptcy filings by one of the principals" and section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)) is applicable to this proceeding (Complainant's Brief at 3). I reject Complainant's contention that Respondent's PACA license application was "inaccurate" because the PACA license application "did not contain the required information relative to previous bankruptcy filings by one of the principals" and that section 46.4(f) of the regulations issued under the PACA (7 C.F.R. § 46.4(f)).  
(continued...)

Instead, the record indicates John A. Koller, an employee of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, returned Respondent's October 10, 2002, PACA license application to Respondent because it was incomplete.<sup>12</sup> On October 18, 2002, John A. Koller returned Respondent's incomplete application to Respondent's counsel requesting that Respondent provide the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by Respondent's affirmative response to question 9 on the PACA license application, and the information identified in David N. Studer's September 26, 2002, letter.<sup>13</sup> I conclude Mr. Koller returned Respondent's PACA license application pursuant to section 46.4(e) of the Regulations (7 C.F.R. § 46.4(e)), which provides, if a PACA license application is incomplete, it may be returned to the applicant with a request that the applicant complete the application.

On October 29, 2002, Respondent submitted the additional information requested in John A. Koller's October 18, 2002, letter.<sup>14</sup> However, Respondent failed to resubmit the PACA license application form with his October 29, 2002, submission. Instead, the United States Department of Agriculture did not receive Respondent's resubmitted PACA license application form until

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<sup>11</sup>(...continued)

46.4(f) is applicable to this proceeding. An inaccurate application is an application that contains erroneous information. *See Huntington Securities Corp. v. Busey*, 112 F.2d 368, 370 (6th Cir. 1940) (stating in its ordinary use *accurately* means precisely, exactly, correctly, without error or defect); *Globe Indemnity Co. v. Cohen*, 106 F.2d 687, 690 (3d Cir. 1939) (stating the word *accuracy* signifies merely the state or quality of being accurate, freedom from mistake or error), *cert. denied*, 309 U.S. 660 (1940); *Cedar Rapids Engineering Co. v. United States*, 86 F. Supp. 577, 582 (N.D. Iowa 1949) (stating in its ordinary use *accurately* means precisely, exactly, correctly, without error or defect); *Marshall v. City of Cambridge*, 38 N.E.2d 59 (Mass. 1941) (distinguishing between an omission and an inaccuracy). Based on the limited record before me, I find Respondent's October 10, 2002, and October 29, 2002, PACA license applications were incomplete, not inaccurate.

<sup>12</sup>*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 4 and Attach. 6 ¶ 3).

<sup>13</sup>*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 4).

<sup>14</sup>*See* Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 5).

November 5, 2002.<sup>15</sup> I conclude Respondent did not file a complete PACA license application until November 5, 2002, when the United States Department of Agriculture had in its possession: (1) Respondent's completed PACA license application form; (2) the bankruptcy petition, schedules, disclosure statements, and other documents relevant to Respondent's bankruptcy petition, as required by Respondent's affirmative response to question 9 on the PACA license application; and (3) the information identified in David N. Studer's September 26, 2002, letter.

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**In re: FRESH VALLEY PRODUCE, INC.  
PACA-APP Docket No. 01-0001.  
Decision and Order.  
Filed March 20, 2003.**

**PACA-APP – Actively involved – Failure to pay reparation award – Responsibly connected – Agency, scope of authority – Evidence, determination by AMS, admissible.**

The Judicial Officer (JO) affirmed Judge Baker's (ALJ) decision that Fresh Valley Produce, Inc. (Petitioner) was responsibly connected with Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC failed to pay a reparation award in violation of the PACA. The JO found Petitioner was the holder of 40 percent of the outstanding stock of Fresh Valley Food Service, LLC. The JO rejected the Petitioner's contention that Petitioner's president did not have authority to establish Fresh Valley Food Service, LLC and to make the Petitioner a member of Fresh Valley Food Service, LLC. The JO also rejected the Petitioner's argument that it was not actively involved in the activities that resulted in the violation of the PACA. The JO held that the violation of the PACA occurred when Fresh Valley Food Service, LLC failed to pay the reparation award by June 16, 2000, and not when Fresh Valley Food Service, LLC initially failed to make prompt payment for produce. Finally, the JO rejected the Petitioner's contention that the ALJ erred when she considered testimony that was not part of the record when the Chief of the PACA Branch made his determination that the Petitioner was responsibly connected with Fresh Valley Food Service, LLC. The JO stated, under 7 C.F.R. § 1.136(a), the record upon which the Chief of the PACA Branch bases his responsibly connected determination is only part of the record in the proceeding to review that determination.

George O. Krauja, for Petitioner.  
Ruben D. Rudolph, Jr., for Respondent.  
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

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<sup>15</sup>See Reply to Matter Concerning Date of Respondent's Application for PACA License (Attach. 6 ¶ 6).

### PROCEDURAL HISTORY

On January 31, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Fresh Valley Produce, Inc. [hereinafter Petitioner], was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].<sup>1</sup> On March 1, 2001, Petitioner filed a “Petition for Review of Determination That Fresh Valley Produce, Inc. Was Responsibly Connected” [hereinafter Petition for Review] pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent’s determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, when Fresh Valley Food Service, LLC violated the PACA.

On April 24, 2002, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a hearing in Tucson, Arizona. George O. Krauja, Law Offices of Fennemore Craig, Tucson, Arizona, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On May 31, 2002, Petitioner filed a “Post-Hearing Brief,” “Proposed Findings of Fact and Conclusions of Law,” an “Order,” and a “Notice of Lodging Transcript.” On June 28, 2002, Respondent filed “Proposed Finding of Fact, Conclusions of Law, and Order.” On July 26, 2002, Petitioner filed “Petitioner’s Reply in Support of Proposed Findings of Fact and Conclusions of Law” and “Objection to Respondent’s Proposed Findings of Fact and Conclusions of Law.” On August 14, 2002, Respondent filed “Response to Petitioner’s Reply.” On September 5, 2002, Petitioner filed “Petitioner’s Reply to Response Brief.”

On October 18, 2002, the ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent’s January 31, 2001, determination that Petitioner was responsibly connected with Fresh

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<sup>1</sup>On May 17, 2000, I issued a “Default Order” ordering Fresh Valley Food Service, LLC, to pay Denice & Filice Packing Company a reparation award no later than June 16, 2000. *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4). Fresh Valley Food Service, LLC, failed to pay the reparation award by June 16, 2000, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).



Valley Food Service, LLC on June 16, 2000, during the period of time Fresh Valley Food Service, LLC violated the PACA (Initial Decision and Order at 11).

On November 25, 2002, Petitioner appealed to, and requested oral argument before, the Judicial Officer. On December 16, 2002, Respondent filed "Respondent's Response to Petitioner's Appeal Petition." On December 20, 2002, Respondent filed "Respondent's Response to Request for Oral Hearing." On December 23, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Petitioner'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 Petitioner 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 most of the ALJ's discussion, most of the ALJ's findings of fact, and the ALJ's order affirming Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, during the period of time Fresh Valley Food Service, LLC violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's findings of fact and conclusions of law, as restated.

Petitioner's exhibits are designated by "PX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

#### **APPLICABLE STATUTORY PROVISIONS**

7 U.S.C.:

#### **TITLE 7—AGRICULTURE**

#### **CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

#### **§ 499a. Short title and definitions**

#### **(b) Definitions**

For purposes of this chapter:

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

**§ 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; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

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

....

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

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

is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

....

**§ 499g. Reparation order**

....

**(d) Suspension of license for failure to obey reparation order or appeal**

Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to the date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

**§ 499h. Grounds for suspension or revocation of license**

....

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

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

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

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which

the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;  
or

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

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

**§ 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)(9), 499b(4), 499d(b)(A)-(B), (c), 499g(d), 499h(b), 499p.

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

**Discussion**

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.<sup>2</sup> Respondent determined that Petitioner was responsibly connected with Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC violated the PACA. Petitioner bears the burden of proving by a preponderance of the evidence that: (1) it was not actively involved in the activities resulting in a violation of the PACA; and (2) either it was only nominally a partner, officer, director, or shareholder of Fresh Valley Food Service, LLC, or it was not an owner of Fresh Valley Food Service, LLC which was the *alter ego* of the owners of Fresh Valley Food Service, LLC.<sup>3</sup>

Petitioner is an Arizona corporation formed on March 18, 1998 (RX 11 at 1; Tr. 17). Petitioner's Articles of Incorporation provides that Petitioner's place of business is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Petitioner's statutory agent is James A. Soto, 441 N. Grand Avenue, Suite 13, Nogales, Arizona; Ruben Castillo and Arminda Cano serve on Petitioner's two-person board of directors; and Ruben Castillo and Arminda Cano are Petitioner's incorporators (RX 20). Petitioner is in the business of importing into the United States, as principal or agent, fruits and vegetables, and then selling, marketing, distributing, and brokering those fruits and vegetables (RX 20; Tr. 39-40).

Fresh Valley Food Service, LLC is an Arizona limited liability company formed on April 22, 1999 (PX 1; RX 7, RX 8, RX 11 at 1). Fresh Valley Food Service, LLC's Articles of Incorporation provides that Fresh Valley Food Service, LLC's registered office is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Fresh Valley Food Service, LLC's statutory agent is James A. Soto,

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<sup>2</sup>7 U.S.C. § 499a(b)(9).

<sup>3</sup>*Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1197 (D.C. Cir. 1998).

441 N. Grand Avenue, Suite 13, Nogales, Arizona; and Fresh Valley Food Service, LLC's members are Ruben Castillo, Paul Gober, and Kevin Vasquez (RX 7). On November 12, 1999, Fresh Valley Food Service, LLC filed First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC with the Arizona Corporation Commission in which Fresh Valley Food Service, LLC replaced the statutory agent and removed Paul Gober as a member and replaced him with Petitioner (RX 8).

Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC and invoiced Petitioner approximately \$299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC (PX 6; RX 11). Denice & Filice Packing Co. invoiced Petitioner \$85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC paid Denice & Filice Packing Co. for these peppers, and Denice & Filice Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC seeking payment for these peppers. (RX 11, RX 12, RX 19; Tr. 138-41.)

Fresh Valley Food Service, LLC never responded to the reparation complaint filed by Denice & Filice Packing Co., and the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC on May 17, 2000, based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC during the period August 28, 1999, through October 13, 1999. The Default Order orders Fresh Valley Food Service, LLC to pay Denice & Filice Packing Co. a reparation award of \$85,042 with interest and a \$300 filing fee. (RX 4.) Fresh Valley Food Service, LLC failed to pay the reparation award by June 16, 2000, in violation of the PACA.

Petitioner maintains it was not actively involved in the activities resulting in the violation of the PACA by Fresh Valley Food Service, LLC or other persons (Petitioner's Post-Hearing Brief at 3). Based upon a careful consideration of the record, I find Petitioner has failed to prove by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's violation of the PACA.

Petitioner maintains it does not meet the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) because it is not and never has been an owner of more than 10 percent of Fresh Valley Food Service, LLC (Petitioner's Post-Hearing Brief at 3). The record establishes that Petitioner owned 40 per centum of Fresh Valley Food Service, LLC (RX 1,

RX 2). Fresh Valley Food Service, LLC's PACA license application signed by Petitioner's president, Ruben Castillo, on May 20, 1999, and received by the United States Department of Agriculture on May 27, 1999, states Petitioner owns 40 percent of Fresh Valley Food Service, LLC (RX 1 at 3-8). Petitioner's owner, Arminda Cano, was informed of Petitioner's ownership interest in Fresh Valley Food Service, LLC in writing, when Petitioner's president, Ruben Castillo, resigned from Petitioner on December 12, 1999 (RX 9). Petitioner knew of its ownership interest in Fresh Valley Food Service, LLC through Petitioner's president, regardless of when Petitioner's owner was informed of the ownership interest. In addition, the First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC signed by Ruben Castillo on October 11, 1999, and filed with the Arizona Corporation Commission on November 12, 1999, recite Petitioner's ownership interest, as first stated by Petitioner's president in the May 1999 Fresh Valley Food Service, LLC application for a PACA license (RX 8).

Petitioner's arguments and contentions that Petitioner was not actively involved with Fresh Valley Food Service, LLC; that Petitioner was not a member of Fresh Valley Food Service, LLC; and that there is no nexus between Petitioner's activities and the activities of Fresh Valley Food Service, LLC are not sustained by the evidence.

The evidence is sufficiently persuasive that Petitioner is precluded from denying that it owned 40 percent of Fresh Valley Food Service, LLC when Fresh Valley Food Service, LLC violated the PACA and from denying that Petitioner was not otherwise responsibly connected with Fresh Valley Food Service, LLC. Petitioner is a company of four employees, two of whom knew of Petitioner's ownership interest in Fresh Valley Food Service, LLC through December 1999 (Tr. 49, 52-56).

The details of the involvement of Petitioner and Fresh Valley Food Service, LLC show that the two companies were inextricably intertwined. Petitioner and Fresh Valley Food Service, LLC had the same telephone and fax numbers and the same physical address (RX 1 at 2-4, RX 3 at 4-5, 8-9, 11, 13, 17, RX 7, RX 8 at 2, RX 16, RX 17, RX 18). Ruben Castillo was a founding member of both Petitioner and Fresh Valley Food Service, LLC (PX 1; RX 7, RX 20). Petitioner's attorney, James A. Soto, prepared the documents to establish both Petitioner and Fresh Valley Food Service, LLC and to obtain PACA licenses for both Petitioner and Fresh Valley Food Service, LLC. Petitioner's office manager, Sylvia Montanez, signed checks on behalf of Fresh Valley Food Service, LLC while working at Petitioner. (PX 1; RX 1 at 8, RX 3 at 17-20, RX 7, RX 16, RX 20; Tr. 49, 52-56.) Under the authority of Petitioner's president, Ruben Castillo, Petitioner became a 40 percent owner of Fresh Valley



Food Service, LLC.

Petitioner argues Arminda Cano, Petitioner's 100 percent owner, never authorized the creation of another company (Petitioner's Post-Hearing Brief at 3). Petitioner's Articles of Incorporation, and Arminda Cano herself, gave Ruben Castillo the broadest possible authority in running Petitioner (RX 20; Tr. 31-32). While Arminda Cano may not have expressly authorized the specific actions of Ruben Castillo, Arminda Cano knew of "problems" at Petitioner and participated in the firing of personnel even if Arminda Cano never visited Petitioner's place of business and at hearing allegedly did not know the last name of Petitioner's current president or his salary. According to Arminda Cano, she met Ruben Castillo only on two occasions; once when Ruben Castillo traveled to Los Angeles, California, to have her sign corporate documents. She further states, except for two meetings with Ruben Castillo in 1998, she never was in contact with him in any way. Allegedly, Arminda Cano is only informed of her business through her husband, Pedro Chavez, who lives in Mexico and visits the business infrequently. Arminda Cano made efforts to establish in her testimony that she only knows what her husband tells her of the business and that she is mainly concerned with raising her children. Her testimony and general demeanor leave some doubt as to the credibility of her testimony; however, the record does establish that she was not involved with the day-to-day management of Petitioner and that Ruben Castillo had broad authority to manage Petitioner. (Tr. 17-35, 41-42, 149.)

Ruben Castillo's actions in establishing Fresh Valley Food Service, LLC to conduct business in conjunction with Petitioner were contemplated expressly in Petitioner's Articles of Incorporation that Arminda Cano signed (RX 3 at 18-20). The indemnification clause of the Articles of Incorporation contemplates the formation of joint ventures, partnerships, or "other enterprises," as follows:

**ARTICLE 9.** The Corporation shall indemnify any person who incurs expenses or liabilities by reason of the fact he or she is or was an officer, director, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprises. This indemnification shall be mandatory in all circumstances in which indemnification is permitted by law.

RX 3 at 19.

Both Ruben Castillo and Arminda Cano signed the Articles of Incorporation.

Because “partnership” and “other enterprises” were contemplated in Petitioner’s Articles of Incorporation, Ruben Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as president of Petitioner.

The evidence suggests that Arminda Cano was not as unaware of the business activities of Petitioner as she would have one believe. However, even if the 100 percent shareholder was initially unaware of the existence of Fresh Valley Food Service, LLC, Ruben Castillo informed Arminda Cano that Petitioner owned Fresh Valley Food Service, LLC as early as 6 months prior to the June 16, 2000, PACA violation. In his December 12, 1999, resignation letter to Arminda Cano, Ruben Castillo informed her Petitioner “owned” Fresh Valley Food Service, LLC (RX 9 at 2). The evidence at the hearing also showed that Petitioner was informed of the actions of Fresh Valley Food Service, LLC as early as August 1999. In a letter dated February 24, 2000, to Denice & Filice Packing Co., Petitioner’s attorney states Petitioner has not been provided information from Fresh Valley Food Service, LLC for 6 months (PX 7 at 2; RX 13 at 2). This letter implies Petitioner had been informed of the activities of Fresh Valley Food Service, LLC in August 1999.

Petitioner’s claim that it had no knowledge of Fresh Valley Food Service, LLC prior to the time it was contacted by Denice & Filice Packing Co. for collection, is completely untenable and not supported by the evidence. Denice & Filice Packing Co. routinely billed Petitioner, not Fresh Valley Food Service, LLC for produce Fresh Valley Food Service, LLC ordered, and Petitioner paid these bills. Denice & Filice Packing Co. transacted approximately \$299,000 of business by billing Petitioner for produce purchased by Fresh Valley Food Service, LLC and Petitioner paid these bills from its corporate account (Tr. 138-40). Petitioner’s claim of ignorance of the existence of Fresh Valley Food Service, LLC is unsupported. Fresh Valley Food Service, LLC was run out of Petitioner’s own office. Petitioner conducted business with Denice & Filice Packing Co. and paid for the produce Fresh Valley Food Service, LLC purchased until August 1999.

I have considered Petitioner’s many arguments and contentions but do not find them convincing or sustainable in law and fact.

Denice & Filice Packing Co. was being paid by the Petitioner, not by Fresh Valley Food Service, LLC and the reparation complaint and subsequent reparation order, which was not paid in violation of the PACA, stemmed from Petitioner’s failure to continue to pay for produce ordered by Fresh Valley Food Service, LLC. The evidence and record establish Petitioner was actively involved in activities resulting in the PACA violation committed by Fresh Valley Food Service, LLC.

In this proceeding, Petitioner failed to prove it did not exercise judgment, discretion, or control over the actions that resulted in the non-payment of the reparation award.

Petitioner's argument that ignorance of the underlying transactions as they occurred equates to no active involvement, mischaracterizes the violation of the PACA which was the basis of Respondent's determination, and thwarts the main goal of the responsible connection doctrine. Following the concepts set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), and *Bell v. Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), the Judicial Officer in *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), enunciated one of the main goals of finding a party responsibly connected to a PACA violator:

Responsibility is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should know, about violations being committed and that they be held responsible for their failure to "counteract or obviate the fault of others." [Quoting *Bell* at 1201].

In the instant proceeding, as a 40 percent owner of the violating PACA licensee, Petitioner was in a position to know of the transactions. Petitioner knew that Fresh Valley Food Service, LLC was purchasing produce from Denice & Filice Packing Co. and knew that Fresh Valley Food Service, LLC in which it held 40 percent ownership was not paying for produce. Petitioner could have obviated the fault of the company it owned but did not. Petitioner had paid for produce ordered by Fresh Valley Food Service, LLC but chose not to continue paying. Petitioner must be found responsibly connected to Fresh Valley Food Service, LLC in which it had an ownership interest, and which ran its business operations out of Petitioner's office.

#### **Findings of Fact and Conclusions of Law**

1. Petitioner is an Arizona corporation whose principal address is 1555 Calle Plata, Suite 203, Nogales, Arizona 85621-4569. Petitioner has been at the 1555 Calle Plata, Suite 203, Nogales, Arizona, location since September 2000.

2. Petitioner's principal place of business was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time the company was established on March 18, 1998, until September 2000.

3. The principle place of business of Fresh Valley Food Service, LLC

was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time Fresh Valley Food Service, LLC was formed on April 22, 1999, and this address is the last known address for Fresh Valley Food Service, LLC. Until September 2000, Fresh Valley Food Service, LLC and Petitioner shared the same telephone and fax numbers.

4. Petitioner currently employs four people, including its president, Victor Hernandez. Victor Hernandez has worked for Petitioner since the inception of the company in 1998.

5. Sylvia Montanez was Petitioner's office manager until December 1999. Ruben Castillo was Petitioner's president until December 1999.

6. Petitioner owned 40 percent of Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA by failing to pay a reparation award. Petitioner's former president, Ruben Castillo, owned 25 percent of Fresh Valley Food Service, LLC during the period of May 27, 1999, through May 27, 2000.

7. Arminda Cano owns 100 percent of Petitioner. Arminda Cano is 32 years old, with a high school education. Arminda Cano maintained she has never been involved with the day-to-day management of Petitioner although she has signed papers, participated in firing one of Petitioner's employees, and was aware of problems. Arminda Cano lives in California and has never visited Petitioner's place of business in Arizona.

8. Arminda Cano is married to Pedro Chavez who lives in Mexico, but visits Arizona on occasion. Pedro Chavez created Petitioner and placed the company's ownership in his wife's name. Pedro Chavez makes management decisions at Arminda Cano's company, and Petitioner's current president, Victor Hernandez, informs Pedro Chavez of the business activities of Petitioner.

9. Arminda Cano was aware of Petitioner's ownership interest in Fresh Valley Food Service, LLC since at least December 1999, when, at the time of his resignation as president, Ruben Castillo informed Arminda Cano that Petitioner had an ownership interest in Fresh Valley Food Service, LLC.

10. Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC and invoiced Petitioner approximately \$299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC. Denice & Filice Packing Co. invoiced Petitioner \$85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC paid Denice & Filice Packing Co. for these peppers, and Denice & Filice

Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC seeking payment for these peppers. Fresh Valley Food Service, LLC never responded to the reparation complaint filed by Denice & Filice Packing Co.

11. On May 17, 2000, the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC during the period August 28, 1999, through October 13, 1999. Fresh Valley Food Service, LLC failed to pay the May 17, 2000, reparation award by June 16, 2000, in violation of the PACA.

12. Fresh Valley Food Service, LLC had its PACA license suspended for failure to pay the May 17, 2000, reparation award by June 16, 2000. Fresh Valley Food Service, LLC's PACA license terminated on July 12, 2000, when it failed to pay its annual fees.

13. On January 31, 2001, Respondent issued a determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA.

14. Petitioner has failed to demonstrate by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's June 16, 2000, violation of the PACA.

15. Petitioner has failed to demonstrate by a preponderance of the evidence that it was only nominally a shareholder of Fresh Valley Food Service, LLC.

16. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA.

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

Petitioner raises two issues in its "Petition for Appeal to Judicial Officer" [hereinafter Appeal Petition]. First, Petitioner contends it is not and never has been a holder of more than 10 per centum of the stock of Fresh Valley Food Service, LLC; therefore, Petitioner does not meet the definition of term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) (Appeal Pet. at 1-10).

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a

corporation or association.<sup>4</sup> Petitioner contends Respondent failed to prove by a preponderance of the evidence that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC<sup>5</sup> (Appeal Pet. at 4).

Petitioner states Fresh Valley Food Service, LLC's Articles of Organization, filed with the Arizona Corporation Commission on April 22, 1999, lists only Paul Gober, Ruben C. Castillo, and Kevin Vasquez as members of Fresh Valley Food Service, LLC (PX 1). Petitioner argues it was not even nominally a member of Fresh Valley Food Service, LLC until November 12, 1999, when Fresh Valley Food Service, LLC filed the First Amended and Restated Articles of Organization with the Arizona Corporation Commission listing Ruben C. Castillo, Kevin Vasquez, and Petitioner as members (PX 3). Petitioner correctly points out that the First Amended and Restated Articles of Organization, in which Petitioner is first listed as a member of Fresh Valley Food Service, LLC were not filed with the Arizona Corporation Commission until approximately 1 month after the last produce transaction that was the subject of *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204. (Appeal Pet. at 5.) However, the issue in this proceeding is whether Petitioner was responsibly connected with Fresh Valley Food Service, LLC on June 16, 2000, when Fresh Valley Food Service, LLC violated the PACA by failing to pay the reparation award which the Judicial Officer ordered it to pay in *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4).

Petitioner further argues that none of the corporate documents issued by Petitioner or Fresh Valley Food Service, LLC show Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC because, while these documents may identify Petitioner as a member of Fresh Valley Food Service, LLC they do not reveal the per centum of stock in Fresh Valley Food Service, LLC held by Petitioner (Appeal Pet. at 5-6).

The record contains two documents issued by Fresh Valley Food Service, LLC that establish that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC. In Fresh Valley Food Service, LLC's application for a PACA license, signed by Ruben Castillo on May 20, 1999, and filed on May 27, 1999, Fresh Valley Food Service, LLC reported to the United States Department of Agriculture that Petitioner held

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<sup>4</sup>See note 2.

<sup>5</sup>Respondent does not allege Petitioner was a partner of Fresh Valley Food Service, LLC or an officer or director of Fresh Valley Food Service, LLC.

40 per centum of the outstanding stock, Ruben Castillo held 25 per centum of the outstanding stock, Paul Gober held 25 per centum of the outstanding stock, and Kevin Vasquez held 10 per centum of the outstanding stock (RX 1; Tr. 91-93). Again in Fresh Valley Food Service, LLC's unsigned operating agreement submitted by Kevin Vasquez to the United States Department of Agriculture in June 2000, Petitioner is identified as owning a 40 percent interest, Ruben Castillo is identified as owning a 25 percent interest, Paul Gober is identified as owning a 25 percent interest, and Kevin Vasquez is identified as owning a 10 percent interest (RX 2 at 2; Tr. 102-04).

Finally, Petitioner states the only documents purporting to make Petitioner a member of Fresh Valley Food Service, LLC are signed by Petitioner's former president, Ruben Castillo. Petitioner contends Ruben Castillo had no authority to establish Fresh Valley Food Service, LLC and to make Petitioner a member of Fresh Valley Food Service, LLC. (Appeal Pet. at 6-10.)

Ruben Castillo had broad authority to run Petitioner. While Arminda Cano, Petitioner's sole stockholder testified she never authorized Ruben Castillo to make Petitioner a member of Fresh Valley Food Service, LLC (Tr. 20), her testimony indicates she provided almost no oversight over the actions of Petitioner or Ruben Castillo and Ruben Castillo "was in charge of everything" (Tr. 32).

Further, Petitioner's Articles of Incorporation contemplate the formation of corporations, partnerships, joint ventures, trusts, or other enterprises and expressly provides for the indemnification of Petitioner's officers, directors, employees, or agents serving at Petitioner's request as directors, officers, employees, or agents of another corporation, partnership, joint venture, trust, or enterprise (RX 3 at 19). Both Ruben Castillo and Arminda Cano signed these Articles of Incorporation (RX 3 at 20). I agree with the ALJ's conclusion that "[b]ecause 'partnership' and 'other enterprises' were contemplated in Petitioner's Articles of Incorporation, Mr. Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as President of Petitioner." (Initial Decision and Order at 7.)

Petitioner argues that the indemnification clause in article 9 of the Articles of Incorporation does not mean that Petitioner's president was vested with authority to unilaterally form another entity and to make Petitioner a member of that entity (Appeal Pet. at 8). I reject Petitioner's argument. The record reveals that Ruben Castillo was vested with authority to perform every corporate function (Tr. 32). Petitioner ratified Ruben Castillo's action by paying for produce purchased by Fresh Valley Food Service, LLC. Finally, pursuant to section 16 of the PACA (7 U.S.C. § 499p) the act of Petitioner's

officer, Ruben Castillo, is deemed the act of Petitioner.

Second, Petitioner contends the ALJ based her conclusion that Petitioner was actively involved in activities resulting in Fresh Valley Food Service, LLC's violation of the PACA on Petitioner's payment of \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC. Petitioner contends the ALJ's finding that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC is not supported by the record. (Appeal Pet. at 2.)

I disagree with Petitioner's contention that the ALJ's finding that Petitioner paid Denice & Filice Packing Co. \$217,000 for produce ordered by Fresh Valley Food Service, LLC is error. I find the record contains substantial evidence that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC.

Petitioner states the Denice & Filice Packing Co. representative who testified did not specify who paid Denice & Filice Packing Co. \$217,000 of the \$299,000 owed for produce. I disagree with Petitioner. Mark Bauman, chief financial officer for Denice & Filice Packing Co. testified that Denice & Filice Packing Co. invoiced Petitioner for produce sold to Fresh Valley Food Service, LLC and Petitioner paid the \$217,000 at issue, as follows:

[BY MR. RUDOLPH:]

Q. All right. And are you familiar with the Petitioner?

[BY MR. BAUMAN:]

A. Yes.

Q. How are you familiar with the Petitioner?

A. The L.L.C. would order products through our company. We would pack it for them and then ship it to their customers.

....

Q. How are you familiar with the Petitioner, the corporation Fresh Valley Produce, Inc.?

A. When Kevin Vasquez first came to us he represented that he worked for the corporation.

Q. Okay.



A. And then subsequently when we started doing business with them they brought business cards saying that they were an L.L.C. And our sales manager did not want to extend credit to the L.L.C. so he told Kevin we were going to invoice the corporation.

And he told me he called Ruben Castillo and informed him that if he wanted to do business with us we would be billing the corporation for any product they bought from us.

....

Q. ....

Do you recall what period of, what time period that Kevin Vasquez first approached you?

A. It would have been early in '99, probably February or March of '99.

Q. Okay. And then later on you said you were supposed, you were going to do business or it was proposed to do business with the L.L.C., Kevin Vasquez has proposed to do business with the L.L.C.?

A. Yes. Yeah, they came to us and said that they have now formed an L.L.C. And that's when we told them we didn't want to do business with an L.L.C. that had no track record.

Q. And why did, how long after you set up this account did Kevin Vasquez bring up the L.L.C.?

A. Would have been about May or June.

Q. Okay. So a couple months after the account had been set up. All right.

I'm handing you what's been marked as Respondent's Exhibit Number 19.

....

Q. Do you know what this document is?

A. This is an invoice that was faxed over to us from Fresh Valley Food Service, L.L.C. for us to pack 84 boxes of 25 pound large peppers and ship them to Boys Market in Delray Beach, Florida. And we filled that order on the 24th and it's initialed by the sales manager. And that number 76287 is the invoice number where we would have invoiced the corporation.

Q. So in this transaction you packed, your company packed the peppers and sent them to the ship to address of Boys Farmers?

A. That's correct.

Q. And how were you going to get paid for these peppers that you packed?

A. We invoiced the corporation for the peppers.

Q. Okay.

A. And have been paid for them.

Q. So you sent your invoice?

A. 76287.

Q. To Fresh Valley Produce?

A. Yes.

Q. The corporation?

A. Yes.

Q. And there was no dispute over this invoice was there?

A. Not at all.

Q. You were paid?

A. We were paid.

....

Q. Okay. Of course your company didn't get paid for some invoices; is that correct?

A. That's correct. We invoiced them for about \$299,000 worth of product. They paid for about 217. And there's 82,000 left to pay, approximately.

Tr. 135-40.

Petitioner correctly states Mark Bauman does not specify who “they” is in his last response in the above-quoted testimony (Appeal Pet. at 10-11). However, the record clearly establishes Mark Bauman was referring to Petitioner when he used the words “them” and “they” in his last response in the above-quoted testimony.<sup>6</sup>

Further, Petitioner notes Mark Bauman’s testimony was not part of the record when Respondent made his January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC (Appeal Pet. at 11). I agree with Petitioner. However, I do not conclude the ALJ erred by relying on Mark Bauman’s testimony because it was not part of the record when Respondent made his January 31, 2001, determination.

Under the Rules of Practice, the record upon which the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, bases a responsibly connected determination is only part of the record in a proceeding to review that determination.<sup>7</sup> Petitioner filed Petition for Review of Respondent’s January 31, 2001, determination on March 1, 2001. A petition for review is deemed a request for hearing.<sup>8</sup> Moreover, Petitioner specifically requested a hearing in the Petition for Review (Pet. for Review at 1). The Rules of Practice provides for the receipt of witness testimony at hearings.<sup>9</sup> The administrative law judge’s decision must be made in accordance with 5 U.S.C. § 556<sup>10</sup> which requires that the decision be based on consideration of the whole record or those parts of the record cited by a party.<sup>11</sup> Therefore, I find the ALJ did not err when she considered the testimony given by Mark Bauman at the April 24, 2002, hearing.

Finally, Petitioner contends Denice & Filice Packing Co.’s institution of a

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<sup>6</sup>See *Wiley v. Borough of Towanda*, 26 F. 594, 595 (C.C.W.D. Pa. 1886) (finding, even though the word “they” was sometimes employed in an agreement, the parties were referring to a corporation).

<sup>7</sup>See 7 C.F.R. § 1.136(a).

<sup>8</sup>See 7 C.F.R. § 1.141(a).

<sup>9</sup>See 7 C.F.R. § 1.141(h)(1).

<sup>10</sup>See the definition of the word *decision* in 7 C.F.R. § 1.132.

<sup>11</sup>See 5 U.S.C. § 556(d).

reparation proceeding only against Fresh Valley Food Service, LLC makes clear that Denice & Filice Packing Co. knew it contracted only with Fresh Valley Food Service, LLC and knew only Fresh Valley Food Service, LLC was liable to Denice & Filice Packing Co. for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Petitioner contends, if Denice & Filice Packing Co. thought Petitioner was involved with or responsible for Fresh Valley Food Service, LLC, Denice & Filice Packing Co. would have instituted the reparation action against Petitioner. (Appeal Pet. at 11.)

The record establishes Denice & Filice Packing Co. viewed Petitioner as related to Fresh Valley Food Service, LLC and responsible for payment for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Mark Bauman testified that Denice & Filice Packing Co. viewed Petitioner responsible for paying for produce that Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC and that in hindsight, Denice & Filice Packing Co. probably should have instituted the reparation action against both Petitioner and Fresh Valley Food Service, LLC (Tr. 135-41). Denice & Filice Packing Co. sent Petitioner a written demand for payment for produce sold to Fresh Valley Food Service, LLC sometime prior to February 3, 2000 (RX 10). When Petitioner refused to pay, Denice & Filice Packing Co. responded with a letter dated February 8, 2000, from its attorney again demanding payment from Petitioner (RX 11). Finally, in a letter dated February 9, 2000, Denice & Filice Packing Co. requested that the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, request Petitioner "and/or" Fresh Valley Food Service, LLC make full payment to Denice & Filice Packing Co. (RX 12).

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

#### **ORDER**

I affirm Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC during the period of time that Fresh Valley Food Service, LLC violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATION DECISIONS**

**THOMAS PRODUCE COMPANY v. LANGE TRADING COMPANY,  
INC.**

**PACA Docket No. R-02-120.**

**Decision and Order.**

**Filed January 30, 2003.**

**PACA – Contracts – Novation.**

Where Respondent buyer was concluded to have accepted a load of tomatoes because it failed to prove that it gave notice of rejection within the time required in the Regulations, but did convey its complaint about the load to Complainant's seller, and its opinion that the load could bring more money if sold elsewhere, Complainant's repossession of the load with Respondent's permission did not constitute a novation of, or rescission of, the contract, and Complainant was deemed to have acted as Respondent's agent in reselling the tomatoes. Inspection of the tomatoes at Complainant's request after the repossession showed that the tomatoes made good delivery, and Respondent was liable for the contract price, less the amount realized on resale.

Mike D. Bess, for Complainant.

Respondent is Pro Se.

Patricia Harps, Presiding Officer.

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

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$10,039.50 in connection with one truckload of tomatoes shipped in the course of interstate commerce.

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

The amount claimed in the formal complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were

given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement and a statement in reply. Respondent filed an answering statement. Both parties also filed a brief.

### Findings of Fact

1. Complainant, Thomas Produce Company, Inc., is a corporation whose post office address is 9905 Clint Moore Road, Boca Raton, Florida, 33496.
2. Respondent, Lange Trading Company, Inc., is a corporation whose post office address is 5231 S. 6th Street, Springfield, Illinois, 62703. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about November 22, 1999, Complainant sold to Respondent, and shipped from loading point in Boca Raton, Florida, to Respondent's customer, Veg Fresh, in Los Angeles, California, 1,600 cartons of medium tomatoes at \$7.00 per carton, or \$11,200.00, plus \$0.85 per carton for palletizing, or \$1,360.00, and \$23.50 for a temperature recorder, for a total f.o.b. contract price of \$12,583.50.
4. The tomatoes mentioned above arrived at the place of business of Veg-Fresh Farms LLC ("Veg-Fresh"), in Los Angeles, California, on Friday, November 26, 1999, at which time Veg-Fresh complained that the tomatoes did not meet good delivery guidelines, and advised that, due to the holiday weekend, an inspection could not be performed until the following Monday. Veg-Fresh also advised that the load would probably return more money if it was moved to a wholesale street market where it could be more readily sold. Complainant subsequently agreed to move the load to a receiver of its own choosing, Continental Tomato Packers in Sacramento, California.
5. On Tuesday, November 30, 1999, the tomatoes were federally inspected at the place of business of Continental Tomato Packers in Sacramento, California, the report of which disclosed, in relevant part, as follows:

TEMPERATURES: 49 to 52°  
PRODUCT: Tomatoes  
BRAND/MARKINGS: "7-T's"  
ORIGIN: FL  
LOT ID: 914611 = USDA  
NUMBER OF CONTAINERS: 1600 Cartons  
INSP. COUNT: N

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AVERAGE DEFECTS	including SER. DAM.	including V.S. DAM.	OFFSIZE/DEFECTS
01 %	00 %	00 %	Quality (Scars, [illeg.], Miss.)
01 %	00 %	00 %	Bruising, scattered throughout the pack
08 %	03 %	00 %	Sunken discolored areas (4 to 14%)
04 %	04 %	04 %	Soft (2 to 9%)
04 %	04 %	04 %	Decay (4 to 7%)
18 %	11 %	08 %	Checksum

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

6. On December 4, 1999, Mr. John M. Moore, the salesman who negotiated the transaction on behalf of Complainant, sent a letter to Mr. Thomas Banks, the salesman who negotiated the transaction on behalf of Respondent. The letter reads as follows:

Your customer in California rejected this load of tomatoes on November 26, 1999. Due to the information that you supplied to me about the quality of the load, I found a Customer of mine to take this load from you. My customer, Continental Tomato Packers, received the load of tomatoes on November 30, 1999. I instructed Continental to have the load inspected ASAP. This load was sold based off of a U.S. Combination Grade. CTP had the load inspected as US # 1. Enclosed is a copy of the Inspection. The inspection was taken on November 30, 1999, four days after your customer had received the load. The inspection shows that the grade on these tomatoes was 82% and was slightly out of grade on serious damage. I believe that if the inspection had been taken in a timely fashion that there would have been no reason for this load to be rejected. This load was sold for \$7.85 per case F.O.B. Boca Raton, Florida. As a result, Thomas Produce will seek any shortfall of moneys received by Continental from the Lange Trading Company, Inc.

7. On December 7, 1999, Respondent's Thomas Banks responded to the letter set forth above with a letter addressed to Complainant's John M. Moore, which reads as follows:

In response to your letter dated December 4, 1999, our customer in California did not reject this load.

As per our phone conversation on Saturday, November 27, 1999, we informed you that the tomatoes were not up to our customer's standards because of very high color, some soft, decay and rain check. Due to the holiday, our customer would not be able to get an inspection until

Monday 29, 1999 as indicated to you.

You made the decision that you would be better off sending the load to a market with some street trade as our customer's only outlet for a load with these problems would be to sell them for salsa at around two to two and ½ dollars at the time.

In our conversation you agreed to take the load back and place it with your customer, Continental Tomato Packers. As such, Lange Trading was relieved of any and all liability for payment of this load of tomatoes.

Therefore, your letter dated December 4, 1999 is contradictory to our understanding of the new agreement entered into with you on Saturday, November 27, 1999 and has no relevance or merit.

8. Continental Tomato Packers paid Complainant \$2,544.00 for the tomatoes with check number 014653, dated December 30, 1999.
9. The informal complaint was filed on May 15, 2000, which is within nine months from the accrual of the cause of action.

### **Conclusions**

Complainant brings this action to recover the unpaid balance of the contract price for one trucklot of tomatoes that it states was wrongfully rejected by Respondent's customer, Veg-Fresh Farms, LLC, in Los Angeles, California. Complainant maintains that after the tomatoes arrived at Veg-Fresh, Respondent reported that the tomatoes were unacceptable and that Veg-Fresh was rejecting them, so Complainant moved the tomatoes to another receiver, Continental Tomato Packers, in Sacramento, California, and had them federally inspected. The inspection, Complainant states, revealed that the tomatoes were in suitable shipping condition. Accordingly, Complainant maintains that the rejection of the tomatoes was not justified, and claims that it incurred damages as a result of the rejection totaling \$10,039.50, which amount represents the difference between the resale proceeds of \$2,544.00 received from Continental Tomato Packers, and the \$12,583.50 contract price with Respondent.

In response to Complainant's allegations, Respondent attached to its sworn answer the affidavit of its salesman, Mr. Thomas Banks. In the affidavit, Mr. Banks states that he received notice that there was a problem with the tomatoes early in the morning on Saturday, November 27, 1999. At that time, Mr. Banks



states he was advised that an inspection had been called for upon arrival of the load on Friday, but that the inspector never showed up, so the load could not be inspected until the following Monday morning. Mr. Banks states that his customer, Veg-Fresh, wanted him to call the shipper and tell him that the load showed very high color, some soft, some decay and some rain check. According to Mr. Banks, Veg-Fresh also advised that the shipper would be better off placing the load in a market with some street trade, as all Veg-Fresh would be able to do was sell it for salsa. Mr. Banks states that he called Complainant's John Moore and relayed his customer's opinion of the product, and that to his surprise, Mr. Moore did not insist upon an inspection and agreed to take the load back. After Complainant moved the load to Continental Tomato Packers, Mr. Banks states he did not hear anything further until December 6, 1999, when he received a letter via facsimile from Mr. Moore stating that Respondent's customer rejected the tomatoes, and seeking monies to cover any shortfall in the payment received from Continental Tomato Packers (see Finding of Fact 6). Mr. Banks adds that he took prompt exception to this letter with his letter of December 7, 1999, which Mr. Moore did not refute (see Finding of Fact 7).

In response to Mr. Banks' allegations, Complainant submitted a sworn statement signed by its salesman, Mr. John Moore, as its opening statement. In the statement, Mr. Moore contends that when the tomatoes arrived at the place of business of Respondent's customer, Mr. Banks advised that his customer couldn't use the load and that the tomatoes were still on the truck. According to Mr. Moore, Mr. Banks stated that the reason his customer didn't want the tomatoes was because they had high color, decay, and softness. Mr. Moore states that Mr. Banks also advised that perhaps the tomatoes could be sold for \$2.00 per carton by taking them to a processor where they could be used to make salsa, or they could be taken to another local wholesaler and sold on the street. Mr. Moore explains that he sold the tomatoes for \$7.85 per carton, so he obviously didn't want the tomatoes to be sold for \$2.00 per carton, but he also did not know any local wholesalers. Mr. Moore states that he only agreed to move the tomatoes because Respondent didn't want them, so he found a receiver in Sacramento who agreed to take the load, and he had the tomatoes inspected there. Mr. Moore states that he got the inspection because he wanted to see what type of problems the tomatoes had. Mr. Moore states further that the inspection showed that the product didn't have high color and decay as Respondent's customer had reported, and that in fact, eight days after shipment, the tomatoes still made good delivery. Mr. Moore states that immediately after the inspection, he called Mr. Banks and told him that the tomatoes didn't have the quality problems that he said they did. Mr. Moore states he also told Mr. Banks that the rejection was unjustified and that he would be holding him liable

for any damages.

The primary issue to be decided here is whether Respondent was relieved of liability for the tomatoes when Complainant agreed to move the load to Continental Tomato Packers. There is no dispute that after Respondent's customer complained about the condition of the tomatoes, Complainant found its own receiver, Continental Tomato Packers, to receive and resell the load. The legal significance which should be attached to Complainant's voluntary repossession of the tomatoes, consented to by Respondent, will be determined by the context within which the repossession took place. The parties did not, at the time, verbally agree to any particular legal significance to the repossession. Complainant's salesman, John Moore, claims that he repossessed the load because he thought Respondent had rejected. However, Mr. Moore admits that Respondent's Thomas Banks did not say he was rejecting.<sup>1</sup> Mr. Moore's description of what he was told by Thomas Banks, given in Complainant's Opening Statement, is as follows:

. . . Mr. Banks told me that his customer couldn't use the load and that they were still on the truck. Mr. Banks stated the reason his customer didn't want the tomatoes was because they had high color, decay, and softness. He told me that perhaps the tomatoes could be sold for \$2 per carton, by taking them to a processor, where they could be used to make salsa. Or they could be taken to another local wholesaler and sold on the street.

Thomas Banks' version of the conversation, contained in an affidavit attached to the Answer, is as follows:

. . . Early Saturday morning on November 27, 1999, I received a message that there was a problem with the Thomas Produce load. The buyer had called for an inspection on Friday when the load had arrived but the inspector did not show up. Due to the Thanksgiving holiday weekend, the load, which, was still on the truck could not be inspected until Monday morning. Veg Fresh wanted me to call the shipper and tell him the load showed very high color, some soft, some decay and some rain check. He said the shipper would be better off placing the load in a market with some street

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<sup>1</sup>An attempt to thrust possession back upon the seller is the very essence of a rejection. "Somewhat simplified, rejection is a combination of the buyer's refusal to keep delivered goods and his notification to the seller that he will not keep them." B J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 8B1, p. 247 (1972).

trade as all Veg Fresh would be able to do with it was to sell it for salsa. I called John Moore with Thomas Produce and relayed my customer's opinion of the product. To my surprise, he did not insist on an inspection, he agreed to take the load back.

Neither of these descriptions of what occurred necessarily entails a rejection of the tomatoes by Respondent.<sup>2</sup>

If Respondent did not reject, it is still pertinent to inquire whether Respondent had accepted the load before it was repossessed by Complainant. This will require a discussion of the reasonable time provision of the Regulations (see 7 C.F.R. 46.2(cc)), and an inquiry as to whether, and when an inspection was requested. Mr. Moore, in Complainant's Statement in Reply, related a conversation he had with an official in the Inspection Service in an effort to show that no inspection was requested. However, the statements attributed to the official in the Inspection Service are hearsay, and, furthermore, it is improper to submit new evidence in a Statement in Reply because there is no opportunity for the other party to rebut the evidence. Respondent's Michael Smith did, however, attempt to rebut the evidence by relating his own conversation with the same official in the Inspection Service in Respondent's brief. Evidence, however, cannot be received in connection with a brief. Accordingly, both the Statement in Reply and Brief, insofar as they relate to the issue of whether an inspection was called for, will be ignored. Without considering these submissions, a preponderance of the evidence of record supports Respondent's contention that an inspection was called for on November 26th.

The relevant "reasonable time" within which rejection or acceptance must take place is defined by the Regulations in section 46.2 (cc)(2) as follows:

For fresh fruits and vegetables . . . with respect to truck shipments, not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection;  
. . .

Paragraphs (3) and (4) of the same section provide that:

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<sup>2</sup>A rejection by Respondent's customer to Respondent does not have the effect of causing a rejection by Respondent to Complainant. A . . . rejections must be made by each buyer to [its] own seller, and must be clearly communicated as such. [See] *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

(3) If, within the applicable period, the receiver cannot make a thorough inspection due to adverse weather conditions or applies for but cannot obtain Federal inspection before the end of this period, and so notifies the consignor within the applicable period, the period shall be extended until weather conditions permit inspection or until Federal inspection is made, as the case may be, plus two hours after either an oral or written report of the results of such inspection is made available to the receiver; and

(4) In computing the time periods specified above, (i) for shipments arriving on non-work days or after the close of regular business hours on work days when a representative of the receiver having authority to reject shipments is not present, non-working hours preceding the start of regular business hours on the next working day shall not be included; and (ii) for shipments arriving during regular business hours when a representative of the receiver having authority to reject shipments customarily is present, the period shall run without interruption except that, for shipments arriving less than two hours before the close of regular business hours, the unexpired balance of the time period shall be extended and run from the start of regular business hours on the next working day.

The subject load arrived on November 26th, a Friday. Respondent has not submitted any evidence as to the time of arrival on the 26th. Respondent states that notice to Complainant was not given until early on the 27th. Respondent does not state what is meant by “early,” but in view of our lack of knowledge of the arrival time on the 26th this is hardly consequential. Respondent had the burden of proof as to notice, and has failed to prove that the federal inspection was requested within the requisite 8 hours following arrival, or, even if it was so requested, that notice was given to Complainant, within the applicable 8 hour period, that the inspection would be delayed.<sup>3</sup> In fact, given the fact that Respondent’s first notice to Complainant was the day following arrival, it seems unlikely that this latter notice would have been within the requisite 8 hours. Accordingly, we must conclude that Respondent accepted the load.<sup>4</sup>

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<sup>3</sup>See *Robert Ruiz Inc. v. Hale Brothers, Inc. and/or Hubert H. Nall Co., Inc.*, 43 Agric. Dec. 572 (1984).

<sup>4</sup>The Uniform Commercial Code, section 2B606, states, in part, that “[a]cceptance occurs when the buyer . . . fails to make an effective rejection . . .” The Regulations (7 C.F.R. '46.2(dd)) state,  
(continued...)

Respondent makes much of the fact that Complainant's repossession of the load was voluntary. This does indeed show that Respondent did not reject. However, when we question the significance of the repossession as an indication that the contract was voided, we fail to see that a voluntary repossession by Complainant is any more relevant than the fact that Respondent voluntarily relinquished possession.<sup>5</sup> Neither of these voluntary actions tells us that either party intended thereby to void the contract. If Complainant had taken back a load that Respondent had yet to accept there would be considerable legal significance.<sup>6</sup> However, as we have already determined that the load had been accepted by Respondent, we think that, in view of the total lack of evidence as to any expressed agreement between the parties attendant upon the repossession of the load, it is best to attribute the minimum significance possible to the repossession of the load. That significance is merely that Complainant acted as Respondent's agent in the disposition of the load in an effort to minimize damages. At the point at which Complainant repossessed the load neither party knew for certain whether the load had made good delivery. What they did know was that Respondent's customer had stated that it was in no position to get a good price for the tomatoes. Therefore, Complainant's voluntary repossession of the load at that point, with Respondent's voluntary permission, was a prudent action to minimize damages.<sup>7</sup>

As we have determined that Respondent accepted the tomatoes, Respondent is liable to Complainant for the full contract price of the tomatoes, less any

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<sup>4</sup>(...continued)

in part, that "[a]cceptance' means: . . . [f]ailure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section . . . ."

<sup>5</sup>There can be no doubt but what Respondent's relinquishment of the load was voluntary. If Respondent had already accepted the load at the time Complainant sought to repossess it then Complainant could not have repossessed it without Respondent's permission, for it was, by virtue of Respondent's acceptance, Respondent's property. If Respondent had not accepted the load at the time Complainant sought to repossess it, all Respondent had to do to prevent Complainant from gaining possession was to accept it.

<sup>6</sup>Complainant would be repossessing its own goods. This would not necessarily mean that there was a novation of the contract, but, if the repossession did not accomplish a novation Complainant could nevertheless not recover the contract price, but would be relegated to damages for non-acceptance under UCC section 2B708.

<sup>7</sup>See *Robert A. Shipley, d/b/a Shipley Sales Service v. Peacock Sales Co., Inc.*, 46 Agric. Dec. 702 (1987).

damages resulting from any breach of warranty by Complainant.<sup>8</sup> The tomatoes were sold under f.o.b. terms. The Regulations<sup>9</sup>, in relevant part, define f.o.b. as meaning:

. . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.

Suitable shipping condition is defined,<sup>10</sup> in relevant part, as meaning:

. . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.<sup>11</sup>

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<sup>8</sup>*Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

<sup>9</sup>7 C.F.R. § 46.43(i).

<sup>10</sup>7 C.F.R. § 46.43(j).

<sup>11</sup>The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without abnormal deterioration”, or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. *See* Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated)

(continued...)

A federal inspection performed on the tomatoes on November 30, 1999, eight days following shipment, disclosed 18% average defects, including 8% soft and decay. The United States Standards for Grades of Fresh Tomatoes<sup>12</sup> provide a destination tolerance for U.S. No. 1 tomatoes of 15% for tomatoes that fail to meet the requirements of the grade, including therein not more than 5% for tomatoes which are soft and/or affected by decay. To allow for some normal deterioration in transit for tomatoes sold f.o.b., we typically expand these tolerances under the suitable shipping condition rule to as much as 20% average defects, including 8% soft and/or decay, for a coast to coast shipment having a duration of approximately five days. The tomatoes in question fell within these tolerances eight days following shipment. On this basis, we find that the evidence clearly fails to support Respondent's contention that the tomatoes were not in suitable shipping condition. Lacking proof of a breach of warranty by Complainant, Respondent is liable to Complainant for the contract price of the tomatoes, \$12,583.50, less the proceeds collected by Complainant from their resale, \$2,544.00, or a balance of \$10,039.50.

Respondent's failure to pay Complainant \$10,039.50 is a violation of section 2 of the Act. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.<sup>13</sup> Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.<sup>14</sup> We have determined that a reasonable

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<sup>11</sup>(...continued)

what is "normal" or abnormal deterioration is judicially determined. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

<sup>12</sup>7 C.F.R. §§ 51.1855 through 51.1877. Grade standards may also be accessed via the Internet at [www.ams.usda.gov/standards/stanfrfv.htm](http://www.ams.usda.gov/standards/stanfrfv.htm).

<sup>13</sup>*Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

<sup>14</sup>See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett* (continued...)

rate is 10 percent per annum. Complainant was required to pay a \$300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

### Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$10,039.50, with interest thereon at the rate of 10% per annum from January 1, 2000, until paid, plus the amount of \$300.00. Copies of this Order shall be served upon the parties.  
Done at Washington, DC.

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**ANTHONY VINEYARDS, INC. v. SUN WORLD INTERNATIONAL, INC.**

**PACA Docket No. R-98-143.**

**Ruling on Respondent's Petition for Reconsideration.**

**Filed January 8, 2003.**

**PACA-R – Equitable estoppel defense – Complaint, amendment of, when new counsel – Attorney fees, prevailing party awarded – American rule, attorney fees – English rule, attorney fees – PACA, attorney fee awards to prevailing merchant, dealer or broker only in an oral hearing.**

The prevailing party in a PACA reparation action may be awarded attorney's fees upon a properly filed request after hearing (7 CFR § 47.19(d)). The question of which party is the prevailing party is one that depends upon the facts of the case. Where Respondent prevailed on two of the three issues presented at the hearing and limited Complainant's recovery to 32% of the amount actually litigated at the hearing, Respondent is determined to be the prevailing party, and is awarded attorney's fees and expenses, reduced by 32%..

Patricia J. Ryan, for Complainant.

Stephen P. McCarron, for Respondent.

Andrew Y. Stanton, Presiding Officer.

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

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order

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<sup>14</sup>(...continued)

*v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).



(hereinafter, "Decision") was issued on February 7, 2001, awarding reparation to Complainant in the amount of \$132,026.19 plus interest, and \$300.00 as reimbursement for Complainant's handling fee. The Decision also awarded fees and expenses to Respondent in the amount of \$53,782.55 plus interest. Complainant filed a Petition for Reconsideration and, on November 28, 2001, a Ruling on Petition for Reconsideration (hereinafter, "Ruling") was issued, awarding Complainant \$186,971.40 plus interest, and \$300.00 as reimbursement for Complainant's handling fee. The Ruling also awarded fees and expenses to Complainant in the amount of \$93,485.70 plus interest.

Respondent filed a Petition for Reconsideration of the November 28, 2001, Ruling in which it makes several assertions of error. Complainant filed an Opposition to Petition for Reconsideration.

Respondent contends that the Ruling erroneously awarded Complainant \$27,516.65 as damages for Respondent's overcharges for supplies and services, reversing the denial of such claim in the Decision. Respondent argues that Complainant's claim should be dismissed on the grounds of equitable estoppel. Respondent states that when the claim for overcharges was made in the formal complaint, Complainant did not allege a specific amount, but asserted that Complainant would "amend the Complaint to allege the precise amount of the overcharges once it receives a breakdown of such overcharges from the PACA auditors." Respondent states that Complainant never did amend the complaint to include the specific amount of alleged overcharges prior to the hearing or at the hearing and did not mention the issue in its brief. Respondent claims that circumstances warranting equitable estoppel are present, citing *In re: S.E.L. International Corporation*, 51 Agric. Dec. 1407 (1992), asserting that Complainant, by its words, acts, conduct or acquiescence, caused Respondent to believe that Complainant had abandoned the claim for overcharges, that Complainant's words and conduct, indicating that it had abandoned the claim, were done willfully or negligently, and that Respondent relied on Complainant's representations that the claim was abandoned by not presenting any evidence with respect to this issue.

The \$27,516.65 claimed by Complainant for overcharges comes from the finding of the Department's auditors, which was made after the filing of the formal complaint and was included in the Report of Investigation served upon both parties. The finding was referred to in the Ruling (at page 3) as follows:

The audit further showed Sun World received discounts totaling \$10,991.41 for its early payment of grape supply invoices. These discounts were not passed on to Anthony Vineyards. Sun World charged complainant \$4,459.30 more than its actual cost for the supplies

it invoiced complainant. Sun World overcharged complainant \$12,065.94 for hauling the grapes from the field to its central facility. This was due to Sun World charging Anthony Vineyards for hauling a full truck when there was other grower's product on the truck. The USDA accounting allowed actual cost for the supply and hauling charges.

Respondent relies upon *S.E.L.* for the elements of equitable estoppel, but the decision in that case specifically makes reference to the fact that it is applying the law of the 11th Circuit (51 Agric. Dec. at 1419). In the case at hand, we must apply the standard for equitable estoppel utilized in the Circuit where Respondent is engaged in business, the 9th Circuit. That standard is set forth in *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995), as follows:

The traditional elements of equitable estoppel are that: (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct. *Watkins v. United States Army*, 875 F.2d 699, 709 (9th Cir.1989) (en banc), cert. denied, 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990).

With respect to the first and third elements, there is no doubt that both parties knew or should have known the facts - that the Department's audit contained a finding that \$27,516.65 was overcharged by Respondent - as that finding was part of the Report of Investigation. We do not conclude that the second element was present; that Complainant intended that its conduct, the failure to formally amend the complaint to note the amount of damages for overcharges found by the audit, would give Respondent the right to believe that Complainant was abandoning its claim. We believe Complainant assumed, with good reason, that Respondent was aware that the amount of the alleged overcharges was \$27,516.65, so there was no reason for Complainant to formally amend its complaint. Further, we do not believe that Respondent detrimentally relied on Complainant's failure to amend the complaint, in view of the fact that the findings of the audit, showing the amount of the alleged damages as \$27,516.65, were made known to Respondent. Respondent had the opportunity at the hearing to present evidence to attempt to rebut Complainant's claim for overcharges, but elected not to do so. Under these circumstances, equitable estoppel is not warranted.

Respondent claims that the Decision erred in determining that Complainant's June 9, 1997, letter, filed on June 11, 1997, was an informal complaint that preserved jurisdiction over transactions that accrued within nine months prior to the date of filing. Respondent asserts that of the six allegations of wrongful conduct alleged in the letter, only the first was made with specificity. With respect to the remaining five allegations, Respondent contends Complainant did not provide any details but merely requested that the Department conduct an audit. Respondent argues that Complainant's letter did not comply with section 47.3(a)(2) of the Rules of Practice (7 C.F.R. § 47.3(a)(2)), as it did not contain "the essential details of the transaction complained of."

Complainant asserts that Respondent should not be permitted to raise the issue of whether Complainant's letter qualifies as an informal complaint, as it was not one of the findings made in the Ruling. However, the Ruling did discuss whether various transactions were within the Department's jurisdiction, and concluded that certain transactions did so qualify because they were referred to, in general terms, in Complainant's letter and accrued within nine months prior to June 11, 1997 (Ruling, at pages 1-3, 9). As the issue of the jurisdictional effect of Complainant's letter was addressed in the Ruling, Respondent is not precluded from raising the issue of whether the letter is a valid informal complaint for jurisdictional purposes.

However, we do not agree with Respondent's contention that Complainant's letter was not a valid informal complaint. While Respondent is correct that section 47.3(a)(2) of the Rules of Practice states that the informal complaint shall set forth the "essential details" of the transactions, that section also states that these details shall be set out "so far as practicable." *Six L's Packing Company, Inc. v. Preciosa Packing House, Inc.*, 41 Agric. Dec. 1233 (1992). Complainant's June 9, 1997, letter is a five page document containing a wealth of detail about the alleged violations committed by Respondent. While the letter requests the Department to conduct an audit to obtain additional information, which eventually took place, the letter includes as much detail about Respondent's alleged violations as was possible at the time it was written. We conclude that Complainant's June 9, 1997, letter meets the criteria for a valid informal complaint as set forth in the Rules of Practice.

Respondent disputes the conclusion of the Decision that Complainant did not waive the contractual requirement that Respondent consult with Complainant prior to granting price adjustments in excess of 30%. Complainant argues, as it did with respect to the jurisdictional effect of its June 9, 1997, letter, that Respondent should not be permitted to raise this issue, as it was addressed in the Decision but not the Ruling, and Respondent should be limited

to only those issues discussed in the Ruling. Although we found that the Ruling discussed the jurisdictional effect of Complainant's letter, and that such issue may thus be addressed here, the Ruling never mentioned the waiver issue. If Respondent desired to contest the finding in the Decision that Complainant did not waive its contractual right to be consulted, Respondent could have filed a petition for reconsideration of the Decision, but elected not to do so. Respondent is precluded from raising the waiver issue at this time.

Even if the waiver issue were given consideration, Respondent has merely repeated the argument raised in its brief that Complainant failed to complain about not being consulted on many transactions where Respondent granted adjustments exceeding 30%. The Decision found that Complainant did complain about the failure to consult through communications by Complainant's then controller, Carla Dodd, with Respondent, and by the fact that, in May 1996, Complainant filed suit in state court regarding the 1995 growing season, alleging, among other things, Respondent's failure to comply with the consultation provisions of the contract, which were essentially the same provisions present for the 1996 growing season at issue here (Decision, at page 24). Respondent has not provided any basis for changing the finding in the Decision that Complainant did not waive the consultation requirement.

Respondent's final assertion of error is that, by concluding that Complainant was the prevailing party, and thus entitled to attorneys fees, the Ruling did not follow the precedent set in *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766, 1855 (1994), *petition for reconsideration denied*, 54 Agric. Dec. 1444 (1995). Respondent notes that the conclusion in the Ruling was based solely on the fact that Complainant was awarded 34% (actually 36%)<sup>1</sup> of the amount it originally claimed, compared to 25% awarded the complainant in *Newbern Groves*, which found that the respondent had prevailed. Respondent contends that additional factors should have been considered in determining the identity of the prevailing party. In response, Complainant argues that the principle enunciated in *Newbern Groves*, that under certain circumstances, the party that is awarded damages may not be the prevailing party, conflicts with a recent Supreme Court case, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001), which held that a prevailing party is the party in whose favor judgment is rendered, regardless of the amount of damages

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<sup>1</sup>Respondent's assertion that Complainant was awarded 34% of its total claim of damages is based on a figure contained in the November 28, 2001, Ruling. However, the Ruling was in error, as the amount of reparation awarded therein, \$186,971.40, constitutes about 36% of Complainant's claimed damages of \$524,814.72.

awarded.

Complainant's contention that *Newbern Groves* conflicts with *Buckhannon* requires a consideration of the underlying purpose of fee-shifting under section 7(a) of the Act. There are three approaches to dealing with attorney fees in litigation in the United States. The most basic is the American rule in which there is no fee-shifting, and both parties are responsible for their own attorney fees. This is the primary rule at the federal level, and in all states except one. Exceptions to the American rule are always statutory. The second approach to fee-shifting is the English rule in which the loser, whether plaintiff or defendant, pays the winner's attorney fees. The English rule has existed as a statutory exception to the American rule in Alaska since it was established as a territory<sup>2</sup>. The English rule also has existed in Arizona since 1976 as to commercial cases only,<sup>3</sup> and in Florida, for a five year period, as to medical malpractice cases only<sup>4</sup>. The third approach is private attorney general type fee-shifting with the aim of promoting a degree of private enforcement of legislatively mandated policy. This type fee-shifting is applicable by statute at the federal and state levels in multiple selective areas, and favors the award of attorney fees to successful plaintiffs, but is restrictive in the award of attorney fees to successful defendants.

In *Buckhannon* the Court had under consideration private attorney general type fee-shifting statutes. The question under consideration was whether, under the applicable civil rights statutes, attorney fees should be awarded to a claimant whose lawsuit provoked the defendant to change its illegal policy without a judgment on the merits, or a consent decree, being entered. The holding in

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<sup>2</sup>Alaska Stat. § 09.60.010 (1962, amend. 1986). Since 1993 the English rule has existed in that State in a modified form that gives fees to a prevailing party according to a fixed schedule with a discretionary override provision. *See* Alaska Rules of Civil Procedure, Rule 82.

<sup>3</sup>Ariz.Rev.Stat. Ann. § 12-341.01 (1982), which allows a "successful party" to recover attorney fees in breach of contract actions.

<sup>4</sup>Fla. Stat. Ann. § 768.56 (1984) provided, in pertinent part, as follows:

. . . the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization. . . . When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against unprevailing parties in accordance with the principles of equity.

*Buckhannon* is spelled out at the beginning of the opinion:

The question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Thus, the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. We will have more to say about this later. A subsidiary factor distinguishing *Buckhannon* from *Newbern Groves* is the fact that *Buckhannon* dealt with private attorney general type fee-shifting while *Newbern Groves* was a commercial case decided under a statute with a very different Congressional purpose.

The purpose of private attorney general type fee-shifting statutes is to enhance private enforcement efforts<sup>5</sup>. As Justice Ginsburg said in the dissent to *Buckhannon*:

The Civil Rights Act of 1964 included provisions for fee awards to “prevailing parties” in Title II (public accommodations), 42 U.S.C. § 2000a-3(b), and Title VII (employment), 42 U.S.C. § 2000e-5(k), but not in Title VI (federal programs). The provisions' central purpose was “to promote vigorous enforcement” of the laws by private plaintiffs; although using the two-way term “prevailing party,” Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent “special circumstances,” but prevailing defendant may obtain fee award only if plaintiff's suit is “frivolous, unreasonable, or without foundation.”<sup>6</sup>

In the case of reparation litigation, such as is allowed under the Perishable Agricultural Commodities Act, no such enforcement motive is present. Indeed, the legislative history shows that in regard to the fee-shifting statute under which we operate an entirely different motive was at work. Report No. 92-751 of the Committee on Agriculture (December 14, 1971) included a statement by Mr. Arthur E. Brown, Deputy Director, Fruit and Vegetable Division, which closely tracked the Department's Executive Communication on the fees and

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<sup>5</sup>*Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, at 620 (1999) (Scalia, J., concurring) “[In regard to] the fee-shifting statutes at issue here. . . Congress desired an *appropriate* level of enforcement . . . .”

<sup>6</sup>*Id.* at 635 (Ginsburg, J., dissenting).

expenses legislation. That statement was, in relevant part, as follows:

Section 2 of the proposed amendment would add a new feature to the Act since there is now no provision for the payment to the prevailing party of fees and expenses, in addition to the damages awarded, in reparation disputes formally adjudicated by the Department. The objective here is also to speed up the handling of reparation complaints through providing a degree of protection to aggrieved parties **by discouraging requests for oral hearings**<sup>7</sup> based on inadequately founded defense allegations or counterclaims filed solely because of their nuisance value or to enhance one's bargaining position in the dispute. This section of the bill would provide for issuance of an order against the losing party to cover the prevailing party's reasonable fees and expenses in those reparation cases in which a hearing is requested and held. **An award of fees and expenses could be against any losing party, whether complainant or respondent**, provided such losing party is a commission merchant, dealer or broker within the meaning of the Act. The regulatory provisions of the Act apply only to such persons, and a reparation order may not issue against a person who is not a commission merchant, dealer or broker. **It is the intent of this section of the bill that the prevailing party may be awarded fees and expenses only, or he may be awarded fees and expenses in addition to an award of damages for violation of Section 2 of the Act.**

**Industry representatives have pointed out that the disputants in such cases would exercise a greater degree of responsibility in requesting an oral hearing if the party losing the case were required to pay reasonable fees and expenses incurred by the prevailing party.** The proposed amendment would provide a strong incentive to negotiate in good faith and reach an amicable settlement if at all possible. Even in the event of formal adjudication, there would be an incentive to use the less time-consuming shortened procedure instead of an oral hearing. (Emphasis supplied.)

In addition, the wording of the statute itself clearly shows an intent that attorney fees may be awarded to either party in a balanced fashion:

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<sup>7</sup>The fee-shifting provisions of section 7(a) apply only to oral hearing cases. In reparation cases either party may, by right, request an oral hearing where the amount in controversy exceeds \$30,000. Otherwise the case is heard under the documentary procedure by affidavit or deposition evidence.

If . . . the Secretary determines that the commission merchant, dealer, or broker has violated any provision of section 499b of this title, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as **reparation or additional reparation**, reasonable fees and expenses incurred in connection with any such hearing. (7 U.S.C. 499g(a). (emphasis supplied).

“*Additional reparation*” for fees and expenses would be awarded to a party only if there had been success, and a monetary award, on the party’s claim. However, “reparation” for fees and expenses, as an either/or proposition, could only be awarded where there was success, but no basic monetary award in the party’s favor. There is no reason to suppose that there is any intent that such an award of reparation for fees and expenses to a party who received no basic monetary award was to be in any way restricted to instances where the opposing party’s claim was “frivolous, unreasonable, or without foundation.”

In addition to the legislative history, and the express wording of section 7(a) of the Act, the nature of two other fee-shifting provisions in the Act lends credence to the proposition that the intent of Congress in passing the fee-shifting provision of section 7(a) was to establish the balanced two way fee-shifting of the English rule in place of the American rule as to fee-shifting, and not to establish a private attorney general type of fee-shifting. In the crafting of section 7(c) of the Act<sup>8</sup> Congress eschewed balance in favor of the effectuation of a definite policy:

. . . Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. . . . Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his

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<sup>8</sup>7 U.S.C. 499g(c).



costs. . . .

Congress here singled out the prevailing appellee alone to be the recipient of attorney fees in order to discourage appeals. The lack of balance is overt, and serves a rational purpose. Congress was clearly not reluctant to expressly favor one party over another when there was reason to do so.

Again, in the bonding provision of section 6(e)<sup>9</sup> Congress favors one party over the other:

In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent . . . .

The attorney's fees payable under this section are payable only to a prevailing respondent. Unlike the provision of section 7(a), such fees will be payable even in non-oral hearing cases, and in such cases there is no provision in the Act that would allow the payment of such fees to a prevailing foreign Complainant. Again, a definite policy is discernible as the rationale for the overt and clearly expressed lack of balance.

An underlying rationale is also discernible behind the balanced provisions of section 7(a). We have stated that "the basic substrata of law governing perishable transactions is the law of sales as established by statute, and under the common law, in applicable State jurisdictions."<sup>10</sup> Clearly, reparation cases constitute commercial litigation in which the interests of the parties are balanced. There is, therefore, no public policy reason to favor one domestic litigant over another in the award of attorney fees in administrative level reparation litigation. In those rare instances where the states have passed fee-shifting statutes that apply to commercial litigation they have recognized the need for balance by opting for the English type fee-shifting approach.

Not only is there no public policy reason to encourage the bringing of

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<sup>9</sup>7 U.S.C. 499f(e).

<sup>10</sup>*Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991)

commercial complaints, but there is equally no reason to discourage commercial defendants. A commercial defendant can defend successfully against large claims, and still end up owing a relatively small amount due to the difficulties of accurately calculating beforehand the exact amount that should be due. In such cases the defendant will have effectively prevailed in the litigation, but will end up with a small award against it.

For example, in reparation cases a claimant will frequently bring suit on the theory that the defendant accepted purchased goods, and is therefore liable for the purchase price. However, the defendant will often admit acceptance, and consequent liability for the purchase price, but will defend on the basis of the allegation that the claimant breached the contract of sale by supplying inferior goods. The issue of whether accepted goods were indeed inferior is more frequently a hotly contested issue in the sale of perishables because perishables will often appear good at time of shipment, but will have deteriorated by the time of arrival. In f.o.b. sales the shipper of perishable goods warrants that the goods will arrive in sound condition if transportation services and conditions are normal. But, since perishable goods will always deteriorate over time, the judgment must be made as to whether the deterioration noted on arrival is a normal amount, or an abnormal amount in breach of contract. This issue is often paralleled by the issue of whether transit conditions were normal. Both parties may litigate in good faith over these issues, and it will frequently happen that a claimant will be found to have breached the contract of sale by shipping goods that did not possess sufficient carrying quality to arrive in sound condition. Such a claimant will therefore be liable for damages for its breach of contract. The determination of the amount of damages is itself often a difficult problem, and the purchase price owing by the defendant as result of acceptance of the goods (an issue not actually litigated) will often exceed the amount of damages owing by the claimant for its breach of contract (the only issue actually litigated). Thus as to the litigated issue the defendant will win, but because of the un-litigated and uncontested fact of the defendant's acceptance, and the consequent liability for the purchase price less damages, the claimant will be awarded a small balance of purchase price over damages. Of course, the Department's award in the claimant's favor will state that the defendant violated section 2 of the Act by failing to pay the amount awarded. But the failure to pay is recognized as a good faith failure to pay, and this is evident from the fact that such failure is never made the subject of a disciplinary complaint for "slow pay" against the defendant by the Department.

The Supreme Court of Alaska dealt with a similar case under its English type fee-shifting statute. In *Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc.*, 497 P.2d 312 (Alaska 1972), Jones, a contractor, entered into

a contract with Lewis, a subcontractor, under which Lewis was to furnish the labor and materials necessary to complete the plumbing and other systems for an apartment building to be built in Anchorage. The total agreed price was \$178,449.19. The contract also provided for progress payments, not to exceed 90% of the contract price. When the building was partially completed it was destroyed in an earthquake. The contract contained a clause that called for indemnification of the contractor by the subcontractor for all damages caused "by reason of the elements . . . ." Under this clause Jones brought an action against Lewis to recover \$119,663.12 that Jones had disbursed to Lewis as progress payments, and Lewis counter-claimed for \$46,620.92 for services rendered and materials furnished before the collapse.

The trial court held that there could be no indemnification under the contract to supply plumbing because the building, the subject matter of the contract, had been destroyed, thus discharging any obligation on the subcontractor's part to furnish further performance. The trial court also found that Lewis was entitled to recover the cost of its performance from Jones on a *quantum meruit* basis.

The trial court then decided that the subcontractor's services and materials supplied should be reasonably valued at approximately \$142,300. From this figure a computation was made which took into account the amount of progress payments (\$119,663.12) and the value of materials belonging to Jones which were salvaged by Lewis (\$30,000), representing a total value received by Lewis of \$149,663.12. From this total was subtracted the amount due to Jones under the *quantum meruit* theory employed by the court, which left an excess of \$7,363.12, the amount of judgment for Jones. The trial court then found that Lewis was the prevailing party, and awarded Lewis \$10,000 in attorney fees.

The Alaska Supreme Court stated that "under AS 09.60.010<sup>11</sup> and Rule 54(d)<sup>12</sup>, Rules of Civil Procedure, it is clear that the prevailing party is entitled to costs." After saying that: "[i]t is the contention of the appellants that only they could be considered the prevailing parties in light of their affirmative recovery of \$7,363.12 at the conclusion of the trial," the Court said:

With this contention we cannot agree; it is not an immutable rule that the party who obtains an affirmative recovery must be considered the

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<sup>11</sup>AS 09.60.010 provides: "Costs allowed prevailing party. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."

<sup>12</sup>Rule 54(d) provides: "Costs. Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The procedure for the taxing of costs by the clerk and review of his action by the court shall be governed by Rule 79."

prevailing party. The decision of the trial court that appellee was the prevailing party did not involve an erroneous construction of either AS 09.60.010 or Rule 54(d). (footnote omitted.)

. . .  
It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract, the obligation having been discharged by destruction of the subject matter.

The court characterized the recovery of the \$7,363.12 by the losing party as an incidental recovery<sup>13</sup>. The Court then went on to decide that the amount of the fee award was proper:

It is clear from the record in this case that the court considered the efforts of appellee's counsel in defeating the appellants' claim for \$119,663.12 and the value of that effort in determining the amount of the attorney's fee awarded. The trial judge also considered the potential liability that threatened appellee. Finally, it is clear that the amount of attorney's fee was within the sound discretion of the trial court and such an award will not be disturbed unless the court has exceeded that discretion. We find no reason to disturb the award in this case. (footnotes omitted.)

An adjudication (when final) that a commercial complainant has breached the contract of sale upon which it sued, or sought reparation, has a claim preclusive effect. So does the determination of the amount of damages resulting from that breach. In other words, these rulings are *res judicata* of the issues, and binding on all other forums. This effect is present even though the defendant receives no net monetary award. We stated earlier that the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. *Buckhannon*, as well as other fee-shifting cases under the various civil rights statutes, recognize the potential that in certain cases attorney fees may be awarded to a defendant where the complaint is dismissed. In those cases there is an adjudication – a judgment – in the defendant's favor. The lack of such a judgment in the complainant's favor, or at least a judicial consent decree, was the determinative

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<sup>13</sup>*Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc.*, 497 P.2d 312, at 314 n.5 (Alaska 1972) "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being considered a prevailing party."

factor in the majority's ruling in *Buckhannon*. In *Buckhannon*, Justice Rehnquist quoted the 1999 7th edition of Black's Law Dictionary which defines prevailing party as: "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.--Also termed *successful party*." This 7th edition definition is relegated to a small segment of the Dictionary's treatment of the subject "party," and constitutes the only thing said concerning "prevailing party." The 1990 6th edition of Black's Law Dictionary gives a much more lengthy treatment of "prevailing party" under a separate heading rather than under the heading "party." The first definition given is as follows: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." This does not conflict with the definition cited in *Buckhannon*, but it does give some additional insight into the meaning of the phrase. We believe that when the Alaska Supreme Court in *Owen Jones & Sons, Inc.* adjudicated that the defendant was entitled to the sum of \$142,300, that defendant became "[a] party in whose favor a judgment [was] rendered . . ." The less abbreviated definition of prevailing party in the 1990 edition of Black's Law Dictionary also is inclusive of this type adjudication when it, perhaps less ambiguously, speaks of one who ". . . successfully defends against [an action], prevailing on the main issue, even though not necessarily to the extent of his original contention."

In his concurring opinion in *Buckhannon* Justice Scalia refers to the Court's "ill-considered dicta" as misleading the Circuits to follow the catalyst theory. While the Court's reasoning in *Buckhannon* may be impeccable in regard to the question of whether a change of position by a litigant in a suit in which there is no adjudication can cause the opposing claimant to be considered a prevailing party under a private attorney general fee-shifting statute, we would also be misled by dicta if we applied the Court's language in *Buckhannon* to a reparation case where no catalyst theory is remotely in view, where there were final adjudications of multiple litigated issues, and where the fee-shifting statute under consideration clearly aims at balance between commercial litigants. We cannot believe that the majority in *Buckhannon* intended any such application of their words. We conclude that it was not the intent of the *Buckhannon* Court to disturb the English type fee-shifting required by Congress under the Act as evinced in *Newbern Groves* and the cases which have followed it.

As we have concluded that *Buckhannon* has not overruled *Newbern Groves*, we must now decide whether the November 28, 2001, Ruling correctly awarded fees and expenses to Complainant in the amount of \$93,485.70 based solely on

the fact that Complainant was determined to have prevailed on 36%<sup>14</sup> of the amount of its original claim (\$186,971.40 of the total damages claimed of \$524,814.72), which exceeds the 25% figure in *Newbern Groves*. Respondent argues that other factors should be considered. In support of this argument, Respondent asserts that the complaint consisted of four claims: (1) failure to remit cooling revenues (on the Sugraone grapes); (2) overcharges for services and supplies; (3) failure to notify of significant price adjustments; and (4) negligent handling of grapes. Respondent contends that the majority of testimony and evidence submitted at the hearing concerned the two of Complainant's claims, 1 and 4, in which Respondent prevailed, that Complainant submitted no evidence supporting claim 2, relying solely on work done by the Department, and prevailed on only 40% of its claim regarding claim 3. Complainant rejects Respondent's effort to "compartmentalize" its conduct towards Complainant, arguing that Respondent's breach of its fiduciary duty as a grower's agent was part of an overall business relationship involving related events.

Respondent is correct that, in determining the identity of the prevailing party, other factors should be considered in addition to the percentage of the original claim which is awarded as damages, and that the amount of effort put forth at the hearing in support of certain allegations is a significant factor.<sup>15</sup> We do not agree with Respondent's contention that the majority of testimony at the hearing concerned Complainant's claims for Respondent's alleged failure to remit cooling revenues on the Sugraone grapes and for Respondent's alleged negligent handling of grapes, as the record indicates that both parties' witnesses spent most of their time addressing the issue of notice of price adjustments, on which we awarded Complainant a total of \$159,454.75, or 42% of the \$377,645.87 claimed. However, Respondent is correct that, on the issues of Respondent's alleged failure to remit cooling revenues on the Sugraone grapes, for which Complainant claimed \$78,921.04, and the alleged negligent handling of grapes, for which Complainant claimed \$108,703.01<sup>16</sup>, Respondent

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<sup>14</sup>See footnote 1.

<sup>15</sup>We reject Respondent's suggestion that the amount of documentary evidence submitted is, in and of itself, an important factor to consider in the determination of who is the prevailing party and entitled to an award of fees and expenses.

<sup>16</sup>Complainant states in its brief (Complainant's brief, at 65) that \$40,055.20 of the amount claimed for negligent handling is also part of Complainant's claim of \$50,091.70 for alleged improper adjustments which Complainant contends should have been allowed by the Department's  
(continued...)

completely prevailed. A substantial time was spent on these issues at the hearing. With respect to Complainant's claim of Respondent's alleged overcharges for supplies and services, Complainant was awarded its entire claim of \$27,516.65, but no time was devoted to this issue at the hearing. Therefore, the total awarded Complainant as a result of evidence presented at the hearing was \$159,454.75 out of the \$497,298.07 remaining at issue after deducting Complainant's claim for alleged overcharges (\$524,814.72 less \$27,516.65), or 32%.

As Respondent prevailed on two of the three issues presented at the hearing, and limited Complainant's recovery to 32% of the amount actually litigated at the hearing, we conclude, as we did in the February 7, 2001, Decision and Order, that Respondent is the prevailing party. Therefore, we will restate our conclusions made in the Decision and Order with respect to Respondent's recovery of fees and expenses, with certain changes.

Respondent filed a claim for fees and expenses in the amount of \$73,463.63. Complainant objected to the amount paid by Respondent's attorney for round-trip airfare between Washington, D.C. to Bakersfield, California, for depositions on September 29, 1998, and October 26, 1998, in the amounts of \$1,775.87 and \$1,876.00, respectively, and for the hearing on September 16, 1999, in the amount of \$1,972.00. Complainant claimed Respondent's attorney could have obtained less expensive flights if he had left from Baltimore rather than Washington, D.C. or purchased tickets earlier. Respondent replied that purchasing tickets earlier would not have saved any money, as Respondent's attorney was not staying over a Saturday night. Complainant's objections are not well taken. Respondent's attorney, whose office is located in Washington, D.C., was entitled to use an airport in the Washington, D.C. area. Complainant offered no evidence that Respondent's attorney could have obtained a less expensive flight if he had purchased tickets earlier.

Complainant also objected to charges for charter flights from Coachella, California, to Bakersfield, California, taken by Respondent's officers Michael Aiton and David Marguleas. The flights were on October 29, 1998, to take depositions, in the amount of \$1,637.72, and on September 24, 1999, to testify at the hearing, in the amount of \$1,463.84. A search on the American Airlines website made at approximately the time the Decision and Order was issued, revealed that a round-trip unrestricted fare to Bakersfield from Palm Springs, California, which is the closest large airport to Coachella, was \$337.00. Respondent never provided any justification for the use of charter flights rather

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<sup>16</sup>(...continued)  
auditors.

than the readily available commercial flights. Therefore, we allow \$337.00 for each person for each trip, resulting in a total of \$1,348.00 for both persons on both trips. This reduces Respondent's eligible fees and expenses by \$1,753.56, from \$73,463.63 to \$71,710.07.

As stated, Complainant's efforts at the hearing resulted in a recovery of about 32% of the amount claimed as damages and litigated at the hearing. All of the issues litigated at the hearing were hotly contested. As a result of Complainant's partial recovery, we will reduce Respondent's \$71,710.07 claim by 32%, or \$22,947.22, which leaves \$48,762.85 to be awarded Respondent as fees and expenses.

### Order

The reparation awarded in the November 28, 2001, Ruling on Reconsideration, \$186,971.40, with interest thereon at the rate of 10% per annum from September 1, 1996, until paid, plus the amount of \$300.00, shall be paid by Respondent to Complainant within 30 days from the date of this Order.

Within 30 days from the date of this Order, Complainant shall pay to Respondent, as reparation for fees and expenses, \$48,762.85, with interest thereon at the rate of 10% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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**C. H. ROBINSON COMPANY v. BUDDY'S PRODUCE, INC.**  
**PACA Docket No. R-02-021.**  
**Order of Dismissal.**  
**Filed August 21, 2003.**

, for Complainant.

, for Respondent.

Patricia Harps, Presiding Officer.

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

**PACA-R – Election of Remedies – Trust action in federal district court as affecting Res judicata – Effect of voluntary dismissal with prejudice on parallel litigation before the Secretary.**

Where Complainant filed a trust action in federal district court involving the same parties and subject matter as in a reparation action before the Secretary, and the trust action was opposed by



Respondent, there was no election of remedies under section 5(b) of the Act. A voluntary dismissal with prejudice in the trust action by order of the District Court upon stipulation of the parties was res judicata of all the issues before the Secretary, and precluded maintenance of the claim before the Secretary. The complaint was dismissed.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). On January 16, 2001, Complainant filed a formal complaint alleging the sale and shipment to Respondent of various lots of perishable produce between January 31, 2000, and July 10, 2000.<sup>1</sup> In addition Complainant alleged Respondent's acceptance of the produce, and that Respondent failed to pay the contract prices totaling \$26,510.00.

On February 26, 2001, Complainant filed a trust action under section 5(c) of the Act<sup>2</sup> against Respondent, and Respondent's principals, in the United States District Court for the Western District of Oklahoma alleging failure to maintain the statutory trust as to the same transactions that are covered by the complaint herein, and, *inter alia*, breach of contract by failure to pay for the produce. Respondent filed an answer in the reparation proceeding before the Secretary on March 30, 2001, alleging that the produce shipped was distressed, and that the transactions were adjusted between the parties. On April 4, 2001, Respondent filed an answer in the trust action denying any liability to Complainant. On July 27, 2001, the parties were notified in the reparation action that the submission of evidence had been completed, and that the record was closed. On October 2, 2001, the parties to the reparation proceeding were notified that the time for the filing of briefs had expired, and that the matter was being assigned to a Presiding Officer for the preparation of a decision.

On January 25, 2002, the parties to the District Court action filed with the Court a "STIPULATION AND ORDER FOR DISMISSAL." This document was signed by the attorneys for each party. The body of the document consisted of one sentence as follows: "The undersigned counsel for Plaintiff and Defendants hereby stipulate and agree that the within civil action may be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a)." On January 28, 2002, the court entered the following order:

### ORDER

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<sup>1</sup>A timely informal complaint covering the same transactions was filed on October 26, 2000.

<sup>2</sup>7 U.S.C. 499(e)(c).

Now, on this 28th day of January, 2002, this matter comes before this Court upon the stipulation of the parties that the civil matter designated as CIV-01-349(R) should be dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a), and this Court, being advised in the premises and for good cause shown, finds that this Order should be granted.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the civil matter CIV-01-349(R) is hereby dismissed with prejudice and without costs to any party, pursuant to Federal Rule of Civil Procedure 41(a).

On January 31, 2002, Respondent's counsel filed a motion with this Department to dismiss the reparation action on the basis of lack of jurisdiction resulting from Complainant's having made an election of remedies by the filing of the trust action, and on the basis of claim preclusion resulting from the voluntary dismissal in the District Court. On April 15, 2002, Complainant filed a response to this motion.

The District Court action was an action for the enforcement of the statutory trust, and, in and of itself, would not normally involve an election of remedies. In the event that a trust claim is contested on the merits it is our policy to stay reparation actions pending the outcome of the district court action, and to treat the final judgment in the district court as *res judicata* of the issues in the reparation case. Furthermore, it is also our policy to not treat the filing of a separate civil court action as an election of remedies under section 5(b) when there is a voluntary dismissal by the party instituting the action.<sup>3</sup> We conclude that Respondent has not shown that an election of remedies pursuant to section 5(b) took place.

In this case the voluntary dismissal in the District Court was with prejudice. A dismissal with prejudice implies an adjudication on the merits, which bars the right to bring or maintain an action on the same claim.<sup>4</sup> Normally such a dismissal is *res judicata* as to every matter in issue. Complainant, however, in

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<sup>3</sup>See *Han Yang Trade Co., Inc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765 (1993); *Spring Acres Sales Company, Inc. v. Freshville Produce Distributors, Inc.*, 45 Agric. Dec. 2181 (1986); and *Gilliland & Co. v. San Antonio Commission Co.*, 2 Agric. Dec. 492, at 495 (1943).

<sup>4</sup>See *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir.1995); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir.1986); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992).

its response to the motion to dismiss, alleges that the intent of the parties was that the dismissal not preclude the continuance of this reparation case, and that the purpose of the dismissal was to avoid duplicate litigation and conform with the election of remedies requirement of section 5(b). Complainant's counsel attached an affidavit to the response to the motion to dismiss. This affidavit was given by Mark A. Amendola, Esq., an Ohio attorney who was retained by Complainant to handle the trust litigation, and who negotiated and signed the dismissal stipulation. Mr. Amendola stated in part:

There was no settlement or compromise of the District Court case. Moreover, there was no value and no consideration for the dismissal of the District Court case. Prior to executing the Stipulation for Dismissal, I discussed with Buddy's counsel the possibility of Robinson agreeing to also dismiss its pending reparation claim in exchange for an appropriate settlement payment. Buddy's did not accept that proposal and it was my understanding that both parties preferred to obtain a final adjudication on Robinson's claim from the Secretary of Agriculture.

Complainant asserts that in "determining the preclusive effect of a stipulation of dismissal, the courts . . . routinely look to the intent of the parties," and urges that, in accord with the affidavit of the Ohio attorney quoted above, the intent of the parties was that the dismissal not have preclusive effect. In 1975 the United States Supreme Court stated that:

Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree . . .<sup>5</sup>

The Court was interpreting an elaborate consent decree issued in a Federal Trade Commission case that prohibited the "acquiring" of certain assets. It was undisputed that the decree had been violated, but for purposes of assessment of penalty it was questioned whether daily penalties could be assessed for the violation of a decree that prohibited only acquisition, allegedly a one time event.

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<sup>5</sup>*United States v. ITT Continental Baking Co.*, 420 U.S. 223 at 238 (1975).

The Court found, in essence, that reference to the agreement between the parties and supporting documents was permissible to ascertain the meaning of an ambiguous word in the consent decree. Numerous circuits have followed this case in stating that the intent of the parties is an element for inquiry in connection with the determination of whether a voluntary dismissal with prejudice based upon a settlement agreement should have a claim preclusive effect.<sup>6</sup> However, it should be noted that the holding of the Court was based squarely upon the contractual nature of the consent decree, and the cases that have followed this holding have made similar observations. However, in this case Complainant's contention that "[t]here was no settlement or compromise of the District Court case," and that "there was no value and no consideration for the dismissal . . .," argues against considering the intent of the parties, since it eliminates any contractual element in the voluntary dismissal.

There is another consideration that bears upon this question. Were we to say, in spite of the above reasoning, that there is a substantial contractual element to the voluntary dismissal so as to open the possibility of an inquiry into the intent of the parties, the cases which allow such an inquiry presuppose an ambiguity in the stipulation such as would make an inquiry as to the intent of the parties appropriate in the same manner in which it would be in a purely contractual context.<sup>7</sup> Here there was no ambiguity in the stipulation or order, and it must be deemed a final adjudication on the merits for *res judicata* purposes of the claims

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<sup>6</sup>See, for example, *Ronald F. Keith v. Edward C. Aldridge, Jr.*, 900 F.2d 736 (Fourth Cir. 1990), *cert. denied*, 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990), where the court stated: "When a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties. . . . This approach, following from the contractual nature of consent judgments, dictates application of contract interpretation principles to determine the intent of the parties." The court then looked to the "mutually manifested . . . intentions" of the parties, noting that "the settlement agreement and the dismissal order entered pursuant to it do not expressly reserve to Keith the right to raise due process or other substantive claims in subsequent litigation."

<sup>7</sup>*Israel v. Carpenter*, 120 F.3d 361 (2nd Cir. 1997) (applying Massachusetts law that "in order to utilize extrinsic evidence of the parties' intent, a court need not invariably find facial ambiguity."); *Coakley & Williams Construction, Incorporated v. Structural Concrete Equipment, Incorporated*, 973 F.2d 349 (4th Cir. 1992); *Marvel Characters, Inc. v. Simon*, No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002); *WILJ International Limited v. Biochem Immonusystems, Inc.*, 4 F.Supp.2d 1(D. Mass. 1998).

asserted, or which could have been asserted, in the District Court trust action.<sup>8</sup> Furthermore, a misunderstanding by the parties as to the legal effect of an agreed upon dismissal with prejudice does not warrant voiding the agreement,<sup>9</sup> and, where “a genuine misunderstanding had occurred concerning the stipulation's scope” it was held that counsel’s misunderstanding could not void the agreement, even though “the consequences of entering into [the] agreement were not fully weighed” and “the choice was poor.”<sup>10</sup>

Complainant, in resisting Respondent’s motion for dismissal, asserts that a 1913 Oklahoma case requires that for a dismissal of a suit to have a preclusive effect it must be “based upon an agreement between the parties by which a settlement and adjustment of the subject matter is made.”<sup>11</sup> Complainant argues that since there was no settlement or adjustment between the parties to the District Court action, preclusive effect should not be given to the voluntary dismissal with prejudice. However, we are here dealing with an order of a federal district court in a federal trust case, not a diversity case, and it is clear that federal law must determine the interpretation of the order.<sup>12</sup> Under federal law:

. . . where there is no settlement agreement at all, there is nothing for the court to consider other than the voluntary dismissal with prejudice, which . . . is sufficient by itself to invoke the preclusive effect of res

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<sup>8</sup>*Marvel Characters, Inc. v. Simon*, No. 00 CIV. 1393(RCC), 2002 WL 313865 (S.D.N.Y. Feb. 27, 2002).

<sup>9</sup>*TCBY Systems, Inc. v. EGB Associates, Inc.*, 2 F.3d 288 (8th Cir. 1993); and *Citibank, N.A. v. Data Lease Financial Corporation*, 904 F.2d 1498 (1990) “. . . misunderstanding as to the legal effect of a dismissal with prejudice does not warrant a hearing.”

<sup>10</sup>*Nemaizer v. Baker*, 793 F.2d 58 (2d Cir.1986).

<sup>11</sup>*Turner v. Fleming*, 130 P. 551(OK 1913).

<sup>12</sup>*Semtek International Incorporated v. Lockheed Martin Corporation*, 531 U.S. 497 (2001); *Heck v. Humphrey*, 512 U.S. 477, at 488 n. 9 (1994) “It is clear that where the federal court decided a federal question, federal res judicata rules govern,” quoting P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1604 (3d ed. 1988); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903). See also *Hallco Manufacturing Co., Inc. v. Raymond Keith Foster*, 256 F.3d 1290 (Fed. Cir. 2001); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469 (Fed.Cir.1991); *PRC Harris, Inc. v. the Boeing Company*, 700 F.2d 894 at n. 1(2nd Cir.1983).

judicata.<sup>13</sup>

We conclude that Complainant's claim in this reparation proceeding is precluded by the dismissal with prejudice of the trust action in the District Court. The complaint should be, and hereby is, dismissed.

Copies of this order shall be served upon the parties.

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<sup>13</sup>*Edward T. Hanley v. Cafe Des Artistes, Inc.*, No. 97 Civ. 9360(DC), 1999 WL 688426 (S.D.N.Y. Sept. 3, 1999) (mem.)

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**MISCELLANEOUS ORDERS**

**In re: ZEMA FOODS, L.L.C.**  
**PACA Docket No. D-01-0027.**  
**Order Dismissing the Complaint.**  
**Filed February 7, 2003.**

Charles E. Spicknall, for Complainant.  
Respondent, Pro se.

*Order issued by James W. Hunt, Chief Administrative Law Judge.*

Complainant's motion to dismiss the disciplinary complaint filed on August 21, 2001 against Zema Foods, L.L.C., alleging willful violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) is granted. The complaint in the above-captioned matter is dismissed without prejudice.

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**PERISHABLE AGRICULTURAL COMMODITIES ACT****DEFAULT DECISIONS**

**In re: C.T. PRODUCE, INC.  
PACA Docket No. D-02-0011.  
Decision Without Hearing by Reason of Default.  
Filed November 5, 2002.**

**PACA – Default – Payment, failure to make prompt.**

David A. Richman, for Complainant.  
Respondent, Pro se.  
*Decision issued by Jill S. Clifton, 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 March 14, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period May 2000 through July 2000, Respondent C.T. Produce, Inc. (hereinafter “Respondent”) failed to make full payment promptly to 2 sellers of the agreed purchase prices in the total amount of \$523,917.39 for 186 lots of perishable agricultural commodities which it purchased, received and accepted in foreign commerce.

As described in Complainant’s Motion for Decision Without Hearing by Reason of Default, service was effected upon Respondent on April 11, 2002. The time for filing an answer expired on May 1, 2002, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. C. T. Produce, Inc., is a corporation organized and existing under the laws of the State of California. Its business mailing address is 2225 Avenida Costa Este, Suite 1100, San Diego, California 92173.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 940841 was issued to Respondent on



March 22, 1994. This license terminated on March 22, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

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

4. During the period from May 2000 through July 2000, Respondent purchased, received, and accepted in foreign commerce, from 2 sellers, 186 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 \$523,917.39.

#### **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 the Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice, 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 December 26, 2002, and effective January 6, 2003. - Editor]

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**In re: GROWERS PRODUCE, a/t/a WESTERN PRODUCE COMPANY.  
PACA Docket No. D-02-0001.  
Decision Without Hearing by Reason of Default.  
Filed November 25, 2002.**

**PACA – Default – Payment, failure to make prompt.**

Mary Hobbie, for Complainant.

Respondent, Pro se.

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

**Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on October 11, 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 during the period August through November 1999, Respondent failed to make full payment promptly to 32 sellers in the total amount of \$332,492.99 for 439 lots of perishable agricultural commodities it purchased, received and accepted in interstate and foreign commerce.

A copy of the complaint was mailed to the Respondent by certified mail on October 11, 2001 and received by Respondent on October 18, 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 Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (Rules of Practice) (7 C.F.R. §1.139).

**Findings of Fact**

1. Respondent, Growers Produce, also trading as Western Produce Company, is a corporation organized and existing under the laws of the State of California. Its business address is 380 Third Street, Oakland, California 94607.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. License number 182180 was issued to Respondent on July 15, 1959. The license terminated on July 15, 2000, when Respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. During the period of August through November 1999, Respondent purchased, received, and accepted in interstate and foreign commerce from 32 sellers, 439 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 \$332,492.99.

### Conclusions

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

### Order

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

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

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty-five 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 January 8, 2003, and effective January 19, 2003. - Editor]

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**In re: BRUNO'S PRODUCE, INC.**  
**PACA Docket No. D-02-0016.**  
**Decision Without Hearing by Reason of Default.**  
**Filed November 1, 2002.**

**PACA – Default – Payment, failure to make prompt.**

David A. Richman, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Jill S. Clifton, 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 March 29, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period February 2001 through May 2001, Respondent Bruno’s Produce Food, Inc. (hereinafter “Respondent”) failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$812,184.68 for 101 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

As described in Complainant’s Motion for Decision Without Hearing by Reason of Default, service was effected upon Respondent on May 7, 2002. The time for filing an answer expired on May 27, 2002, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Bruno’s Produce Food, Inc., is a corporation organized and existing under the laws of the State of Nevada. Its business mailing addresses are 4425 East Sahara #42, Las Vegas, Nevada 89104-6359; and 3959 Patrick Lane, Las Vegas, Nevada 89120-6219.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 010169 was issued to Respondent on October 25, 2000. This license terminated on October 25, 2001 pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

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

4. During the period from February, 2001 through May, 2001, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 101 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 \$812,184.68.

### **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 the Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice, 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 January 28, 2003, and effective February 8, 2003. - Editor]

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**In re: HEARTLAND CITRUS, INC.**  
**PACA Docket No. D-02-0020.**  
**Decision Without Hearing by Reason of Default.**  
**Filed December 20, 2002.**

**PACA – Default – Payment, failure to make prompt.**

Charles Kendall, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Jill S. Clifton, 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 July 12, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period December 5, 1999, through July 3,

2000, Respondent Heartland Citrus, Inc. (hereinafter "Respondent") failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of \$119,031.56 for 110 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce, and failed to remit net proceeds to four growers, in the total amount of \$86,882.75, for 101 lots of perishable agricultural commodities consigned to and sold by Respondent in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business on July 12, 2002, and was returned as refused to the office of the Hearing Clerk on August 19, 2002. A copy of the Complaint was re-mailed to Respondent by regular mail on September 10, 2002 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq.*, hereinafter "Rules of Practice"). Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

#### **Finding of Fact**

1. Respondent is a corporation organized and existing in the state of Florida. Its business address is 712 Gooch Road, Fort Meade, Florida 33841. Its mailing address is P.O. Box 10, Fort Meade, Florida 33841.

2. At all times material herein, Respondent was licensed under the PACA. License number 960127 was issued to Respondent on October 18, 1995. This license terminated on October 18, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

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

4. As set forth in paragraph III of the Complaint, Respondent, during the period January 2000 through June 2000, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of \$119,031.56 for 110 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

5. As set forth in paragraph IV of the Complaint, Respondent, during the period November 1999 through June 2000, failed to remit net proceeds to four growers, in the total amount of \$86,882.75, for 101 lots of perishable

agricultural commodities consigned to and sold by Respondent in interstate commerce.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 110 transactions set forth in Finding of Fact No. 4 above, and failure to remit net proceeds to growers with respect to the 101 transactions set forth in Finding of Fact No. 5 above constitute wilful, 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**

Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice, 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 7, 2003, and effective February 18, 2003. - Editor]

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**In re: D & C PRODUCE, INC.**  
**PACA Docket No. D-02-0005.**  
**Decision Without Hearing by Reason of Admissions.**  
**Filed January 21, 2002.**

**PACA – Default – Payment, failure to make prompt.**

Clara Kim, for Complainant  
William L. Yaeger, for Respondent  
*Decision and Order issue by James W. Hunt, Administrative Law Judge.*

**Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter referred to as the “Act” or “PACA”) and the regulations issued thereunder (7 C.F.R. Part 46; hereinafter referred to as the “Regulations”), instituted by a Complaint filed on January 8, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

Complainant alleged that Respondent D & C Produce, Inc., (hereinafter “Respondent”), during the period May 2000 through June 2001, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of \$454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce. Complainant also alleged that PACA license number 000960, which was issued to Respondent on April 5, 2000, terminated on April 5, 2001, when it was not renewed. The Complaint requested a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent’s violations be published.

On March 21, 2002, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Middle District of North Carolina pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*), designated Case Number 02-80864, in which Respondent admitted owing the 8 sellers named in the Complaint amounts totaling \$545,125.60.

On March 22, 2002, Respondent filed an Answer to the Complaint with the Department hearing clerk. In that Answer, Respondent’s counsel William L. Yaeger wrote “It is my understanding that Chad Barnett, the President of the now bankrupt [Respondent] D & C Produce, Inc., *admits to the material allegations* of the complaint and will consent to the sanctions dictated by PACA, including that he will be barred for up to two years from holding a license under PACA regulations (emphasis added)...” In the attachment to that Answer, President Barnett wrote, “I, Chad Barnett, agree to the consent work out [sic] by Bill Yagers [sic] office and the PACA, concerning my rights and responsibilities in any business governed by the PACA.”

Complainant also filed a motion with supporting memorandum seeking a Decision Without Hearing by Reason of Admissions made by Respondent in its Answer and in its bankruptcy petition. In that motion, Complainant also noted that official notice may be taken of the documents that Respondent has filed in connection with its Chapter 7 bankruptcy proceeding. Based upon a careful consideration of the pleadings and precedent decisions cited by Complainant, official notice is taken of the bankruptcy documents filed by Respondent and



the following Decision is issued without further procedure or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Pertinent Statutory Provisions**

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

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or 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 such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act. (emphasis added)

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

(a) Whenever (1) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this Act (7 U.S.C. § 499b), or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the 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.

**Pertinent Regulation**

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

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

....

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

....

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

#### **Findings of Fact**

1. D & C Produce, Inc., (hereinafter “Respondent”) is a corporation organized and existing under the laws of the State of North Carolina. Its business address while operating was 2145 Foxfire Road, Suite 12-B, Jackson Springs, North Carolina 27281. Its mailing address while operating was P.O. Box 1016, Vass, North Carolina 28394. Its current addresses are: c/o Chad Barnett, 1607 Hoffman Road, Jackson Springs, North Carolina 27821; and c/o Chad Barnett, 153 Vivian Street, West End, North Carolina 27376.
2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. PACA license number 000960 was issued to Respondent on April 5, 2000. That license terminated on April 5, 2001, when Respondent failed to pay the applicable annual fee to renew its license.
3. Respondent, during the period May 2000 through June 2001, on or about the dates and in the transactions set forth in paragraph III of the Complaint, failed to make full payment promptly to 8 sellers of the agreed purchase prices in the total amount of \$454,017.20 for 47 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.
4. On March 21, 2002, Respondent filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Middle District of North Carolina. That petition has been designated Case Number 02-80864.

5. Respondent's bankruptcy documents<sup>1</sup> included Schedule F - Creditors Holding Unsecured Nonpriority Claims (hereinafter "Bankruptcy Schedule F"). In that bankruptcy schedule, Respondent admitted that it owes fixed amounts for debts that total \$545,125.60 to the 8 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$454,017.20 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 55 creditors named are the 8 firms listed in the Complaint, along with the amounts of their respective claims. A comparison with the table set forth in paragraph III of the Complaint reveals that the amounts acknowledged as owed by Respondent are identical for two (2) of the produce sellers, higher for another two (2) of the produce sellers, and lower for four (4) of the produce sellers. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent are as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Schedule F</u>
DiMare Ruskin, Inc.	\$ 124,555.55	\$120,000.00
DiMare Johns Island	30,008.00	30,008.00
East Coast Brokers & Packers, Inc.	42,640.00	77,000.00
R & V Warren Farms, Inc.	41,727.00	141,571.50
Classie Produce (A Div. of Classie Growers)	104,464.00	90,000.00
Impact Brokerage	50,815.20	29,022.40
Big Red Tomato Packers	10,960.00	10,960.00
Nova Produce, Inc.	48,847.45	46,563.70
	<u>\$454,017.20</u>	<u>\$545,125.60</u>

6. Respondent reported in the Summary of Schedules to the voluntary petition filed in its bankruptcy proceeding that it had total assets of \$56,620.00 and total liabilities of \$1,217,502.09 as of March 21, 2002.

7. Respondent's President Chad Barnett declared under penalty of perjury that the information provided in Respondent's bankruptcy petition was true and correct when he signed that petition.

8. On March 22, 2002, Respondent filed an Answer in which it admitted to the material allegations of the Complaint.

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<sup>1</sup>Official notice is hereby taken of those documents as authorized by *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

### Conclusions

Respondent has admitted, in its Answer, that it purchased, received, and accepted 47 lots of perishable agricultural commodities in interstate commerce from the 8 sellers named in the Complaint. Respondent also admitted that it failed to make full payment promptly, during the period May 2000 through June 2001, to those 8 sellers of the agreed purchase prices in the total amount of \$454,017.20. Respondent's admissions in its Answer and the admissions made in Respondent's bankruptcy documents, of which official notice has been taken, establish that the \$454,017.20 produce debt that Respondent owes those 8 sellers for 47 lots of perishable agricultural commodities is part of the acknowledged unsecured debt for which Respondent has sought relief from the Bankruptcy Court. By so scheduling that produce debt, Respondent has implicitly asserted that there is no prospect of full payment of that debt at any future date. A decision and order that relies upon such admissions may be issued in disciplinary proceedings brought under the PACA.<sup>2</sup>

Respondent's admitted failures to make full payment promptly are violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's violations are willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)) as a matter of law. The violations are "flagrant" because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. Respondent's violations are "repeated" because repeated means more than one.<sup>3</sup> Also, Respondent's failures

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

<sup>3</sup>See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972) (finding 26 violations involving \$19,059.08 occurring over 2 ½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), aff'd, 1997 WL 829211 (2d Cir. December 19, 1997), court decision printed at 56 Agric. Dec. 1790 (1997), (Havana's failure to pay 66 sellers \$1, 960, 958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4),

(continued...)

to pay for its purchase obligations, which Respondent has acknowledged as liquidated, undisputed and non-contingent debts, within the time limits established by a substantive regulation—7 C.F.R. § 46.2(aa)—duly promulgated under the PACA are willful as a matter of law.<sup>4</sup> Accordingly, Respondent's admitted failures to make full payment promptly, to the 8 sellers named in the Complaint, constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

According to the Department Judicial Officer's policy, in any PACA disciplinary proceeding in which it is alleged that a Respondent has failed to pay in accordance with the PACA and Respondent admits the material allegations in the Complaint and makes no assertion that the Respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the Complaint was served on Respondent or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.<sup>5</sup>

Currently, Respondent does not have a valid PACA license. As a result, the proper sanction for its admitted violations is a finding that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations be published.<sup>6</sup> Thus, the following Order is issued.

### Order

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<sup>3</sup>(...continued)

and Havpo's failure to pay 6 sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Distributors*, 56 Agric. Dec. 880, at 896-97 (1997) (holding that 174 violations involving 14 sellers and at least \$238,374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

<sup>4</sup>*Id.*

<sup>5</sup>*See, In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, at 562 (1998).

<sup>6</sup>*See, e.g., In re Kirby Produce Company*, 58 Agric. Dec. 1011 (1999); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002 (1999); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1964).

Respondent D & C Produce, Inc., has committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of such violations set forth herein shall be published.

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

Copies hereof shall be served upon the parties.

[This Decision and Order became effective on March 3, 2003. – Editor]

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**In re: PELICAN PRODUCE, INC.**  
**PACA Docket No. D-03-0001.**  
**Decision Without Hearing by Reason of Default.**  
**Filed January 21, 2002.**

**PACA – Default – Payment, failure to make prompt.**

Ann Parnes, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

#### **Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the “Act” or “PACA”), instituted by a Notice to Show Cause and Complaint filed on October 8, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period July 2001 through August 2002, Respondent Pelican Produce, (hereinafter “Respondent”) failed to make full payment promptly to 5 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$274,690.19 for 84 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

Respondent’s PACA license terminated on July 7, 2002, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), because Respondent failed to pay the required renewal fee. On September 9, 2002, Complainant received Respondent’s completed application for a new PACA license. In accordance with Section 4(d) of the Act (7 U.S.C. § 499d(d)), Complainant withheld the issuance of a new license pending its investigation to determine whether

Respondent was unfit to engage in business subject to the Act. As a result of the investigation, it was determined that Respondent had failed to make full payment promptly for its purchases of perishable agricultural commodities as stated above. Therefore, Complainant alleges that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker because Respondent has engaged in practices of a character prohibited by the PACA.

The Associate Deputy Administrator filed the Notice to Show Cause why Respondent should not be denied a PACA license on October 8, 2002, and a Complaint alleging the payment violations. The Notice to Show Cause and Complaint were sent to Respondent via certified mail on October 9, 2002. On October 10, 2002, the Hearing Clerk re-sent the Complaint along with a cover sheet informing Respondent that the docket number for this case had changed, and that therefore, Respondent had ten (10) days from service of that letter to file an answer. The Complaint and Notice to Show Cause were mailed to both Respondent's business and mailing address. The copy mailed to Respondent's mailing address was served on October 17, 2002. The copy mailed to Respondent's business address was returned undeliverable. On November 5, 2002, the Hearing Clerk re-sent the Notice to Show Cause and Complaint, via regular mail, to a different address for Respondent, 148 Harbor Circle, New Orleans, Louisiana 71026. The Hearing Clerk received no response from Respondent.

Respondent failed to file an answer to the Complaint within the time allowed for that purpose, and thus waived its opportunity for a hearing. Since Respondent was given an opportunity for a hearing to show cause why its application for license should not be denied but failed to avail itself of its right and Respondent failed to file an answer, 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 Louisiana. Its business address is 740 St. George Avenue, Jefferson, Louisiana 70121. Its mailing address is P. O. Box 26336, New Orleans, Louisiana 70126.

2. License number 941514 was issued to Respondent on July 7, 1994. This license terminated on July 7, 2002, 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 May 6, 2001, through August 20, 2002, Respondent failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of \$274,690.19 for 84 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

4. On September 9, 2002, Complainant received Respondent's completed application for a PACA license.

### **Conclusions**

Respondent was given an opportunity for a hearing to show cause why its application for a PACA license should not be denied, pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)); Respondent, however, failed to avail itself of its right. Moreover, Respondent failed to answer the allegations in the Complaint, which constitutes a waiver of hearing under section 1.139 of the Rules of Practice and is deemed an admission of the allegations of the Complaint (7 C.F.R. 1.136). Respondent's failure to make full payment promptly with respect to the 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)). As a result of Respondent's failure to make full payment promptly for its purchases of perishable agricultural commodities, Respondent is unfit to engage in the business of a commission merchant, dealer, or broker because Respondent has engaged in practices of a character prohibited by the PACA pursuant to Section 4(d) of the Act (7 U.S.C. § 499d(d)).

### **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.

Furthermore, a finding is made pursuant to Section 4(d) of the PACA (7 U.S.C. § 499d(d)) that Respondent is unfit to be licensed under the PACA because Respondent has engaged in practices of a character prohibited by the PACA. Thus, Respondent's application for a PACA license is refused.

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 on March 3, 2003. – Editor]

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**In re: DANNY & SONS, INC., also d/b/a CHESAPEAKE FARMS.  
PACA Docket No. D-02-0014.  
Decision Without Hearing by Reason of Default.  
Filed January 23, 2002.**

**PACA – Default** – Payment, failure to make prompt.

Charles Kendall, for Complainant.

Robert Scarlett, for Respondent.

*Decision and Order filed by James W. Hunt, 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 March 29, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period October 2, 2000, through February 3, 2001, Respondent Danny & Sons, Inc., also doing business as Chesapeake Farms, (hereinafter “Respondent”) failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of \$1,783,608.03 for 617 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce. A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on March 29, 2002, and was returned to the office of the Hearing Clerk on April 16, 2002. A copy of the Complaint was re-mailed to Respondent by regular mail on May 7, 2002 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq.*, hereinafter “Rules of Practice”), and was returned to the office of the Hearing Clerk on May 29, 2002. The time for filing an Answer to the Complaint expired on May 27, 2002. The Hearing Clerk additionally sent a copy of the Complaint by certified mail on July 25, 2002 to the attorney of

record for Respondent, Robert Scarlett, Esq., who received the Complaint on July 29, 2002. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

#### **Finding of Fact**

1. Respondent is a corporation organized and existing under the laws of the State of Maryland. Its business address was 4665 Hollins Ferry Road, Baltimore, Maryland 21227. Its mailing address is P.O. Box 18270, Halethorpe, Maryland 21227.

2. At all times material herein, Respondent was licensed under the PACA. License number 940510 was issued to Respondent on January 7, 1994. This license was suspended on April 10, 2001, when the firm failed to pay a reparation order. The license terminated on January 7, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

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

4. Respondent, during the period November 1998 through July 2001, failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of \$1,783,608.03 for 617 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

#### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 617 transactions set forth in Finding of Fact No. 4 above constitutes wilful, 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**

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

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

Pursuant to the Rules of Practice, 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 became final on March 4, 2003 – Editor]

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**In re: FURRS SUPERMARKETS, INC.**  
**PACA Docket No. D-02-0028.**  
**Decision Without Hearing Based on Admissions.**  
**Filed February, 6, 2003.**

Ann Parnes, for Complainant.

Robert H. Jacobvitz, for Respondent.

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

**PACA – Default – Payment, failure to make prompt.**

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, “PACA”), Complainant has filed a Motion for Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, “Rules of Practice”). A copy of Complainant’s motion has been served upon Respondent, which has not filed a response thereto.

This proceeding was initiated by a complaint filed on September 12, 2002, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to one produce seller, Quality Fruit & Veg. Co., El Paso, Texas (hereinafter, “Quality Fruit”), in the amount of \$174,105.05, for 910 lots of perishable agricultural commodities which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001. The complaint also alleged that, on February 8, 2001, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court of the District of New Mexico (Case No. 11-01-10779-SA), and that the case was converted to a Chapter 7 Bankruptcy on December 19, 2001. The complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and publication of that finding.

Respondent, acting through its trustee in bankruptcy, filed an answer in which it admitted that it failed to make full payment promptly for the produce purchases alleged in the complaint, although Respondent made several affirmative defenses. However, none of these defenses have any merit.

Respondent's admission that it failed to make full payment promptly is found in its answer at paragraph 4 of its Third Defense, in which Respondent admitted that it made the sales to Quality Fruit on which the alleged payment violations are based but asserted that it did not pay Quality Fruit because Quality Fruit had failed to perfect its claim under the PACA trust provisions (*see* 7 U.S.C. § 499e(c)). The failure of Quality Fruit to perfect its PACA trust claim has no effect on Respondent's statutory responsibility to make full payment promptly for produce purposes. *In re Great Western Produce, Inc.*, 50 Agric. Dec. 1941, 1942 at note 3 (1991). Additional evidence that Respondent admittedly failed to make full payment promptly to Quality Fruit is found in Schedule F of Respondent's Bankruptcy Petition (attached to Complainant's Motion for Decision Without Hearing Based on Admissions as Exhibit 1), in which Respondent lists Quality Fruit's claim for \$174,105.05 as an unsecured indebtedness. Respondent's admission that it has failed to pay Quality Fruit the amount alleged in the complaint warrants the immediate issuance of a Decision Without Hearing Based on Admissions.

The Department's policy with respect to admissions in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 549 (1998), as follows:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

Respondent has admitted in its answer that it has failed to pay Quality Fruit the amount alleged in the complaint. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's PACA license. However, since Respondent's license has terminated due to its failure to pay the

annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA, and publication of that finding.

Respondent has put forward several defenses in its answer, none of which have any merit. In Respondent's First Defense, it claims that this disciplinary proceeding is barred by the automatic stay (11 U.S.C. § 362(a)(1)), which took effect at the time Respondent filed for bankruptcy. However, PACA disciplinary proceedings come within the exception to the automatic stay provisions as an exercise of "police and regulatory power" (11 U.S.C. § 362(b)(4)). *In re Fresh Approach, Inc.*, 49 B.R. 494 (N.D. Tex. 1985). It has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, *supra* at 496. Further, Congress, in 1978, specifically amended section 525 of the Bankruptcy Code (11 U.S.C. § 525) in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, *supra* at 496-98.

In Respondent's Second Defense, it claims that the disciplinary action should name the trustee for Respondent as representative of Respondent's bankruptcy estate. Respondent provides no grounds for such a claim and it is rejected. Complainant is not alleging that the trustee committed any PACA violations, so there is no basis for including the trustee as a party Respondent herein.

In Respondent's Third Defense, it argues that the Department has brought the disciplinary complaint against it not for the sanction requested in the complaint, but to collect the amount Respondent allegedly owes Quality Fruit from Fleming Companies, Inc. (Fleming), Lewisville, Texas, a 35.4% stockholder of Respondent during the period in which the alleged payment violations occurred. Respondent has not provided any evidence to support this allegation. Respondent attached to its answer (as Exhibit II) a September 20, 2002, letter written by Complainant to Fleming in which Fleming is informed that it has been determined to be "responsibly connected" with Respondent under the PACA and thus subject to possible licensing and employment restrictions, as provided by the PACA. The letter invites Fleming to respond to this determination and advises that Fleming has a right to request a formal hearing before an Department Administrative Law Judge to contest this determination. The proceeding referred to in the September 20, 2002, letter

deals only with the issue of whether Fleming meets the statutory criteria making it “responsibly connected” under the PACA (7 U.S.C. § 499a(b)(9)) and does not address the issue of the payment violations alleged to have been committed by Respondent. The responsibly connected proceeding involving Fleming is entirely separate from the disciplinary proceeding against Respondent.

Respondent also argues in its Third Defense that its failures to pay Quality Fruit were not willful, flagrant and repeated violations of the PACA. However, failures to make full payment promptly for produce, such as those admittedly engaged in by Respondent, always constitute willful, flagrant and repeated violations of the PACA. *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989). As stated in *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

As Respondent has admitted all the material allegations of fact contained in the complaint, a the issuance of a Decision Without Hearing Based on Admissions is appropriate, without further procedure or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Respondent, Furr's Supermarkets, Inc. (hereinafter, “Respondent”), is a corporation organized and existing under the laws of the State of Delaware. Respondent’s business address is 4411 The 25 Way N.E., Albuquerque, New Mexico 87109. Respondent’s mailing address is P.O. Box 102677, Albuquerque, New Mexico 87184.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 920759 was issued to Respondent on March 2, 1992. This license terminated on March 2, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent filed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent failed to make full payment promptly to one produce seller, Quality Fruit, the amount of \$174,105.05 for 910 lots of perishable agricultural commodities

which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001.

### **Conclusions**

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

### **Order**

Respondent, Furrs Supermarkets, Inc., is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

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

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

Copies hereof shall be served upon the parties.

[This Decision and Order became final on March 21, 2003. – Editor]

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**In re: MICHIGAN REPACKING & PRODUCE CO., INC.  
PACA Docket No. D-02-0015.  
Decision Without Hearing Respondent by Reason of Default.  
Filed April 21, 2003.**

Charles Kendall, for Complainant.  
Respondent, Pro se.

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

**PACA – Default – Payment, failure to make prompt.**

### **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 July 12, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period December 3, 2000, through November 5, 2001, Respondent Michigan Repacking & Produce Co., Inc. (hereinafter “Respondent”) failed to make full payment promptly to 25 sellers of the agreed purchase prices in the total amount of \$3,181,829.95 for 340 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business on March 29, 2002 by certified mail. The Certified Return Receipt (CRR) was returned to the Office of the Hearing Clerk without a signature or date. On April 22, 2002, the Office of the Hearing Clerk sent a letter to the Postmaster requesting further information. The Office of the Hearing Clerk received a response on August 20, 2002, indicating that Michigan Repacking & Produce Co., Inc. had moved in 2001, and that mail to the company was being “forwarded per written instructions.” Finally, the Office of the Hearing Clerk sent the Complaint to the home address of the company’s president, Mr. Robert Tringale, on September 12, 2002; the receipt was signed on September 20, 2002. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

### **Finding of Fact**

1. Respondent is a corporation organized and existing in the state of Michigan. Its business mailing address is 1903 Wilkins Street, Detroit, Michigan 48207.

2. At all times material herein, Respondent was licensed under the PACA. License number 192773 was issued to Respondent on June 30, 1961. This license terminated on June 30, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.



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

4. As set forth in paragraph III of the Complaint, Respondent, during the period December 3, 2000, through November 5, 2001, failed to make full payment promptly to 25 sellers of the agreed purchase prices in the total amount of \$3,181,829.95 for 340 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 340 transactions set forth in Finding of Fact No. 4 above constitutes wilful, 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**

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

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

Pursuant to the Rules of Practice, 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 on April 21, 2003 – Editor]

**CONSENT DECISIONS**

**(Not published herein - Editor)**

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

Conte, Inc. PACA Docket No. 01-0018. 3/19/03.