

AGRICULTURE DECISIONS

Volume 62

July - December 2003
Part Three (PACA)
Pages 736 - 870



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

AGRICULTURE DECISIONS

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

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

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

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format 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.

Volumes 59 (circa 2000) through the current volume of *Agriculture Decisions* are also available online at <http://www.usda.gov/da/oaljdecisions/> along with links to other related websites. Volumes 39 (circa 1980) through Volume 58 (circa 1999) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk (CD) of *Agriculture Decisions* will be available for sale at the US Government Printing Office On-line Bookstore at <http://bookstore.gpo.gov/>.

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

This page intentionally left blank.

LIST OF DECISIONS REPORTED

JULY - DECEMBER 2003

PERISHABLE AGRICULTURAL PRODUCTS ACT

COURT DECISIONS

AVOCADOS PLUS INCORPORATED, ET AL. v. USDA.
No. 03-5086. 736

H.C. MACCLAREN, INC. v. USDA.
No. 02-3006. 737

DEPARTMENTAL DECISIONS

ROBERT A. ROBERTI, JR., d/b/a PHOENIX FRUIT CO.
PACA Docket No. D-03-0006.
Decision and Order. 748

GEO. A. HEIMOS PRODUCE COMPANY, INC.
PACA Docket No. D-99-0016.
Decision and Order. 763

POST & TABACK, INC.
PACA Docket No. D-01-0026.
Decision and Order. 802

MISCELLANEOUS ORDERS

JOHN J. KAPLAN, JR.
PACA-APP Docket No. 03-0001.
Order Dismissing the Petition for Review and
Request for Hearing. 844

WALTER R. DOYLE
PACA-APP Docket No. 03-0018
Order Dismissing Case 844

DEFAULT DECISIONS

ALL WORLD FARMS, INC.
PACA Docket No. D-02-0013.
Decision Without Hearing by Reason of Default. 845

A&L PRODUCE CO. AND HIGH DESERT DISTRIBUTING, INC.
PACA Docket No. 02-0019.
Decision Without Hearing by Reason of Default. 847

RLC PRODUCE, INC. a/t/a R&L PRODUCE.
PACA Docket No. 02-0029.
Decision Without Hearing by Reason of Default. 849

U.S. TROPICALS L.L.C.
PACA Docket No. D-03-0009.
Decision Without Hearing by Reason of Default. 851

WORLD PRODUCE, INC.
PACA Docket No. D-02-0017.
Decision Without Hearing by Reason of Default. 853

THE MILES SMITH FAMILY CORP. d/b/a CAL FRESH PRODUCE.
PACA Docket No. D-03-0005.
Decision Without Hearing by Reason of Default. 855

In re: BEAR KODIAK PRODUCE, INC.
PACA Docket No. D-03-0011.
Decision Without Hearing by Reason of Default. 857

In re: METRO BROKERAGE & DISTRIBUTING, INC.
PACA Docket No. D-03-0007.
Decision Without Hearing by Reason of Default. 859

In re: GOLDEN GEM GROWERS, INC.
PACA Docket No. D-03-0019.
Decision Without Hearing by Reason of Default. 861

In re: SPECIALTY PRODUCE COMPANY, INC. PACA Docket No. D-03-0016. Decision Without Hearing by Reason of Default.	863
In re: SEMINOLE PRODUCE, INC. PACA Docket No. D-03-0010. Decision Without Hearing by Reason of Default.	865
In re: WABASH DISTRIBUTING COMPANY. PACA Docket No. D-03-0013. Decision Without Hearing by Reason of Default.	867
CONSENT DECISIONS	870

This page intentionally left blank.

PERISHABLE AGRICULTURAL COMMODITIES ACT**COURT DECISIONS****AVOCADOS PLUS INCORPORATED, ET AL. v. USDA.****No. 03-5086.****Filed July 10, 2003.****(Cite as: 2003 WL 21658679 (D.C.Cir.)).****PACA— Injunctive relief pending appeal.**

Petitioners were denied an expedited appeal and injunctive relief from administrative penalties, including suspension of license, pending appeal of an adverse ruling in the case below because the stringent standards for these extraordinary judicial actions were not met.

United States Court of Appeals,
District of Columbia Circuit.

BEFORE: TATEL and GARLAND, Circuit Judges.

ORDER

PER CURIAM.

Consolidated with 03-5101

Upon consideration of the motion for an injunction pending appeal or to escrow assessments, the responses thereto, and the reply; the motion to file out of time the motion to expedite consideration of the appeal and the response thereto; and the lodged motion to expedite consideration of the appeal and the lodged response thereto, it is

ORDERED that the motion for an injunction or to escrow assessments be denied. Appellants have not satisfied the stringent standards required for an injunction pending appeal. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977); *D.C. Circuit Handbook of Practice and Internal Procedures* 32 (2002). Nor have appellants demonstrated the escrowing of assessments is required to protect their interests pending the resolution of the appeal. It is

FURTHER ORDERED that the motion for leave to file out of time the

motion to expedite be denied. Appellants have not shown good cause for their failure to file the motion by the date set out in the initial scheduling order. *See* Fed. R.App. P. 26(b); *D.C. Circuit Handbook of Practice and Internal Procedures* 28 (2002).

H.C. MACCLAREN, INC. v. USDA.
No. 02-3006.
Filed September 4, 2003.

(Cite as: 342 F.3d 584).

PACA – Constructive knowledge of employee’s actions – Negligence, gross, failure to properly supervise – Penalties, license revocation – Scope of review – Arbitrary and capricious, when not.

Wholesale produce broker’s commissioned employees admitted to alteration of 53 USDA inspection certificates and to issuing eight false accounts of sale for a fraudulent purpose. After the discovery of the discrepancies, Petitioner conducted an internal audit and reimbursed underpaid producers and cooperated fully with USDA investigators. The Petitioner had no prior violations over a long history as a PACA licensee. The JO modified the ALJ’s decision by concluding that the Petitioner did not know but should have known of the PACA violations by its employees and further that Petitioner’s constructive knowledge warranted revocation of their PACA license. The JO determined that the failure to review even a portion of the employee’s sales transactions constituted gross negligence warranting the severe sanction of license revocation. Unless the agency’s determination was arbitrary and capricious, the court will not set aside the agency’s action.

United States Court of Appeals,
Sixth Circuit.

Affirmed.

Before MOORE and GIBBONS, Circuit Judges; SCHWARZER, Senior District Judge.*

OPINION

GIBBONS, Circuit Judge.

Petitioner H.C. MacClaren, Inc. (MacClaren), a wholesale produce broker,

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

appeals a final order of the Secretary of Agriculture revoking its license pursuant to the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a-499s. The Secretary determined that the sanction of license revocation was appropriate after concluding that MacClaren had committed sixty-one violations of PACA. Specifically, MacClaren employees admitted to altering fifty-three United States Department of Agriculture (USDA or "the agency") inspection certificates and issuing eight false accounts of sale for a fraudulent purpose. MacClaren contends that in imposing the sanction of license revocation, the Secretary erred in failing to consider the remedial purpose of PACA and all relevant circumstances and imposed a sanction that is without justification in fact. For the reasons set forth below, we affirm the decision of the Secretary.

I.

MacClaren began doing business in the 1920s and was issued a PACA license in 1974. Since 1974, MacClaren's license has been renewed annually. MacClaren operates out of Detroit, Michigan, and is owned and managed by Gregory MacClaren, president, director and fifty-one percent stockholder, and Darrell Moccia, vice-president, director, and forty-nine percent stockholder. In addition to Gregory MacClaren and Darrell Moccia, during the relevant time period MacClaren employed four salespersons, Norman Olds, Alan Johnston, Frederick Gottlob and Daniel Schmidlin, who were paid on commission. All six individuals purchased fruits and vegetables (perishable commodities) from shippers throughout the country and resold the produce to local jobbers and wholesalers. They worked in the same area with raised dividers separating their desks and together handled about 400 transactions per month.

Prior to the violations at issue, MacClaren had no record of violations of PACA. During 1994 through 1996, however, three MacClaren employees committed sixty-one violations of PACA. Olds, Johnston and Gottlob admitted to altering fifty-three inspection certificates resulting in underpayments totaling \$130,903.00 to twenty-two suppliers. In addition, Olds and Gottlob admitted to issuing eight false accounts of sale to seven suppliers resulting in underpayments of \$6,599.15.

The admissions by MacClaren employees resulted from the investigation of another company suspected of altering inspection certificates. In December 1996, USDA investigators visited MacClaren to examine MacClaren's file

relating to a transaction with the company under investigation. Upon examining the file, the investigators discovered two copies of the same USDA inspection certificate containing conflicting entries. Neither Gregory MacClaren nor Darrell Moccia could explain the discrepancy. The investigators then reviewed thirty-six files and found discrepancies in eleven of the files handled by Olds, Gottlob and Johnston.

Gregory MacClaren and Darrell Moccia denied knowledge of the alterations and told investigators that they wanted to cooperate and investigate the matter internally. They initiated an internal review and had their employees review all past files for altered inspection certificates. The internal investigation uncovered numerous additional altered inspection certificates which Gregory MacClaren and Darrell Moccia turned over to investigators. Olds, Gottlob and Johnston voluntarily gave statements to the investigators admitting that they had altered USDA inspection certificates and denying that Gregory MacClaren or Darrell Moccia were aware of their actions. Gottlob also admitted to issuing seven false accounts of sale, and Olds admitted to issuing one such false account.

Gregory MacClaren personally contacted the suppliers affected by the altered inspection certificates and false accounts to express MacClaren's intent to make restitution. According to MacClaren, the company returned almost one hundred percent of the amounts it underpaid shippers as a result of the alterations and false accountings.¹

Despite their admissions of improper conduct, MacClaren continued to employ Olds and Gottlob on the condition that they reimburse MacClaren for the restitution that it intended to pay the shippers. In addition, Olds and Gottlob were directed to call each shipper affected by the altered inspection certificates, explain their actions and advise the shipper that MacClaren intended to make restitution for any losses the shipper suffered. Olds continued working for MacClaren, and through paycheck deductions he reimbursed MacClaren for the restitution on the inspection certificates he altered. Gottlob, however, only continued working for MacClaren for about a month and a half until he was terminated for poor work performance. Gottlob did not repay MacClaren any of the restitution amount.

¹ The USDA concedes that MacClaren repaid "most but not all of the underpayments."

On June 17, 1999, the USDA issued a complaint charging MacClaren with violating PACA by altering fifty-three USDA inspection certificates and submitting false accounts to seven suppliers. The Complaint requested that MacClaren's license be revoked due to its "willful, flagrant and repeated violations" of PACA. On September 20 and 21, 2000, Administrative Law Judge (ALJ) James W. Hunt conducted a hearing in Detroit, Michigan. In his decision and order finding that MacClaren violated PACA as alleged in the complaint, the ALJ noted that MacClaren "did not deny that 53 USDA inspection certificates had been altered." He held that because "these unlawful acts were committed by [MacClaren's] salesmen in the course of their employment, they are deemed to be the acts of [MacClaren]." In deciding the appropriate sanction for the violations, the ALJ found that it had not been shown that MacClaren "was irresponsible or unscrupulous and no evidence was provided to show that license revocation or suspension would have a greater beneficial effect on the industry than a monetary fine." According to the ALJ, MacClaren "acted responsibly when it became aware of the fraudulent practices of its salesmen" and "took prompt measures to provide restitution to the shippers." Moreover, the ALJ recognized that neither Olds or Gottlob was criminally prosecuted for altering federal inspections under 7 U.S.C. § 499n(b).² Therefore, the ALJ imposed a civil penalty of \$50,000.

The agency appealed the ALJ's decision to the Judicial Officer, acting for the Secretary of Agriculture, on May 23, 2001.³ Among other things, the agency argued that the ALJ erred in failing to find MacClaren's violations willful and therefore further erred by imposing a sanction of a civil monetary penalty rather than license revocation. On November 8, 2001, without conducting an additional hearing, Judicial Officer William G. Jenson issued a decision and order in which he agreed with the majority of the ALJ's findings. The decision, however, differed from the opinion of the ALJ in two significant areas. First, in the findings of fact, the Judicial Officer concluded that Gregory MacClaren and Darrell Moccia, MacClaren's owners, "did not know, but should have known, during the period of June 1994 through November 1996, that the United States Department of Agriculture inspection

² Gottlob obtained immunity from criminal prosecution in return for his testimony at the USDA hearing. Olds testified at the hearing, but did not receive immunity.

³ The Secretary of Agriculture has delegated authority to the Judicial Officer to act as final deciding officer in the USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 & 557. 7 C.F.R. § 2.35.

certificates ... were altered and that the false accounts of sales ... were made." In addition, the Judicial Officer disagreed with the sanction of a civil monetary penalty and instead imposed the sanction of license revocation. MacClaren filed its petition for review in this court on January 2, 2002, which was within sixty days of issuance of the final agency order as required under 28 U.S.C. § 2344.

II.

In 1930, Congress enacted PACA "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables." *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 745 (5th Cir.1999) (quoting *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.1974)). PACA was "designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility." *Kanowitz Fruit and Produce Co., Inc., v. United States Dep't of Agric.*, No. 97-4224, 1998 WL 863340, at 1 (2d Cir. Oct. 29, 1998). It provides "a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Allred's Produce*, 178 F.3d at 745 (quoting *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir.1967)). To achieve this control, PACA establishes a strict licensing system and subjects all dealers of perishable agricultural commodities to severe sanctions for violations of PACA's requirements. *Id.*; 7 U.S.C. §§ 499c(a) & 499h. The USDA is designated with authority to administer and enforce PACA.

Under PACA, dealers are subject to a number of statutory requirements including making full payment promptly for all purchases of perishable agricultural commodities. 7 U.S.C. § 499b(4). In addition, it is unlawful for any dealer "to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity" and "to fail or refuse [to] truly and correctly ... account for such transactions." *Id.* Violations of PACA's requirements may result in sanctions. The Secretary may publish the facts and circumstances of violations and suspend the license of the violator for up to ninety days, or, if a violation is flagrant or repeated, the Secretary may revoke the violator's license. 7 U.S.C. § 499h(a). In 1995, Congress amended PACA to provide for the alternative sanction of a civil monetary penalty not to exceed \$2,000 per violation or \$2,000 each day a violation continues. 7 U.S.C. § 499h(e).

The USDA set forth the standard governing the decision to impose a particular sanction in *In re S.S. Farms Linn County, Inc.*:

[R]eliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions. Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

50 Agric. Dec. 476, 497 (1991) (citations omitted), *aff'd*, 1993 WL 128889 (9th Cir.1993). Accordingly, the Secretary must consider all relevant circumstances, including both mitigating and aggravating circumstances, when selecting the appropriate sanction. See *Tambone v. United States Dep't of Agric.*, 50 F.3d 52, 55 (D.C.Cir.1995).

MacClaren first contends that the Secretary, acting through the Judicial Officer, failed to apply the proper USDA standard for determining sanctions in deciding to revoke MacClaren's license. Whether the Secretary applied the correct standard is a question of law subject to *de novo* review. *Potato Sales Co., Inc. v. Dep't of Agric.*, 92 F.3d 800, 803 (9th Cir.1996) ("[a]n agency's conclusions of law are subject to *de novo* review"). Our review of the Secretary's decision indicates that the Secretary applied the correct legal standard for determining the appropriate sanction as set forth in *S.S. Farms Linn County, Inc.*

MacClaren next claims that the Secretary applied the legal standard incorrectly and therefore imposed an improper sanction because the Secretary did not examine the nature of the violations in relation to the remedial purpose of PACA and did not consider all relevant circumstances. Our review of an administrative agency decision is narrow, and we will uphold the decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Allred's Produce*, 178 F.3d at 746 (quoting 5 U.S.C. § 706(2)(A)). Specifically, we review whether the Secretary misapplied the sanction standard for an abuse of discretion, and we may not overturn the Secretary's choice of sanction unless it is unwarranted in law or without justification in fact. See *Havana Potatoes of New York Corp. v. United States Dep't of Agric.*, 136 F.3d 89, 91, 93 (2d Cir.1997) (considering under an abuse of discretion standard whether the Secretary's choice of sanction was based on an erroneous policy regarding sanctions and whether the Judicial Officer misapplied the USDA sanction standard, and noting that the Secretary's choice

of sanction is not to be overturned unless it is unwarranted in law or without justification in fact); *Norinsberg Corp. v. United States Dep't of Agric.*, 47 F.3d 1224, 1228 (D.C.Cir.1995) (analyzing appellant's argument that the Secretary failed to consider all relevant circumstances for an abuse of discretion and recognizing that the Secretary's choice of sanction cannot be overturned unless it is unwarranted in law or unjustified in fact).

According to MacClaren, the remedial purpose of PACA is to "assure that only financially responsible brokers are in business so that growers are paid for the produce they supply." MacClaren admits in its reply brief, however, that "detering irresponsible and unscrupulous conduct" is also part of PACA's "remedial purpose." MacClaren points out that its actions of investigating the wrongdoing and making restitution indicate financial responsibility. MacClaren argues that the Secretary's decision to impose the sanction of revocation, as opposed to a civil monetary penalty, did not properly consider the benefits of a civil monetary penalty, including promoting the remedial purposes of PACA and encouraging dealers suspected of violations to cooperate with investigators and make restitution. Moreover, MacClaren contends that the Secretary ignored relevant circumstances such as "who will be most affected by the sanction, the deception of the salesmen's acts and the lack of any prior violations by the company."

Before determining the appropriate sanction against MacClaren, the Secretary fully set forth the sanction policy as described in *S.S. Farms Linn County, Inc.* While the Secretary did not explicitly describe the remedial purposes of PACA, the Secretary noted that "[t]he purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA." Considering this purpose, the Secretary concluded that a civil monetary penalty would not sufficiently deter MacClaren and other potential violators from future violations of PACA and that license revocation was necessary to deter such violations.

The sanction policy states that it is "the nature of the violations" that is to be examined "in relation to the remedial purposes" of PACA, not the actions taken after the violations, which could be, and were, considered as relevant circumstances. The nature of the violations at issue, altering inspection certificates and falsifying accounts resulting in losses to shippers in excess of \$136,000, indicates that MacClaren was not a financially responsible dealer. The Secretary set forth the specific violations of PACA and noted that the

number of violations and the seriousness of the violations were factors in determining that revocation of MacClaren's license was warranted. Therefore, the Secretary properly considered the nature of the violations in relation to the remedial purposes of the PACA. *Cf. ABL Produce, Inc. v. United States Dep't of Agric.*, 25 F.3d 641, 646 (8th Cir.1994) (noting that "consideration of the 'relevant circumstances' should include consideration of the statute's purpose" and finding that license revocation was not appropriate after examining all relevant circumstances).

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "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. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

MacClaren asserts that all of the aggravating factors listed by the Secretary were caused by the salesmen with the exception of MacClaren's negligent supervision and its retention of the salespersons who engaged in the unlawful conduct, and, according to MacClaren, consideration of these two factors is inappropriate. MacClaren fails to cite any authority supporting its argument that these factors are not relevant or otherwise should not be considered. According to MacClaren, the Secretary improperly established a new duty under PACA that supervisors review some undesignated portion of a

salesperson's files and that failure to do so constitutes negligent supervision. The Secretary, however, properly considered the management and supervision of employees in a highly regulated industry as a relevant factor to be weighed in a sanction determination. *See generally, Norinsberg*, 47 F.3d at 1227 (considering relevant circumstances such as the company's financial difficulties, accords reached with suppliers, and the potential harm to the company's creditors from suspending its license). Similarly, while retention of employees who commit violations of PACA is not directly prohibited by PACA, the retention of such employees may be considered relevant in determining whether license suspension or revocation is required to deter future violations. Moreover, as noted above, MacClaren is deemed to have committed the knowing and willful violations committed by its employees, and, therefore, the Secretary properly considered the aggravating factors inherent in the employees' violations. Accordingly, the Secretary considered all relevant circumstances as required in *S.S. Farms Linn County, Inc.* in deciding to impose the sanction of license revocation.

MacClaren next claims that the Secretary erred in imposing a sanction of license revocation as a result of MacClaren's violations of PACA. As we previously noted, the Secretary's decision regarding an appropriate sanction may only be overturned if it is found to be unwarranted in law or without justification in fact. *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir.1987). An appellate court may not reweigh the evidence or substitute its judgment for that of the Secretary. *Havana Potatoes*, 136 F.3d at 91. "The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court." *Glover Livestock Comm'n Co.*, 411 U.S. at 188-89, 93 S.Ct. 1455. "The court may decide only whether under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in (his) choice of the remedy.'" *Id.* at 189, 93 S.Ct. 1455 (quoting *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)).

MacClaren argues that the sanction imposed is without justification in fact. Specifically, MacClaren claims that there is no evidence to support the Secretary's determination that license revocation is necessary to deter future violations. MacClaren asserts that it has acted to rectify the wrongdoing and prevent future violations and argues that these remedial actions should be taken into consideration. In addition, MacClaren contends that the Secretary's finding that Gregory MacClaren and Darrell Moccia would have known about

the altered inspections and false accountings if they had properly supervised their salesmen is without justification in fact.

License revocation under PACA is authorized where the violation is "flagrant or repeated." 7 U.S.C. § 499h(a); *Norinsberg Corp.*, 47 F.3d at 1225. In determining whether violations are "flagrant" under PACA, the court considers "the number of violations, the amount of money involved, and the time period during which the violations occurred." *Allred's Produce*, 178 F.3d at 748. "Repeated" violations under PACA are violations that are not committed simultaneously. *Id.* The Secretary found that MacClaren's violations of PACA were both flagrant and repeated. The Secretary's findings are supported by the record. Three of MacClaren's four salesmen admitted to altering fifty-three inspection certificates over a twenty-nine month period resulting in underpayments totaling \$130,903 to twenty-two suppliers. These violations meet the definitions of flagrant and repeated. Therefore, the revocation of MacClaren's license was well within the Secretary's authority and discretion. *See Allred's Produce*, 178 F.3d at 747 (agreeing with the Secretary that Allred's violations of PACA were flagrant and repeated and therefore holding that the Secretary did not abuse his discretion in revoking a dealer's license).

Moreover, the Secretary's legal conclusions that license revocation was necessary to deter future violations and that Gregory MacClaren and Darrell Moccia were negligent in failing to review transaction files prepared by their salesmen are sufficiently supported by facts set forth by the Secretary.⁴ With regard to deterrence, the Secretary found as follows:

[I]n light of the number of [MacClaren's] willful violations, the seriousness

⁴ MacClaren argues that there is little in this case to suggest that license revocation, rather than a civil monetary penalty, is necessary to deter it or others from future violations of PACA. MacClaren points out that a civil monetary penalty would seem especially appropriate in this case where the imposition of such a penalty, as opposed to revocation, would encourage other dealers to cooperate with investigators and attempt to make restitution. We recognize the merit in MacClaren's argument. We do note, however, that a while imposing a civil monetary penalty as opposed to license revocation may encourage cooperation, it would not be as effective a deterrent because violators might believe that they could commit violations and, if caught, simply cooperate and pay restitution and monetary penalties. In the instant case, we are limited to determining only whether the Secretary made an allowable judgment in the choice of remedy. *Glover Livestock Comm'n Co.*, 411 U.S. at 189, 93 S.Ct. 1455. Both revocation and a civil penalty were proper possible remedies in this case. We are not at liberty to reexamine the aggravating and mitigating evidence to determine whether we would have arrived at some lesser sanction, such as a civil penalty. *See Havana Potatoes*, 136 F.3d at 91.

of [MacClaren's] willful violations, the 29-month period during which the violations occurred, the number of [MacClaren's] employees who altered United States Department of Agriculture inspection certificates and made false accounts of sales, the amount of money which [MacClaren] underpaid its produce suppliers and/or brokers, [MacClaren's] retention of the salespersons who engaged in the unlawful conduct, and [MacClaren's] principal's failure to review transaction files prepared by [its] salespersons, I conclude a civil penalty would not be sufficient to deter [MacClaren] and other potential violators from future violations of the PACA.

In determining whether Gregory MacClaren and Darrell Moccia were negligent in failing to review their salesmen's transaction files, the Secretary considered the requirements of PACA, testimony from an experienced manager in the produce sales industry, and testimony from the USDA sanction witness. Based on the prohibitions set forth in PACA and the testimony that appropriate supervision by a manager includes reviewing a salesperson's transaction files, at least on a random sampling basis, the Secretary concluded that "failure to review a least a portion of the transaction files prepared by ... salespersons constitutes gross negligence." Because these legal conclusions are sufficiently supported by evidence in the record, the Secretary's decision to revoke MacClaren's PACA license was justified in fact and was not an abuse of discretion.

III.

For all the reasons set forth above, we affirm the decision of the Secretary.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: ROBERT A. ROBERTI, JR., d/b/a PHOENIX FRUIT CO.

PACA Docket No. D-03-0006.

Decision and Order.

Filed August 12, 2003.

PACA – Application for PACA license – Practices of a character prohibited by the PACA – Fit for PACA license.

The Judicial Officer (JO) affirmed the decision by Chief Administrative Law Judge James W. Hunt concluding, pursuant to 7 U.S.C. § 499d(d), Respondent was unfit to receive a PACA license because of his practices of a character prohibited by the PACA. The JO also concluded Respondent is a person who is or was responsibly connected with a person whose PACA license is currently under suspension and pursuant to 7 U.S.C. § 499d(b)(A), the Secretary of Agriculture must refuse a PACA license to Respondent. The JO rejected Respondent's contention that the Chief ALJ erroneously relied upon 7 U.S.C. § 499d(b) and Respondent's contention that Respondent's connection with violations of 7 U.S.C. § 499b(4) was a legally insufficient basis for finding Respondent unfit to engage in the business of a commission merchant, dealer, or broker.

Ruben D. Rudolph, Jr., for Complainant.

Charles Hultstrand, for Respondent.

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

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a "Notice to Show Cause" on December 4, 2002. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant: (1) alleges Robert A. Roberti, Jr., d/b/a Phoenix Fruit Co. [hereinafter Respondent], engaged in practices of a character prohibited by the PACA; (2) requests a finding that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker; and (3) requests Respondent's PACA license application, filed November 5, 2002, be refused (Notice to Show Cause ¶ VIII).

On December 19, 2002, Respondent filed a "Response to Notice to Show Cause" in which Respondent: (1) denies a number of the allegations in Complainant's Notice to Show Cause; (2) asserts the accurate allegations in Complainant's Notice to Show Cause are not sufficient to withhold the issuance of a PACA license to Respondent; and (3) requests an order directing the issuance of a PACA license to Respondent.

On February 28, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted a hearing in Phoenix, Arizona. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Charles Hultstrand, Hultstrand & Goodale P.C., Mesa, Arizona, represented Respondent.

On March 31, 2003, Complainant filed "Proposed Findings of Fact, Conclusions of Law, and Order" [hereinafter Post-Hearing Brief]. On April 11, 2003, Respondent filed a "Response to Complainant's Proposed Findings of Fact, Conclusions of Law, and Order" [hereinafter Post-Hearing Response Brief].

On May 8, 2003, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding Respondent engaged in practices of a character prohibited by the PACA prior to filing an application for a PACA license on November 5, 2002; (2) concluding Respondent is not fit to receive a PACA license because Respondent engaged in practices of a character prohibited by the PACA; and (3) denying Respondent's November 5, 2002, application for a PACA license (Initial Decision and Order at 10).

On June 9, 2003, Respondent appealed to the Judicial Officer. On June 30, 2003, Complainant filed "Complainant's Response to Respondent's Appeal Petition." On July 1, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order; except that, in addition to the Chief ALJ's conclusion that Respondent is not fit to receive a PACA license, I also conclude the Secretary of Agriculture must refuse to issue Respondent a PACA license because Respondent is or was responsibly connected with a person whose PACA license is currently under suspension. Therefore, except for minor, non-substantive changes and an additional conclusion of law, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions of law as restated.

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

are designated by “Tr. Respondent did not introduce any exhibits.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

....

(b) Refusal of license; grounds

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

responsibly connected with a person who—

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

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

.....
(D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

.....

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a licence 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 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 the 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 this chapter 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 chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

(e) Refusal of license

The Secretary may refuse to issue a license to an applicant if he finds that 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, has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, and if he finds that the circumstances of such bankruptcy warrant such a refusal, unless the applicant furnishes a bond of such nature and amount as may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this chapter.

.....

§ 499g. Reparation order

.....

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

Unless the licensee against whom a reparation 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 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 the judgment on 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

(a) Authority of Secretary

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

7 U.S.C. §§ 499b(4), 499d(b)(A)-(B), (D), (d)-(e), 499g(d), 499h(a).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

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

....

SUBCHAPTER B—MARKETING OF PERISHABLE

AGRICULTURAL COMMODITIES

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

(m) *Dealer* means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and include:

....

(2) Retailers, when the invoice cost of all purchases of produce exceeds \$230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce[.]

....

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

....

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

7 C.F.R. § 46.2(m)(2), (aa)(5).

CHIEF ADMINISTRATIVE LAW JUDGE'S

**INITIAL DECISION AND ORDER
(AS RESTATED)**

Statement of the Case

Respondent filed a completed application for a PACA license on November 5, 2002.¹ Pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Complainant conducted an investigation to determine whether Respondent was fit for a PACA license. Complainant completed the investigation no later than December 4, 2002.² Complainant concluded Respondent was not fit to receive a PACA license. Complainant based this conclusion on the following allegations: (1) in 1995, Respondent was president, director, and 100 percent stockholder of SWF Produce, Inc., a PACA licensee which repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers; (2) Respondent was found to have been responsibly connected with SWF Produce, Inc., at the time it committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) in 2001, Respondent was involved with Garden Fresh Fruit Market, Inc., a PACA licensee which repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers; (4) Respondent was found to have been responsibly connected with Garden Fresh Fruit Market, Inc., at the time it committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (5) Respondent was the president, director, and 100 percent stockholder of Sandia Produce, Inc., a PACA licensee issued a reparation order on June 13, 2000, requiring it to pay Ruby Robinson Co., Inc., \$13,168.10 for failure to pay for produce in violation of section 2 of the PACA (7 U.S.C. § 499b); (6) on July 19, 2000, Sandia Produce, Inc.'s PACA license was suspended because it failed to pay \$13,168.10 in accordance with the June 13, 2000, reparation order; (7) Sandia Produce, Inc.'s PACA license is currently under suspension because Sandia Produce, Inc., has not paid \$13,168.10 in accordance with the June 13, 2000,

¹*In re Robert A. Roberti, Jr.*, 62 Agric. Dec. 302 ,(2003) (Ruling on Certified Question).

²See note 1.

reparation order; (8) on July 17, 2001, Respondent filed for personal bankruptcy and in his bankruptcy petition, Respondent took personal responsibility for Garden Fresh Fruit Market, Inc.'s produce debts; (9) Respondent was involved with Field Fresh Fruit Market, a firm subject to PACA licencing, but which was operated without a PACA license; and (10) Respondent listed Field Fresh Fruit Market's produce creditors in his July 17, 2001, bankruptcy petition (Notice to Show Cause; Complainant's Post-Hearing Brief at 6, 10-11).

Respondent was a director, the president, and 100 percent stockholder of SWF Produce, Inc., during the period when SWF Produce, Inc., committed repeated and flagrant violations of the PACA. However, all of SWF Produce, Inc.'s produce sellers were later paid in full. (Tr. 55-56, 86-87, 96; CX 8, CX 9, CX 10.)

Respondent was involved with Garden Fresh Fruit Market, Inc., until November 1, 1993, when he transferred all of his stock in Garden Fresh Fruit Market, Inc., to his father and resigned as president and director of Garden Fresh Fruit Market, Inc. (Tr. 87-88; CX 2 at 7-8). Later, due to the medical condition of his father, Respondent helped with the operation of Garden Fresh Fruit Market, Inc., but Respondent did not have an ownership interest in Garden Fresh Fruit Market, Inc. or act as an officer or director of Garden Fresh Fruit Market, Inc. (Tr. 104-05). On November 3, 1999, Garden Fresh Fruit Market, Inc., filed for bankruptcy. On September 6, 2001, the Chief ALJ found, during the period August 23, 1998, through June 24, 1999, Garden Fresh Fruit Market, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for fruits and vegetables which Garden Fresh Fruit Market, Inc., received, accepted, and sold in interstate and foreign commerce.³ (Tr. 25-26; CX 16, 19.)

Complainant contends Respondent's name ("Robert Roberti, Jr. ") appears on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition and the appearance of Respondent's name on the November 3, 1999, bankruptcy petition establishes that Respondent took personal responsibility for Garden Fresh Fruit Market, Inc.'s produce debts. Respondent also listed Garden Fresh Fruit Market, Inc.'s produce creditors on his July 17, 2001, bankruptcy petition. Information in Complainant's computer database further indicates Respondent continued to be associated with Garden Fresh Fruit Market, Inc. (Tr. 13, 22-29; CX 5 at 16-34, CX 19 at 2.)

³*In re Garden Fresh Fruit Market, Inc.*, 60 Agric. Dec. 889 (2001).

The record shows that Respondent's name is typed on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition (CX 19 at 2). Respondent, however, testified he did not sign this bankruptcy petition and the signature is that of his father, Robert Roberti, Sr. (Tr. 88). The signature above the typed name is clearly not the same as the other examples of Respondent's signature that appear in the record but, rather, the signature on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition appears to be that of Respondent's father.⁴

With respect to the listing of Garden Fresh Fruit Market, Inc.'s creditors in Respondent's July 17, 2001, bankruptcy petition, Respondent testified he was sued by one of Garden Fresh Fruit Market, Inc.'s creditors and his attorney advised him to include Garden Fresh Fruit Market, Inc., creditors in his bankruptcy petition but to identify their claims as "contingent, "unliquidated, and "disputed (Tr. 88-89; CX 5 at 16-34). Under Rule 3003(c)(2) of the Federal Rules of Bankruptcy Procedure, any creditor whose claim is scheduled as disputed, contingent, or unliquidated must file a proof of claim.

Respondent was determined to be responsibly connected with Garden Fresh Fruit Market, Inc., at the time of its violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, Respondent was not served with this responsibly-connected determination, and the record does not otherwise establish that Respondent knew of this determination. (Tr. 39-40; CX 18.)

As for Field Fresh Fruit Market, Respondent testified he was involved with Field Fresh Fruit Market, a retail store, for 6 to 8 months in 1996 or 1997 and Field Fresh Fruit Market's produce purchases reached \$15,000 a week (Tr. 92-95). However, Field Fresh Fruit Market's weekly purchases before reaching that amount are not shown.

Finally, with respect to Sandia Produce, Inc., Respondent admits: (1) he was president and owner of Sandia Produce, Inc.; (2) Sandia Produce, Inc., was unable to pay all its creditors and one creditor, Ruby Robinson Co., Inc., obtained a reparation award in the amount of \$13,168.10 in 2000 for Sandia Produce, Inc.'s failure to pay for produce; (3) Sandia Produce, Inc., did not pay this reparation award to Ruby Robinson Co., Inc.; and (4) based on Sandia Produce, Inc.'s failure to pay the reparation award to Ruby Robinson Co., Inc., Sandia Produce, Inc.'s PACA license was suspended on July 19, 2000 (Tr. 89-91; Respondent's Response to Notice to Show Cause ¶ III(c); Respondent's Post-Hearing Response Brief at 6).

⁴Compare the signatures in CX 19 at 2 with the signatures in CX 2 at 4, 7, and 8.

Respondent testified that he had wanted to pay Ruby Robinson Co., Inc., “something but that “they said they wanted the full amount paid in full. I didn’t have it. I listed them as a creditor. We filed our bankruptcy (Tr. 90).

Respondent listed Ruby Robinson Co., Inc.’s reparation award claim for \$13,168.10 in Respondent’s July 17, 2001, bankruptcy petition. However, like the claims by Garden Fresh Fruit Market, Inc.’s produce creditors, Respondent identified Ruby Robinson Co., Inc.’s claim as “contingent, “unliquidated, and “disputed (CX 5 at 38).

Respondent was discharged in bankruptcy in October 2001 (Tr. 107). Respondent testified that, in August or September 2002, he contacted Ruby Robinson Co., Inc., to try to make arrangements to pay the “\$13,000 debt, but that Ruby Robinson Co., Inc., “wanted approximately \$22,000 or \$23,000 paid in a cashier’s check (Tr. 90-91). Respondent also testified that Sandia Produce, Inc., owed two other creditors between \$6,000 and \$10,000 (Tr. 108).

Discussion

Complainant failed to show by a preponderance of the evidence that Respondent was involved with Garden Fresh Fruit Market, Inc., when it willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period August 23, 1998, through June 24, 1999. Respondent’s name on Garden Fresh Fruit Market, Inc.’s bankruptcy petition is obviously an error and the information in Complainant’s database is unreliable, secondhand information based on documents that were not presented at the hearing (Tr. 30-31). Complainant never served Respondent with the determination that Respondent was responsibly connected with Garden Fresh Fruit Market, Inc. Reliance on Complainant’s responsibly-connected determination would therefore violate Respondent’s right to due process. Respondent’s alleged connection with Garden Fresh Fruit Market, Inc., for purposes of considering whether Respondent is fit to be granted a PACA license is accordingly disregarded.

The record does not show that Field Fresh Fruit Market, a retail operation, was required to have a PACA license. Section 46.2(m)(2) of the Regulations (7 C.F.R. § 46.2(m)(2)) provides that a retailer is not a dealer required to be licensed until its invoice cost of all produce purchases exceeds \$230,000 during a calendar year. Even though a projection of Field Fresh Fruit Market’s eventual weekly purchases would exceed this amount, Complainant did not show that Field Fresh Fruit Market’s produce

purchases had reached that volume during the 6 to 8 months of Respondent's operation of Field Fresh Fruit Market. The record therefore fails to show Respondent was associated with Field Fresh Fruit Market at a time that it failed to have a required PACA license.

Respondent argues, pursuant to section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), his failure to pay a reparation order is not applicable to his fitness to receive a PACA license because the June 13, 2000, reparation order was not issued within 2 years of his application for a PACA license and he is also subject to the bankruptcy exception under section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) (Respondent's Post-Hearing Response Brief at 5-6).

Respondent further argues that despite being adjudged bankrupt within 3 years of his application, he may still receive a license under section 4(e) of the PACA (7 U.S.C. § 499d(e)) if he posts a bond, but that the Secretary of Agriculture has refused to set a bond amount (Respondent's Post-Hearing Response Brief at 2, 5).

Even though the June 13, 2000, reparation order against Respondent was issued more than 2 years prior to the date of Respondent's PACA license application and notwithstanding the bankruptcy exception in section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), Respondent is not thereby entitled to a PACA license by simply posting a bond. Complainant may, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), refuse to issue a PACA license if Complainant finds the applicant "unfit because the applicant "prior to the date of the filing of the application engaged in any practice of the character prohibited by the PACA.

In this case, Respondent had engaged in such practices prior to filing his PACA license application on November 5, 2002. Respondent was the president, a director, and sole stockholder of, and responsibly connected with, SWF Produce, Inc., a firm that engaged in repeated and flagrant violations of the PACA. To Respondent's credit, he eventually paid SWF Produce, Inc.'s creditors. However, the fact remains that SWF Produce, Inc., had engaged in repeated and flagrant violations of the PACA during a period in which Respondent was responsibly connected with SWF Produce, Inc. That circumstance may therefore be considered by Complainant as a "practice of the character prohibited by the PACA in determining whether Respondent is fit to engage in the business of a commission merchant, dealer, or broker.

More recently, Respondent, through Sandia Produce, Inc., another firm he owned and operated, failed to pay a reparation award. Respondent argues that this failure to pay no longer applies in deciding whether he should be

issued a PACA license because the June 13, 2000, reparation order was issued over 2 years before Respondent filed his PACA license application and because of his bankruptcy. However, as a result of Respondent's failure to pay the reparation award, Sandia Produce, Inc.'s PACA license was suspended. The suspension of Sandia Produce, Inc.'s PACA license has not been lifted. Section 4(b)(A) of the PACA (7 U.S.C. § 499d(b)(A)) provides that the Secretary of Agriculture shall refuse to issue a PACA license to an applicant who is or was responsibly connected with a person "whose license is currently under suspension. Further, the failure to pay the reparation order constitutes a "practice of the character prohibited by the PACA under section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Respondent has apparently still not complied with the United States Department of Agriculture's June 13, 2000, reparation order. The bankruptcy exception in section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) contemplates that the reparation award will be listed in the bankruptcy petition and then be discharged with the bankrupt's other debts.⁵ At the hearing, Respondent did not deny that he owed Ruby Robinson Co., Inc., \$13,168.10. Nevertheless, Respondent listed the reparation award in his July 17, 2001, bankruptcy petition as a contingent, unliquidated, and disputed claim when it was, indeed, none of these. Respondent did not explain why his undisputed debt to Ruby Robinson Co., Inc., was to be treated the same as the disputed claims from Garden Fresh Fruit Market, Inc.'s creditors. Respondent, moreover, did not contend that his bankruptcy discharged his debt to Ruby Robinson Co., Inc., but rather indicated in his testimony that he and Ruby Robinson Co., Inc., regarded the debt as continuing even after his October 2001 discharge in bankruptcy.

Respondent's failure to explain the reason for the way he treated his undisputed debt to Ruby Robinson Co., Inc., in his bankruptcy petition thus leaves unresolved the question whether the debt is still outstanding. I infer the reparation award has not been paid and Respondent has therefore failed to comply with the United States Department of Agriculture's reparation order. In view of these circumstances, and Respondent's prior association with SWF Produce, Inc., Respondent has failed to show that he is fit to receive a PACA license.

Findings of Fact

⁵See, e.g., *Jerome Kantro Co. v. L. George Co.*, 28 Agric. Dec. 493 (1969).

1. Respondent is an individual whose business address is 2241 East Marquette Drive, Gilbert, Arizona 85234.
2. Respondent filed a completed application for a PACA license on November 5, 2002.
3. Respondent was president and 100 percent stockholder of, and responsibly connected with, SWF Produce, Inc., a PACA licensee, at the time SWF Produce, Inc., engaged in repeated and flagrant violations of the PACA.
4. Respondent was president and 100 percent stockholder of Sandia Produce, Inc. On June 13, 2000, the United States Department of Agriculture ordered Sandia Produce, Inc., to pay Ruby Robinson Co., Inc., a reparation award of \$13,168.10 based upon Sandia Produce, Inc.'s failure to pay for perishable agricultural commodities.
5. The amount of the reparation award referenced in paragraph 4 of these findings of fact was liquidated and was not contingent or disputed.
6. Respondent filed a petition for personal bankruptcy on July 17, 2001. In his petition for personal bankruptcy, Respondent listed the reparation award to Ruby Robinson Co., Inc., as a contingent, unliquidated, and disputed claim.
7. In October 2001, Respondent was discharged in bankruptcy. Respondent's discharge in bankruptcy did not discharge the debt Respondent owed to Ruby Robinson Co., Inc.
8. Respondent has not paid the reparation award referenced in paragraph 4 of these findings of fact.
9. Respondent has not complied with the United States Department of Agriculture's reparation order referenced in paragraph 4 of these findings of fact.
10. On July 19, 2000, Sandia Produce, Inc.'s PACA license was suspended because of its failure to pay the reparation award referenced in paragraph 4 of these findings of fact. The suspension of Sandia Produce, Inc.'s PACA license has not been lifted.

Conclusions of Law

1. Respondent engaged in practices of a character prohibited by the PACA prior to filing an application for a PACA license. Pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Respondent is not fit to receive a PACA license because of his practices of a character prohibited by the PACA.
2. Respondent is a person who is or was responsibly connected with

a person (Sandia Produce, Inc.) whose PACA license is currently under suspension. Pursuant to section 4(b)(A) of the PACA (7 U.S.C. § 499d(b)(A)), the Secretary of Agriculture must refuse a PACA license to Respondent because he is a person who is or was responsibly connected with a person whose PACA license is currently under suspension.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's "Memorandum of Points and Authorities [hereinafter Appeal Petition] attached to his "Notice of Appeal. First, Respondent contends the Chief ALJ's reliance on the June 13, 2000, reparation order issued against Sandia Produce, Inc., in determining that a PACA license should not be issued to Respondent, is error. Respondent contends Sandia Produce, Inc.'s \$13,168.10 debt to Ruby Robinson Co., Inc., for produce, which resulted in the June 13, 2000, reparation order, was discharged in bankruptcy and pursuant to section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), grounds for refusal to issue a license "only extend for a two year period following the bankruptcy. Similarly, Respondent contends SWF Produce, Inc.'s failure to pay its debts 10 years ago is "not consistent with the specific grounds for refusal of a license found in section 4(b) of the PACA (7 U.S.C. § 499d(b)), "the statute which has only a two or three year limitation. (Appeal Pet. at 2-3.)

As an initial matter, I disagree with Respondent's construction of section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)). However, Respondent's construction of section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) is not relevant to this proceeding because the Chief ALJ does not rely upon section 4(b) of the PACA (7 U.S.C. § 499d(b)) as the statutory basis for his conclusion that Respondent is not fit to receive a PACA license. Instead, the Chief ALJ concluded Respondent is not fit to receive a PACA license because Respondent engaged in practices of a character prohibited by the PACA prior to the date of Respondent's filing the PACA license application. The Chief ALJ's conclusion is expressly based upon section 4(d) of the PACA (7 U.S.C. § 499d(d)). (Initial Decision and Order at 10.) Except that a practice of the character prohibited by the PACA must precede the date of the filing of the PACA license application, section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides no limitation on the timing of a practice that may be considered when determining whether a PACA license applicant is unfit to engage in the business of a commission merchant, dealer, or broker. Therefore, I reject Respondent's contention that the Chief ALJ erroneously relied on section 4(b) of the PACA (7 U.S.C. § 499d(b)) as the statutory

basis for his conclusion that Respondent is unfit to receive a PACA license.

Second, Respondent contends SWF Produce, Inc.'s failure to pay its debts 10 years ago "is . . . legally insufficient evidence upon which to base a finding that the Respondent is 'unfit' to hold a PACA license. (Appeal Pet. at 3.)

I disagree with Respondent's contention that SWF Produce, Inc.'s failure to pay produce sellers, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is a legally insufficient basis for finding Respondent unfit to engage in the business of a commission merchant, dealer, or broker. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that the Secretary of Agriculture may find a PACA license applicant unfit to engage in the business of a commission merchant, dealer, or broker because the applicant engaged in a practice of the character prohibited by the PACA. SWF Produce, Inc., committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 10). A violation of the PACA is, by definition, a "practice of the character prohibited by the PACA. Respondent was a director, the president, and sole stockholder of SWF Produce, Inc., at the time SWF Produce, Inc., committed violations of the PACA and takes full responsibility for SWF Produce, Inc.'s PACA violations (Tr. 96; CX 8, CX 9). SWF Produce, Inc.'s practices and Respondent's connection with SWF Produce, Inc., at the time SWF Produce, Inc., engaged in those practices form a legally sufficient basis for finding Respondent unfit to engage in the business of a commission merchant, dealer, or broker.

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

ORDER

1. Respondent's application for a PACA license filed November 5, 2002, is denied.
2. This Order shall become effective immediately upon service on Respondent.

In re: GEO. A. HEIMOS PRODUCE COMPANY, INC.
PACA Docket No. D-99-0016.
Decision and Order.
Filed October 29, 2003.

PACA – Inspection certificates – Alteration – Egregious defined – Unscrupulous defined – Continuing violation – License suspension – Civil penalty A.P.A. - Aggravating factors.

The Judicial Officer (JO) suspended Respondent's PACA license for making false statements, for a fraudulent purpose, in connection with transactions involving perishable agricultural commodities in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The JO found that Respondent's employee or employees, acting within the scope of their employment, altered four United States Department of Agriculture (USDA) inspection certificates for fraudulent purposes. The JO concluded that, as a matter of law, Respondent was responsible for its employees' violations (7 U.S.C. § 499p). The JO reversed the Chief ALJ's assessment of an \$8,000 civil penalty stating that Respondent's violations were egregious violations, which, after an examination of all relevant circumstances, warranted a 48-day suspension of Respondent's PACA license, and that an \$8,000 civil penalty was not sufficient to deter future violations of the PACA. The JO found the Chief ALJ erroneously considered the detrimental effect on Respondent of a PACA license suspension when he assessed an \$8,000 civil penalty against Respondent. However, in light of Complainant's recommendation in favor of a civil penalty, the number of Respondent's violations, the period during which the violations occurred, and the mitigating circumstances, the JO gave Respondent the option of paying a \$98,400 civil penalty, which the JO found to have an equivalent deterring effect of a 48-day suspension of Respondent's PACA license. The JO rejected Respondent's contention that Respondent was financially responsible stating that Respondent's willful alterations of USDA certificates resulting in losses of \$8,238.26 to Respondent's produce suppliers established that Respondent is not financially responsible. The JO also rejected Respondent's contention that Respondent was not unscrupulous stating the willful alterations of USDA inspection certificates are unscrupulous acts. The JO concluded that each of Respondent's violations continued from the time Respondent made the false statement for a fraudulent purpose until Respondent informed the recipient of the false statement that the statement was in fact false and provided the recipient of the false statement with a correct statement.

Eric Paul for Complainant.

Stephen P. McCarron, for Respondent.

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

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a "Complaint on August 9, 1999. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) [hereinafter the Rules of Practice].

Complainant: (1) alleges the Geo. A. Heimos Produce Company, Inc. [hereinafter Respondent], made false and misleading statements for a fraudulent purpose in connection with transactions involving perishable

agricultural commodities in the course of interstate commerce by altering four United States Department of Agriculture inspection certificates; (2) requests a finding that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) requests the issuance of an order suspending Respondent's PACA license for 60 days or assessing Respondent a civil monetary penalty with an equivalent deterring effect of a 60-day suspension of Respondent's PACA license (Compl. ¶¶ III, IV).

On September 15, 1999, Respondent filed an "Answer to Complaint" in which Respondent: (1) denies the material allegations of the Complaint; and (2) requests dismissal of the Complaint.

On July 10, 2002, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in St. Louis, Missouri. Eric Paul, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Respondent.

Complainant called three witnesses and Respondent called two witnesses during the July 10, 2002, hearing. The Chief ALJ continued the hearing to August 2, 2002, taking testimony of Complainant's two remaining witnesses by telephone in Washington, DC. The Chief ALJ admitted into evidence Complainant's exhibit numbers 1 through 9 and Respondent's exhibit number 1.¹

On September 19, 2002, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions and Order" and Respondent filed "Brief of Respondent." On October 11, 2002, Complainant filed "Complainant's Reply Brief" and Respondent filed "Reply Brief of Respondent."

On March 10, 2003, the Chief ALJ issued a "Decision and Order [hereinafter Initial Decision and Order]: (1) concluding Respondent altered four United States Department of Agriculture inspection certificates in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) assessing Respondent an \$8,000 civil penalty (Initial Decision and Order at 30-31).

On April 19, 2003, Complainant appealed to the Judicial Officer. On June 13, 2003, Respondent filed "Respondent's Reply to Appeal Petition." On June 17, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

¹The Chief ALJ placed Complainant's exhibit number 9 under seal.

Based upon a careful consideration of the record, I disagree with the sanction imposed by the Chief ALJ. Therefore, while I retain portions of the Chief ALJ's Initial Decision and Order, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

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

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

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

....

§ 499f. Complaints, written notification, and investigations

....

(b) Disciplinary violations

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section 499e of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section 552 of title 5 (commonly known as the Freedom of Information Act), as provided in subsection (b)(3) of such section.

.....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

.....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section

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

....

§ 499l. Violations; report to Attorney General; proceedings; costs

The Secretary may report any violation of this chapter for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States.

....

§ 499n. Inspection of perishable agricultural commodities

....

(b) Issuance of fraudulent certificates; penalties

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

a period of not more than one year, or both, at the discretion of the court.

.....

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

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

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

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

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

.....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

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

.....

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26.

DECISION**Statement of Facts**

Respondent, a business with approximately 50 employees, was started in 1918. The United States Department of Agriculture issued Respondent PACA license number 166807 in 1956. Respondent has renewed its PACA license annually. Respondent's address is 32 Produce Row, St. Louis, Missouri 63102. Respondent has no record of prior PACA violations. (Tr. 166-67; CX 1).

In 1997, Complainant initiated an investigation of a Chicago produce dealer, Evergreen International, Inc., for allegedly altering United States Department of Agriculture inspection certificates. Complainant asked Respondent in the course of contacting companies which had shipped produce to Evergreen International, Inc., to supply Complainant with copies of United States Department of Agriculture inspection certificates for produce Respondent had shipped to Evergreen International, Inc. Respondent agreed to cooperate and sent copies of United States Department of Agriculture inspection certificates to Complainant. (Tr. 171-72).

One United States Department of Agriculture inspection certificate, K-272284-1, dated January 17, 1997, related to cauliflower Respondent had purchased on a "price after sale" basis from Teixeira Farms, Inc., located in Santa Maria, California (CX 3 at 3). The bill of lading showed St. Louis, Missouri, as the agreed destination for the produce (CX 3 at 30). Instead of accepting delivery in St. Louis, Missouri, Respondent shipped the produce to Evergreen International, Inc., in Chicago, Illinois, where the United

States Department of Agriculture inspected it. Evergreen International, Inc., faxed a copy of United States Department of Agriculture inspection certificate K-272284-1 to Respondent. Respondent faxed a copy of United States Department of Agriculture inspection certificate K-272284-1 to Teixeira Farms, Inc., which showed "Heimos and "St. Louis as the applicant for and the location of the inspection (CX 3 at 7), whereas the original inspection certificate showed the applicant as "Evergreen International and the inspection location as "Chicago, Illinois (CX 3 at 3). Another United States Department of Agriculture inspection certificate, discussed in this Decision and Order, *infra*, also appeared to have been altered. In view of these apparent alterations, Complainant decided to investigate Respondent (CX 2). Complainant's investigator, Andrew Furbee, asked Respondent's president, James Heimos, if he was aware of the altered United States Department of Agriculture inspection certificates. According to Andrew Furbee, "[Heimos] said no, he was not and provided me access to all of his firm's transaction records to basically see if this was an extensive problem or just an isolated couple of incidents (Tr. 11-12).

Complainant investigated 200 files reflecting transactions in which Respondent applied for United States Department of Agriculture inspection and 200 files reflecting transactions in which Respondent shipped produce to a third party which applied for United States Department of Agriculture inspection. Of these transaction files, three files contained United States Department of Agriculture inspection certificates that appeared to have been altered (Tr. 12-13). One of these United States Department of Agriculture inspection certificates, K-272337-7, again involved Teixeira Farms, Inc., and Evergreen International, Inc. The produce was broccoli and cauliflower which Respondent had purchased from Teixeira Farms, Inc. The terms were "price after sale and the bill of lading showed St. Louis, Missouri, as the delivery location. (CX 4 at 1, 3, 11). Instead of accepting delivery in St. Louis, Missouri, Respondent shipped the produce to Evergreen International, Inc., in Chicago, Illinois. Evergreen International, Inc., applied for United States Department of Agriculture inspection of the broccoli on January 29, 1997, and faxed a copy of United States Department of Agriculture inspection certificate K-272337-7 to Respondent (Tr. 19-22). Although Complainant alleges Respondent altered United States Department of Agriculture inspection certificate K-272337-7 to show the applicant for inspection was "Heimos rather than "Evergreen, the record does not show such an alteration (CX 4). The record does, however, show "Evergreen Int'l on one copy of United States Department of Agriculture inspection

certificate K-272337-7 (CX 4 at 3) and just “Evergreen” on another copy of the same inspection certificate (CX 4 at 7).

Respondent’s two purchases of produce from Teixeira Farms, Inc., which Respondent shipped to Evergreen International, Inc., were on an “open basis,” which means that the parties agreed on a price range within which the produce would be sold with the amount Respondent was to pay Teixeira Farms, Inc., to be determined after the produce was sold. Teixeira Farms, Inc., understood that Respondent would sell the produce on the St. Louis, Missouri, rather than the Chicago, Illinois, market since Teixeira Farms, Inc., was selling to other firms in Chicago, Illinois, on a free on board [hereinafter FOB] basis (Tr. 25). David Murray, a Teixeira Farms, Inc., sales representative, explained that Teixeira would be competing against itself if it allowed Respondent to sell Teixeira’s produce in Chicago, Illinois, on an “open basis” when it was selling produce to other firms in Chicago on an FOB basis (Tr. 59-65). However, David Murray also said that prices for produce on the St. Louis, Missouri, and Chicago, Illinois, markets were “close,” and Andrew Furbee testified that there was no significant difference in the prices for produce on the two markets (Tr. 22, 80-81).

When Complainant contacted Teixeira, Farms, Inc., for its copy of United States Department of Agriculture inspection certificate K-272337-7, Teixeira did not have a copy and requested one from Respondent (Tr. 21-22; CX 4 at 6). The copy Respondent sent to Teixeira, Farms, Inc., showed “Evergreen” as the applicant for inspection (CX 4 at 7); other copies of United States Department of Agriculture inspection certificate K-272337-7 showed “Evergreen Int’l” as the applicant for inspection (CX 4 at 3-5). David Murray said Teixeira Farms, Inc., became aware that Respondent shipped the broccoli it purchased from Teixeira to Evergreen International, Inc., in Chicago, Illinois, only after Teixeira received CX 4 at 7 from Respondent (Tr. 66-67).

Perry Favazza, Respondent’s salesperson handling these two transactions with Teixeira Farms, Inc., admitted changing the name of the applicant for inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7. Perry Favazza said he did it “in order to protect the identity of my customer from the shipper and not for any monetary reasons.” (CX 5).

Perry Favazza was also Respondent’s salesperson for the other two transactions with altered United States Department of Agriculture inspection certificates. The first concerned Perry Favazza’s purchase of strawberries for \$3,508.80 on March 10, 1997, from Westerfield Transportation, Inc., a

produce dealer located in Oklahoma City, Oklahoma (Tr. 30, 210; CX 6 at 1). On March 12, 1997, Perry Favazza requested two United States Department of Agriculture inspections of the strawberries (Tr. 31-37; CX 6 at 3-10).

The United States Department of Agriculture inspection certificate for one of the two inspections, K-393680-4, showed the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
....		
B.	07%	01%
	<u>00%</u>	<u>00%</u>
	07%	01%
		Bruise (0 to 16%)
		Decay
		Checksum

CX 6 at 3.

Perry Favazza faxed a copy of United States Department of Agriculture inspection certificate K-393680-4 to Westerfield Transportation, Inc. However, the percent of defects on the copy of United States Department of Agriculture inspection certificate K-393680-4 sent to Westerfield Transportation, Inc., was altered to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
....		
B.	07%	11%
	<u>00%*</u>	<u>00%</u>
	17%	11%
		Bruise (0 to 16%)
		Decay
		Checksum

CX 6 at 5.

Westerfield Transportation, Inc., relying on both altered and unaltered United States Department of Agriculture inspection certificate K-393680-4, agreed to reduce the original \$3,508.80 price for the strawberries to

*So in original - Editor

\$1,273.64 (Tr. 30-31, 37, 214; CX 6 at 2).

On March 28, 1997, Perry Favazza, acting for Respondent, purchased strawberries for \$11,802.70 FOB from Andrew & Williamson Sales Co., Inc., a licensed produce grower agent located in San Diego, California. On March 31, 1997, Perry Favazza requested a United States Department of Agriculture inspection of the strawberries. (Tr. 40-49, 195-97; CX 7 at 1.) The United States Department of Agriculture inspection certificate for the inspection, K-393964-2, showed the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
	05% 00%	Bruise (0 to 12%)
	<u>00%</u> <u>00%</u>	Decay
	05% 00%	Checksum

CX 7 at 3.

Perry Favazza sent a copy of United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc. However, the percent of defects on the copy of United States Department of Agriculture inspection certificate K-393964-2 sent to Andrew & Williamson Sales Co., Inc., was altered to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
	25% 00%	Bruise (0 to 32%)
	<u>00%</u> <u>00%</u>	Decay
	25% 00%	Checksum

CX 7 at 5.

Andrew & Williamson Sales Co., Inc., relying on altered United States Department of Agriculture inspection certificate K-393964-2, agreed to reduce the original \$11,802.70 price for the strawberries to \$5,799.50 (Tr. 44-45, 196-98; CX 7 at 7).

Respondent's president, James Heimos, and its controller, David Marino, were not aware of these two altered United States Department of Agriculture inspection certificates until Complainant's investigator, Andrew Furbee,

notified them of the alterations in November 1997, approximately 8 months after the inspection certificates were altered. James Heimos immediately called Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc. He offered to, and did, pay restitution to Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc. (Tr. 39, 52, 145-46, 173, 215, 218.)

Perry Favazza, while admitting that he had altered United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7, told James Heimos that he had no knowledge of the alterations of United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 (Tr. 178). Perry Favazza apologized to James Heimos for what he had done and said he would not do it again. Respondent retained him as a salesperson, but adopted the practice of reviewing the United States Department of Agriculture inspection certificates for inspections requested by Perry Favazza (Tr. 170, 174). Complainant, likewise, also adopted a new policy at about this time of sending copies of United States Department of Agriculture inspection certificates directly to produce shippers (Tr. 171).

Complainant contends Respondent willfully made false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 for the fraudulent purpose of hiding from Teixeira Farms, Inc., the shipment of produce to Evergreen International, Inc., in Chicago, Illinois, and Respondent's willful alterations of the inspection certificates constituted a breach of Respondent's implied duty to Teixeira to receive and market the produce in St. Louis, Missouri. Complainant contends Respondent willfully made false and misleading statements on United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 for the fraudulent purpose of deceiving Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., in order to obtain their agreement to reductions in the agreed FOB prices for produce. Complainant contends Respondent's fraudulent misrepresentations constitute willful, flagrant, and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Complainant's Proposed Findings of Fact, Conclusions and Order.)

Discussion

Respondent's Violations

The record shows, and I find, that Perry Favazza altered United States Department of Agriculture inspection certificate K-272284-1 by changing the name of the applicant for United States Department of Agriculture inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., and by changing the location of the inspection from Chicago, Illinois, to St. Louis, Missouri. I further find Perry Favazza made these alterations for the fraudulent purpose of deceiving Teixeira Farms, Inc., as to the market where produce was sold. With respect to United States Department of Agriculture inspection certificate K-272337-7, the evidence does not directly show that the name of the applicant for inspection and the location of the inspection were changed from Evergreen International, Inc., and Chicago, Illinois, to the Geo. A. Heimos Produce Company, Inc., and St. Louis, Missouri. However, the record does establish that some change had been made to the name of the applicant for the inspection on United States Department of Agriculture inspection certificate K-272337-7. Perry Favazza admitted changing the name of the applicant for inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., and the location of inspection from Chicago, Illinois, to St. Louis, Missouri. Teixeira Farms, Inc., was not aware that the produce was sold in Chicago, Illinois. In these circumstances, I find Complainant has provided sufficient evidence to infer that United States Department of Agriculture inspection certificate K-272337-7 was altered as alleged. Respondent presented no evidence to refute this inference. Accordingly, I find Perry Favazza altered United States Department of Agriculture inspection certificate K-272337-7 for the fraudulent purpose of deceiving Teixeira Farms, Inc., as to the market where produce was sold.

With respect to the changes on United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2, reflecting the produce sold to Respondent by Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., the record does not establish that Perry Favazza altered the inspection certificates even though he was the salesperson for these transactions. However, whether Perry Favazza or someone else altered United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2, Respondent had custody and control of the inspection certificates when the alterations were made and the alterations appear deliberate. Therefore, I infer, in the absence of contrary evidence, Respondent's employees or agents, in the scope of employment, altered United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 to obtain reductions in the prices of the produce covered by the inspection certificates. Accordingly, I find the alterations were made for

the fraudulent purpose of deceiving Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., to induce them to reduce the prices for produce they sold to Respondent.

I find the testimony of Respondent's president, James Heimos, was credible that he did not know that United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2 had been altered until the time of Complainant's investigation. However, under the PACA's codified agency provision,² Respondent is accountable for the actions of its employees and agents even if Respondent's officers, directors, and owners are unaware of their conduct.³ I therefore conclude Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when, for a fraudulent purpose, it made false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2.

The Sanction for Respondent's PACA Violations

Complainant seeks a 60-day suspension of Respondent's PACA license or, as an alternative to a suspension of Respondent's PACA license, a \$123,000 civil monetary penalty which Complainant contends is equivalent to a 60-day suspension of Respondent's PACA license (Complainant's Proposed Findings of Fact, Conclusions and Order at 32). Respondent requests the assessment of a civil penalty of less than \$8,000 (Brief of Respondent at 12).

Congress enacted the PACA to regulate and control the handling of fresh fruits and vegetables in interstate and foreign commerce. The enactment of the PACA was occasioned by the severe losses that shippers and growers were suffering because of the unfair practices of commission merchants, dealers, and brokers. The primary purpose of the PACA was to provide protection from these "sharp practices of financially irresponsible and unscrupulous persons by establishing a licensing system for commission merchants, brokers, and dealers with sanctions for violations through license

²7 U.S.C. § 499p.

³*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 747 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

suspension or revocation.⁴

The United States Department of Agriculture enforces the PACA through its Agricultural Marketing Service and imposes sanctions for violations to deter PACA violations. The Agricultural Marketing Service enforces the PACA “in a very tough and harsh manner, with the overwhelming support and approval of the industry.”⁵ License revocation or suspension is intended “to protect the public interest against violations. “If administrative sanctions are too lenient, rather than being a deterrent, they will be a stimulant to violations by others. Since . . . the purpose of a suspension order is to ‘assure a proper adherence to the provisions of the Act,’ the deterrent effect on the respondent and on the regulated industry must be considered.”⁶

The imposition of tough sanctions is also considered necessary to achieve the Congressional purpose when it enacts a remedial statute administered by the United States Department of Agriculture that grants a person the “privilege of engaging in a regulated business.”⁷ Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or revocation.⁸ The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and provides one example of a violation of the PACA in which a civil penalty, rather than license revocation or suspension, might be appropriate, as follows:

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

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license

⁴*In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 710 (1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995).

⁵*In re H & J Brokerage, Inc.*, 45 Agric. Dec. 1154, 1189 (1986).

⁶*In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1595 (1971).

⁷*In re James J. Miller*, 33 Agric. Dec. 53, 65-74 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850-51 (1972).

⁸7 U.S.C. § 499h(e).

suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

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

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

MR. HATAMIYA. . . .
. . . .

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

. . . .

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

MR. HATAMIYA. . . .
. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that

putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

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

Mr. Hatamiya also submitted a written statement, which was made part of the record of the hearing, stating that license suspension or revocation is appropriate for egregious violations of the PACA, as follows:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

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

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

"Egregious is defined as "conspicuously bad."⁹ The intentional falsification of a United States Department of Agriculture inspection

⁹Merriam-Webster's Collegiate Dictionary 369 (10th ed. 1997).

certificate for a fraudulent purpose meets this definition of "egregious. The alteration of a United States Department of Agriculture inspection certificate is particularly egregious because inspection certificates play a critical role in the produce industry. James Westerfield, the president of Westerfield Transportation, Inc., at the time Respondent underpaid Westerfield Transportation, Inc., as a result of Respondent's alteration of United States Department of Agriculture inspection certificate K-393680-4, testified regarding the important role of United States Department of Agriculture inspection certificates, as follows:

[BY MR. PAUL:]

Q. On quality problems, when an adjustment was sought on quality grounds at time of delivery, did you require some sort of evidence of the actual condition before agreeing to a price adjustment?

[BY MR. WESTERFIELD:]

A. Absolutely.

Q. What evidence did you require?

A. US federal inspection.

Q. Was there any evidence of actual physical condition at time of delivery other than an official USDA inspection that you would accept as a basis for price adjustments?

A. At one period -- and I can remember one load or lot -- I was asked for a 75 percent deduction per Perry, due to the condition of the berries on arrival.

Q. And you agreed to that without an inspection?

A. Yes, sir.

Q. Did you ever ask for a large adjustment and agree to that

without an inspection?

A. No, sir.

Q. Do you send copies of inspection certificates to growers?

A. Yes, sir.

....

Q. How important was it to Westerfield Transportation that there were true and correct findings on USDA inspection reports that are received?

A. Ultimately very important.

Q. And was the reliance placed on USDA inspection reports any different at the other firms you've been associated with before and after Westerfield Transportation?

A. No. I've always set the same grounds as far as that's concerned.

Tr. 208-09.

Similarly, Jeff Boles, a salesperson for Andrew & Williamson Sales Co., Inc., the produce supplier Respondent underpaid as a result of its alteration of United States Department of Agriculture inspection certificate K-393964-2, testified that accurate United States Department of Agriculture inspection certificates are "[e]xtremely important to Andrew & Williamson Sales Co., Inc. (Tr. 194). The important role of United States Department of Agriculture inspection certificates is reflected in section 14(b) of the PACA (7 U.S.C. § 499n(b)) which makes the alteration of a United States Department of Agriculture inspection certificate a criminal offense.

The record establishes that Respondent, for a fraudulent purpose, through at least one of its employees or agents, willfully made false or misleading statements by altering four United States Department of Agriculture inspection certificates in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such

as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employee or employees were acting within the scope of their employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employee or employees are deemed to be knowing and willful violations by Respondent.¹⁰

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

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

Complainant's sanction witness, Josephine Jenkins, a marketing specialist with the Trade Practices Section, Agricultural Marketing Service, with 10 years experience in more than 100 disciplinary proceedings, and an administrative official charged with the responsibility for achieving the congressional purpose of the PACA, recommended a 60-day suspension of

¹⁰*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

Respondent's PACA license or a \$123,000 civil penalty, which Complainant calculated to be the equivalent of a 60-day suspension of Respondent's PACA license (CX 9; Tr. 83-84). Josephine Jenkins based her recommendation on the nature of Respondent's violations, the harm caused by Respondent's violations, and the size of Respondent's business (Tr. 85, 94). Josephine Jenkins testified that Respondent's continued employment of Perry Favazza, after Respondent's president learned of Perry Favazza's alterations of United States Department of Agriculture inspection certificates, is an aggravating circumstance (Tr. 97-98, 114). However, Josephine Jenkins identified four mitigating circumstances: (1) there is no evidence that Respondent's employee or employees who actually committed the violations were owners of Respondent (Tr. 85, 113); (2) Respondent's owners did not know of the violations prior to Complainant's investigation (Tr. 86, 113); (3) Respondent had no history of previous PACA violations (Tr. 85, 113-14, 130); and (4) Respondent returned its ill-gotten gains to Westerfield Transportation, Inc., and Andrews and Williamson Sales, Co., Inc., the firms which suffered quantifiable financial harm because of Respondent's alterations of United States Department of Agriculture inspection certificates (Tr. 97).

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons acting for or employed by Respondent. Perry Favazza's and perhaps other employees' alterations of United States Department of Agriculture inspection certificates constitute egregious violations of the PACA. I agree with Complainant's sanction witness that Respondent's continued employment of Perry Favazza, after Respondent's president learned of Perry Favazza's alterations of United States Department of Agriculture inspection certificates, is an aggravating circumstance. I also find that the circumstances which Complainant's sanction witness characterized as mitigating are indeed mitigating circumstances. In addition, I find Respondent's cooperation with the investigation of its violations of the PACA and Respondent's corrective action to ensure that violations of the PACA do not occur in the future are mitigating circumstances.

I conclude that a 48-day suspension of Respondent's PACA license is an appropriate sanction under the circumstances in this proceeding. Despite the egregious nature of Respondent's violations, in light of Complainant's sanction witness' recommendation in favor of a civil penalty in lieu of PACA license suspension, the number of Respondent's violations, the period

during which the violations occurred, and the mitigating circumstances, I provide Respondent with the option of paying a civil monetary penalty in lieu of having its PACA license suspended for 48 days. The record establishes that the assessment of a \$98,400 civil penalty against Respondent has a deterrent effect equivalent to a 48-day suspension of Respondent's PACA license (CX 9).

Complainant's Appeal Petition

Complainant raises seven issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously refers to Respondent as the "George A. Heimos Produce Company, Inc.," in the Initial Decision and Order (Complainant's Appeal Pet. at 6).

The Chief ALJ refers to Respondent as the "George A. Heimos Produce Company, Inc.," and the "George Heimos Produce Company, Inc. (Initial Decision and Order at 1, 2, 27, and 31). Complainant alleges and Respondent admits Respondent's corporate name is the "Geo. A. Heimos Produce Company, Inc. (Compl. ¶ II; Answer to Compl. ¶ 1). Moreover, the record establishes that Respondent's corporate name is the "Geo. A. Heimos Produce Company, Inc. Respondent has no objection to the correction of the Chief ALJ's references to Respondent as the "George A. Heimos Produce Company, Inc.," and the "George Heimos Produce Company, Inc. (Respondent's Reply to Appeal Pet. at 8). Therefore, I do not adopt the Chief ALJ's references to Respondent; however, I find the Chief ALJ's inaccurate references to Respondent harmless error.

Second, Complainant contends the Chief ALJ's rejection of suspension of Respondent's PACA license as an appropriate sanction is error (Complainant's Appeal Pet. at 6-10).

I agree with Complainant's contention that the Chief ALJ's rejection of PACA license suspension as an appropriate sanction for Respondent's violations of the PACA, is error. As fully explained in this Decision and Order, *supra*, Respondent's willful alterations of United States Department of Agriculture inspection certificates for fraudulent purposes are egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu

of license suspension or revocation.¹¹ The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and that license suspension or revocation is appropriate for egregious violations of the PACA.

Respondent responds that the Chief ALJ correctly concluded that PACA license suspension is not an appropriate sanction in this proceeding based upon the Chief ALJ's finding that Complainant failed to show Respondent had acted unscrupulously or was financially irresponsible (Respondent's Reply to Appeal Pet. at 8-9).

The Chief ALJ correctly found one of the primary purposes of the PACA is to protect produce shippers and growers from financially irresponsible and unscrupulous commission merchants, dealers, and brokers. However, the Chief ALJ erroneously suggested Respondent was not financially irresponsible or unscrupulous. (Initial Decision and Order at 10-11, 23.)

"Unscrupulous means "not scrupulous." ¹² "Scrupulous means "acting in strict regard for what is considered right or proper." ¹³ The record does not support the Chief ALJ's suggestion that the willful alteration of a United States Department of Agriculture inspection certificate for a fraudulent purpose is an act that is considered "right or proper." I find Respondent's willful alterations of United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2 for fraudulent purposes, unscrupulous.

Further, Respondent's willful alterations of United States Department of

¹¹ U.S.C. § 499h(e).

¹² Merriam-Webster's Collegiate Dictionary 1296 (10th ed. 1997):
unscrupulous . . . *adj.* . . . : not scrupulous : UNPRINCIPLED

¹³ Merriam-Webster's Collegiate Dictionary 1051 (10th ed. 1997):

scrupulous . . . *adj.* . . . **1** : having moral integrity : acting in strict regard for what is considered right or proper **2** : punctiliously exact

The Oxford English Dictionary, vol. XIV, 755 (2d ed. 1991):

scrupulous

3. Careful to follow the dictates of conscience; giving heed to the scruples of conscience so as to avoid doing what is wrong; strict in matters of right and wrong.

.

4. Of actions, etc.: Rigidly directed by the dictates of conscience; characterized by a strict and minute regard for what is right

Agriculture inspection certificates resulting in losses of \$8,238.36 to Respondent's produce suppliers establish Respondent is not financially responsible.¹⁴

Respondent also asserts "[t]o the extent Complainant is arguing that an ALJ must follow its recommendation as to a sanction, this is clearly wrong. (Respondent Reply to Appeal Pet. at 10.)

I agree with Respondent that the Chief ALJ is not required to adopt Complainant's sanction recommendation. The United States Department of Agriculture's sanction policy provides that recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute should be given "appropriate weight." ¹⁵ The recommendations of administrative officials are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹⁶

¹⁴See *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 590 (6th Cir. 2003) (stating a PACA dealer's alteration of United States Department of Agriculture inspection certificates and falsification of accounts of sale resulting in losses to shippers in excess of \$136,000 indicate that the PACA dealer is not a financially responsible dealer).

¹⁵*In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

¹⁶*In re Excel Corporation*, 62 Agric. Dec. 196, 234 (2003); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *aff'd*, No. 02-15602, 2003 WL 21259771 (9th Cir. May 29, 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 (continued...)

Respondent further asserts Complainant's attempt to justify its recommended 60-day suspension of Respondent's PACA license based on *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733 (2001), is misplaced. Respondent notes: (1) H.C. MacClaren, Inc., altered 53 United States Department of Agriculture inspection certificates and falsified eight accounts of sale, whereas Respondent only altered four United States Department of Agriculture inspection certificates; (2) three of H.C. MacClaren, Inc.'s employees altered United States Department of Agriculture inspection certificates and falsified accounts of sale, whereas probably only one of Respondent's employees altered United States Department of Agriculture inspection certificates; (3) as a result of the alterations of United States Department of Agriculture inspection certificates and the falsification of accounts of sale, H.C. MacClaren, Inc., underpaid produce shippers approximately \$130,000, whereas, as a result of the alterations of United States Department of Agriculture inspection certificates, Respondent only underpaid produce shippers \$8,238.36; (4) H.C. MacClaren, Inc.'s violations of the PACA occurred over a period of approximately 29 months, whereas Respondent's violations of the PACA only occurred over a period of approximately 3 months; and (5) the record contains no basis for concluding that Respondent should have known of the alterations of United States Department of Agriculture inspection certificates. (Respondent's Reply to Appeal Pet. at 10-11.)

I agree with Respondent's point that the facts in *In re H.C. MacClaren, Inc.*, are not identical to the facts in the instant proceeding. However, Complainant does not argue that the facts in *In re H.C. MacClaren, Inc.*, are identical to the facts in the instant proceeding. Instead, Complainant cites *In re H.C. MacClaren, Inc.*, to support Complainant's contention that Respondent's alterations of United States Department of Agriculture inspection certificates are willful and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Complainant's Appeal Pet. at 7).

In *In re H.C. MacClaren, Inc.*, I found that the intentional alterations of

¹⁶(...continued)

WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

United States Department of Agriculture inspection certificates for fraudulent purposes that cause produce shippers monetary loss are egregious violations of the PACA and concluded that, as a matter of law, the knowing and willful alterations by H.C. MacClaren, Inc.'s employees are knowing and willful violations by H.C. MacClaren, Inc.¹⁷ Therefore, I do not find Complainant's reliance on *In re H.C. MacClaren, Inc.*, to support Complainant's contention that Respondent's alterations of United States Department of Agriculture inspection certificates are willful and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is misplaced.

Respondent further argues only a civil penalty may be assessed against Respondent because Respondent did not willfully violate the PACA, as follows:

Another reason why license suspension is not proper is because this is not a case of willfulness with respect to Heimos. As explained by the Chief ALJ, there can be no license suspension unless the violative act is willful. . . . Clearly, Favazza's conduct in altering the inspection was willful. However, it is equally clear that Heimos had no knowledge of Favazza's wrongful conduct, nor any reason to know of the alterations. Section 16 of the PACA, 7 U.S.C. § 499p, indicates that licensees are liable for the acts of their agents. Therefore, Heimos is liable for Favazza's violations in altering the inspections. But § 499p does not say that the licensee is deemed to have the same state of mind as its agent. The Heimos company did not intend that Favazza do this, nor did the Heimos company carelessly allow Favazza to do this. Hence, it would be unlawful to impute willfulness to Heimos under § 499p, and without the finding of willfulness, there is no authority for the suspension of Heimos' license. Instead, this is a case in which notice is required before a license can be suspended. Thus, a civil money penalty is the correct disposition under both the PACA and the APA.

Respondent's Reply to Appeal Pet. at 11-12.

I disagree with Respondent's contention that Respondent's employee's willfulness cannot be attributed to Respondent. The knowledge that can be

¹⁷*In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 747-49 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees, acting within the scope of their employment, is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employee or employees were acting within the scope of employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employee or employees are deemed to be knowing and willful violations by Respondent.¹⁸ The United States Court of Appeals for the Sixth Circuit addressed this precise issue in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "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

¹⁸*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

as that of such agent, officer, or other person. 7 U.S.C. § 499p. According to the Sixth Circuit, acts are “willful” when “knowingly taken by one subject to the statutory provisions in disregard of the action’s legality. *Hodgins v. United States Dep’t of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). “Actions taken in reckless disregard of statutory provisions may also be considered ‘willful.’ *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions’ legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep’t of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Third, Complainant contends the Chief ALJ improperly relied upon Respondent’s self-serving testimony as to the detrimental effect on Respondent of a 60-day suspension of Respondent’s PACA license (Complainant’s Appeal Pet. at 10-14).

The PACA does not require consideration of the detrimental effect of a PACA license suspension when determining the sanction to be imposed for violations of the PACA. Respondent correctly argues the legislative history relevant to the 1995 amendments of the PACA establishes that one of the purposes of section 8(e) of the PACA (7 U.S.C. § 499h(e)), which provides for the assessment of a civil penalty for a violation of section 2 of the PACA (7 U.S.C. § 499b), in lieu of license suspension or revocation, is to avoid putting the violating PACA licensee out of business (Respondent’s Reply to Appeal Pet. at 13). However, the legislative history relevant to this 1995 amendment of the PACA also establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension appropriate for violations of the PACA that are not “egregious. The Chief ALJ found Respondent’s alterations of United States Department of Agriculture inspection certificates egregious. I agree with the Chief ALJ’s finding regarding the seriousness of Respondent’s violations. Therefore, under the circumstances in this proceeding, suspension of Respondent’s PACA license is appropriate and necessary to deter future violations of the PACA and the effect on Respondent of a suspension of Respondent’s PACA license is not relevant to this proceeding. Despite the egregious nature of Respondent’s violations, in light of Complainant’s sanction witness’

recommendation, the number of Respondent's violations, the period during which the violations occurred, and the mitigating circumstances, I provide Respondent with the option of paying a \$98,400 civil monetary penalty in lieu of having its PACA license suspended.

Fourth, Complainant contends the \$8,000 civil penalty assessed by the Chief ALJ is not adequate to deter Respondent and others in the regulated industry from future violations of the PACA (Complainant's Appeal Pet. at 14-16).

A civil penalty must be sufficient to deter the PACA violator and other members of the regulated industry from violations of the PACA. The imposition of too lenient a sanction could act as a stimulant to PACA violations because potential violators might view the prospect of the assessment of a small civil penalty for egregious violations that are likely to go undiscovered as a reasonable business risk or a cost of doing business.

The Secretary of Agriculture may not conduct random investigations of PACA violations, but must first receive a written notification of an alleged PACA violation from an interested person or an officer or agency of a state or territory having jurisdiction over commission merchants, dealers, or brokers in the state or territory.¹⁹ The rapid pace at which the produce business is conducted makes unlikely a produce shipper's discovery of an alteration of a United States Department of Agriculture inspection certificate; therefore, a violator can alter United States Department of Agriculture inspection certificates for a fraudulent purpose in a manner that produces an economic or operational benefit to the violator with a low risk that the produce shipper will discover the alteration and report the alteration to the Secretary of Agriculture for investigation. The low risk of discovery of the alteration of a United States Department of Agriculture inspection certificate, the economic or operational gain that can result from the alteration of a United States Department of Agriculture inspection certificate, and the egregious nature of the violation, require a severe sanction for the alteration of a United States Department of Agriculture inspection certificate in order to deter the violator and other potential violators from future alterations of United States Department of Agriculture inspection certificates for fraudulent purposes.

Complainant's sanction witness, Josephine Jenkins, testified that the assessment of an \$8,000 civil penalty against Respondent would not be an adequate deterrent, as follows:

¹⁹7 U.S.C. § 499f(b).

[BY MR. PAUL:]

Q. Now, if the determination was made in this case that the only sanction authorized under the Act was \$2,000 times four or \$8,000, would the assessment of an \$8,000 civil penalty constitute an adequate deterrent for the -- for the violations?

[BY MS. JENKINS:]

A. The agency doesn't feel that that would be an effective deterrent. It would consider it a serious sanction. We feel that possibly Respondent could view it as just a minor expense, the cost of doing business, and again these are serious violations that strike at the heart of the industry's trust.

Tr. 92.

I agree with Josephine Jenkins' assessment that, under the circumstances in this proceeding, an \$8,000 civil penalty for Respondent's four violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not a sufficient sanction to deter Respondent and others from future violations of the PACA. Therefore, I do not adopt the \$8,000 civil penalty assessed by the Chief ALJ.

Respondent contends it had no actual knowledge of and did not approve of alterations of United States Department of Agriculture inspection certificates by its "rogue employee. Respondent contends the action needed to deter alterations of United States Department of Agriculture inspection certificates is the prosecution of the actual wrong-doer, Perry Favazza, under section 14(b) of the PACA (7 U.S.C. § 499n(b)). (Respondent's Reply to Appeal Pet. at 14.)

I agree with Respondent that prosecution of individuals who alter United States Department of Agriculture inspection certificates under section 14(b) of the PACA (7 U.S.C. § 499n(b)) would deter future violations of the PACA. However, prosecution of a PACA licensee's employee who actually alters a United States Department of Agriculture inspection certificate is not a necessary prerequisite to the imposition of a sanction against a PACA licensee for its violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent's lack of actual knowledge of its employee's alterations of United States Department of Agriculture inspection certificates is not a defense to Respondent's violations of section 2(4) of the PACA

(7 U.S.C. § 499b(4)). Under the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, is deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person.²⁰ Hence, Respondent's employees' willful alterations of United States Department of Agriculture inspection certificates are deemed Respondent's willful alterations of United States Department of Agriculture inspection certificates even if Respondent's officers, directors, and owners had no actual knowledge of the alterations and would not have condoned the alterations had they known of the alterations.

Fifth, Complainant contends the Chief ALJ erroneously held that Respondent's four violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were not continuing violations under the PACA. Complainant contends: (1) Respondent's false and misleading statements on United States Department of Agriculture inspection certificate K-393680-4 continued 247 days from the time Respondent sent altered United States Department of Agriculture inspection certificate K-393680-4 to Westerfield Transportation, Inc., until Respondent made full payment to Westerfield Transportation, Inc., on November 14, 1997; (2) Respondent's false and misleading statements on United States Department of Agriculture inspection certificate K-393964-2 continued 228 days from the time Respondent sent altered United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc., until Respondent made full payment to Andrew & Williamson Sales Co., Inc.; and (3) Respondent's false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 continued approximately 7 months from the time Respondent sent altered United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 to Teixeira, Farms, Inc., in January 1997, until Respondent informed Teixeira Farms, Inc., of the correct information in August 1997. (Complainant's Appeal Pet. at 16-19.)

Respondent contends the Chief ALJ correctly concluded Respondent's violations of the PACA were not continuing violations. Respondent asserts the alteration of a United States Department of Agriculture inspection certificate is a transaction that is completed at the time the alteration is made. (Respondent's Reply to Appeal Pet. at 15-17.)

²⁰7 U.S.C. § 499p. See also *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

The Chief ALJ held Respondent's alterations of four United States Department of Agriculture inspection certificates were not continuing violations and Respondent's "unlawful acts were completed at the time the alterations were made[.] Thus, the Chief ALJ concluded the maximum civil monetary penalty that could be assessed against Respondent under section 8(e) of the PACA (7 U.S.C. § 499h(e)) is \$2,000 for each of Respondent's four violations. (Initial Decision and Order at 24, 27.)

The Chief ALJ erroneously held Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred only during the time Respondent's employee or employees were physically altering United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes unlawful a commission merchant's, dealer's, or broker's false or misleading statements for a fraudulent purpose; generally, the violation begins at the time the commission merchant, dealer, or broker makes a false or misleading statement for a fraudulent purpose and ends when the fraud is revealed.²¹ Under the circumstances in this proceeding, I find each of Respondent's violations began when Respondent made the false statement, for a fraudulent purpose, on the United States Department of Agriculture inspection certificate in question and continued until Respondent informed the recipient of the false statement that the statement was in fact false and provided the recipient of the false statement with a correct statement.

Moreover, the assessment of an \$8,000 civil penalty against Respondent would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Therefore, if I had agreed with the Chief ALJ's holding that the maximum civil penalty that could be assessed against Respondent is \$8,000, I would not have provided Respondent with the option of paying a civil penalty.

Sixth, Complainant contends the Chief ALJ erroneously declined to find that Respondent's continued employment of Perry Favazza constitutes an aggravating factor in determining the appropriate sanction in this

²¹See generally, *Beauty Time, Inc. v. Vu Skin Systems, Inc.*, 118 F.3d 140, 146-47 (3d Cir. 1997) (stating, when underlying events are based in fraud or deceit, the statute of limitations is tolled until such time as the fraud has been revealed or should have been discovered); *Kicklighter v. New York Life Ins. Co.*, 145 F.2d 548, 549-50 (5th Cir. 1944) (stating fraud continues during the whole of its concealment inseparable from the original wrong); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 622-23 (E.D. Pa. 1979) (holding fraud continues until revealed or until it should have been discovered by the due diligence of the victim of the fraud), *aff'd*, 612 F.2d 572 (3d Cir. 1979) (Table).

proceeding. Complainant asserts that Respondent's continuing employment of Perry Favazza constitutes an express disregard of the seriousness of the PACA violations that are the subject of this proceeding. (Complainant's Appeal Pet. at 19-22.)

The Chief ALJ concluded that Respondent's continued employment of Perry Favazza, after Respondent's president learned that Perry Favazza had altered United States Department of Agriculture inspection certificates, was not an aggravating factor to be considered when determining the appropriate sanction. The Chief ALJ based his conclusion on Complainant's failure to "take action against Perry Favazza (Initial Decision and Order at 25-26).

I reject the Chief ALJ's conclusion that a PACA licensee's retention of an employee who violates the PACA is not an aggravating factor to be considered when determining the appropriate sanction. The Chief ALJ's conclusion is not consistent with *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733 (2001), in which I held that H.C. MacClaren, Inc.'s retention of salespersons, after H.C. MacClaren, Inc.'s principals learned of their PACA violations, is an aggravating factor to be considered when determining the appropriate sanction. Complainant's failure to take action against an employee who commits violations of the PACA does not negate or lessen the aggravating nature of a PACA licensee's retention of an employee who commits a violation of the PACA. The United States Court of Appeals for the Sixth Circuit affirmed *In re H.C. MacClaren, Inc.*, concluding that a PACA licensee's retention of a violating employee may be considered when determining the severity of a sanction, as follows:

[W]hile retention of employees who commit violations of PACA is not directly prohibited by PACA, the retention of such employees may be considered relevant in determining whether license suspension or revocation is required to deter future violations.

H.C. MacClaren, Inc. v. United States Dep't of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Respondent disagrees with Complainant's assertion that Respondent did not take Perry Favazza's violations of the PACA seriously. Respondent states it took appropriate action consonant with the belief that Perry Favazza's violations were serious. (Respondent's Reply to Appeal Pet. at 17-18.)

Respondent's restitution of the amounts it underpaid its produce suppliers because of the alterations of United States Department of

Agriculture inspection certificates and the corrective action Respondent took to deter future violations of the PACA by Perry Favazza are mitigating circumstances. However, these mitigating circumstances do not negate Respondent's retention of Perry Favazza which I find to be an aggravating circumstance. I considered both the mitigating and aggravating circumstances when determining the sanction in this proceeding.

Respondent also asserts Perry Favazza is not barred by the PACA from working for Respondent and the conclusion that Respondent's retention of Perry Favazza is an aggravating circumstance to be considered when determining the appropriate sanction penalizes Respondent for engaging in a lawful activity. Further, Respondent argues, since the PACA explicitly addresses who may or may not be employed by PACA licensees if there has been a violation of the PACA, it would be contrary to the PACA to penalize Respondent for retaining Perry Favazza. (Respondent's Reply to Appeal Pet. at 18.)

Nothing in the PACA prohibits the Secretary of Agriculture from taking aggravating and mitigating circumstances into account when fashioning a sanction authorized under the PACA. The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances.²²

Seventh, Complainant contends the appropriate sanction for four repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the imposition of a 60-day suspension of Respondent's PACA license or a fully equivalent civil penalty (Complainant's Appeal Pet. at 22-29).

For the reasons set forth in this Decision and Order, *supra*, I conclude that a 48-day suspension of Respondent's PACA license or, in lieu of a 48-day suspension of Respondent's PACA license, a civil penalty with an equivalent deterring effect is an appropriate sanction under the circumstances in this proceeding. The record establishes that the assessment of a \$98,400 civil penalty against Respondent has an equivalent deterring effect of a 48-day suspension of Respondent's PACA license (CX 9).

Findings of Fact

²²*In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

1. Respondent, the Geo. A. Heimos Produce Company, Inc., is a business with approximately 50 employees. Respondent's mailing address is 32 Produce Row, St. Louis, Missouri 63102.

2. At all times material to this proceeding, Respondent was licensed under the PACA. The United States Department of Agriculture issued Respondent PACA license number 166807 in 1956. Respondent has renewed its PACA license annually.

3. On January 14, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased cauliflower and celery from Teixeira Farms, Inc., a shipper located in Santa Maria, California. The terms of sale were "price after sale" and the shipping destination was "St. Louis, MO."

4. Respondent, through its salesperson, Perry Favazza, shipped the produce referenced in paragraph 3 of these findings of fact to Evergreen International, Inc., a Chicago, Illinois, produce dealer.

5. On January 17, 1997, Evergreen International, Inc., obtained a United States Department of Agriculture inspection of the cauliflower referenced in paragraph 3 of these findings of fact and sent a copy of the applicable United States Department of Agriculture inspection certificate, K-272284-1, to Respondent. The name and address of the applicant for inspection, as entered by the inspector, on United States Department of Agriculture inspection certificate K-272284-1 were "Evergreen International" and "Chicago, Illinois."

6. Respondent's salesperson, Perry Favazza, altered the name and address of the applicant for inspection on United States Department of Agriculture inspection certificate K-272284-1 to "Heimos" and "St. Louis," and sent a copy of altered United States Department of Agriculture inspection certificate K-272284-1 to Teixeira Farms, Inc.

7. On January 25, 1997, Respondent, acting through its salesperson Perry Favazza, purchased broccoli and cauliflower from Teixeira Farms, Inc. The terms of sale were "price after sale" and the shipping destination was "St. Louis, Mo."

8. Respondent, through its salesperson Perry Favazza, shipped the produce referenced in paragraph 7 of these findings of fact to Evergreen International, Inc., a Chicago, Illinois, produce dealer.

9. On January 29, 1997, Evergreen International, Inc., obtained a United States Department of Agriculture inspection of the broccoli referenced in paragraph 7 of these findings of fact and sent a copy of the applicable United States Department of Agriculture inspection certificate, K-272337-7, to Respondent. The name and address of the applicant for inspection, as entered by the inspector, on United States Department of

Agriculture inspection certificate K-272337-7 were "Evergreen Int'l and "Chicago, IL.

10. Respondent's salesperson, Perry Favazza, admitted that he altered the name and address of the applicant for inspection on United States Department of Agriculture inspection certificate K-272337-7 to "Heimos and "St. Louis.

11. On March 10, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased strawberries from Westerfield Transportation, Inc., an Oklahoma City, Oklahoma, produce dealer. The agreed FOB price for the strawberries was \$3,508.80.

12. On March 12, 1997, Respondent, acting through its salesperson, Perry Favazza, requested two United States Department of Agriculture inspections of the strawberries referenced in paragraph 11 of these findings of fact. The inspection revealed on United States Department of Agriculture inspection certificate K-393680-4 that the strawberries had the following defects:

LOT	AVERAGE DEFECTS	including SER. DAM.
. . . .		
B.	07% 01%	Bruise (0 to 16%)
	<u>00% 00%</u>	Decay
	07% 01%	Checksum

13. An agent or employee of Respondent altered United States Department of Agriculture inspection certificate K-393680-4 to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
. . . .		
B.	07% 11%	Bruise (0 to 16%)
	<u>00% 00%</u>	Decay
	17% 11%	Checksum

14. Westerfield Transportation, Inc., relied on both the altered copy of United States Department of Agriculture inspection certificate K-393680-4 and an unaltered copy of United States Department of Agriculture inspection certificate K-393680-4 when it agreed to grant Respondent a \$2,235.16 reduction in the original \$3,508.80 FOB price to \$1,273.64.

15. On March 28, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased strawberries from Andrew & Williamson Sales Co., Inc., a licensed produce grower agent located in San Diego, California. The agreed FOB price for the strawberries was \$11,802.70.

16. On March 31, 1997, Respondent, acting through its salesperson, Perry Favazza, requested a United States Department of Agriculture inspection of the strawberries referenced in paragraph 15 of these findings of fact. The inspection revealed on United States Department of Agriculture inspection certificate K-393964-2 that the strawberries had the following defects:

LOT	AVERAGE DEFECTS	including SER. DAM.
	05% 00%	Bruise (0 to 12%)
	<u>00%</u> <u>00%</u>	Decay
	05% 00%	Checksum

17. An agent or employee of Respondent altered United States Department of Agriculture inspection certificate K-393964-2 to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
	25% 00%	Bruise (0 to 32%)
	<u>00%</u> <u>00%</u>	Decay
	25% 00%	Checksum

18. Perry Favazza sent a copy of altered United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc.

19. Andrew & Williamson Sales Co., Inc., relied on the altered copy of United States Department of Agriculture inspection certificate K-393964-2 when it agreed to grant Respondent a \$6,003.20 reduction in the original \$11,802.70 FOB price to \$5,799.50.

Conclusions of Law

Respondent, through the alterations of United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 for a fraudulent purpose by its employee or agent, Perry Favazza, and the alterations of United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 for a fraudulent purpose by one or more of Respondent's agents or employees, willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

Order

1. Respondent's PACA license is suspended for 48 days, effective 61 days after service of this Order on Respondent; *Provided, however*, That Respondent's PACA license shall not be suspended if Respondent pays a civil penalty in accordance with paragraph 2 of this Order.

2. Respondent is assessed a \$98,400 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, James Frazier within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to PACA Docket No. D-99-0016. In the event

James Frazier does not receive a certified check or money order in accordance with paragraph 2 of this Order, Respondent's PACA license shall be suspended for 48 days beginning 61 days after service of this Order on Respondent.

**In re: POST & TABACK, INC.
PACA Docket No. D-01-0026.
Decision and Order.
Filed December 16, 2003.**

PACA – Perishable agricultural commodities – Bribery – Unlawful gratuities – Failure to pay – Hearsay admissible – Acts of employees and agents – Willful, flagrant, and repeated violations – Publication of facts and circumstances – Sanction policy – Sealed evidence – “Slow-pay” case – “No-pay” case – Res judicata.

The Judicial Officer (JO) published the facts and circumstances of Respondent's willful, repeated, and flagrant violations of the PACA. The JO concluded that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for perishable agricultural commodities and by Respondent's employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with inspections of perishable agricultural commodities. The JO concluded that, as a matter of law, Respondent was responsible for its employee's violations (7 U.S.C. § 499p). The JO held that administrative law judges have authority under the Rules of Practice (7 C.F.R. § 1.144(c)) to place evidence under seal to restrict access to the evidence. Finally, the JO held that Respondent's produce sellers' acceptance of partial payment in full satisfaction of the produce debt does not constitute full payment in accordance with the PACA.

Andrew Y. Stanton and Charles E. Spicknall, for Complainant.

Paul T. Gentile, for Respondent.

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

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a “Complaint on August 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§

1.130-.151) [hereinafter the Rules of Practice].

Subsequently, Complainant filed a “First Amended Complaint [hereinafter Amended Complaint]: (1) alleging that Post & Taback, Inc. [hereinafter Respondent], during the period September 4, 2000, through February 20, 2001, failed to make full payment promptly to 58 sellers of the agreed purchase prices in the total amount of \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce; (2) alleging that, during the period March 29, 1999, through August 5, 1999, Respondent, through its employee, Mark Alfisi, made illegal payments to a United States Department of Agriculture inspector in connection with 65 inspections of perishable agricultural commodities that Respondent purchased from 26 sellers in interstate and foreign commerce; (3) alleging that Respondent made illegal payments to United States Department of Agriculture inspectors on numerous occasions prior to March 29, 1999; (4) alleging that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) requesting the issuance of an order revoking Respondent’s PACA license (Amended Compl. ¶¶ III-VII).

On August 9, 2002, Respondent filed an “Answer to Amended Complaint in which Respondent denies the material allegations of the Amended Complaint.

On December 17-19, 2002, January 28-30, 2003, and April 8-9, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. Andrew Y. Stanton and Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 1, 2003, Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions and Order” and Respondent filed “Proposed Findings of Fact and Conclusions of Law.” On July 7, 2003, Complainant filed “Complainant’s Reply Brief.

On July 28, 2003, the Chief ALJ issued a “Decision and Order [hereinafter Initial Decision and Order]: (1) finding Respondent owed 58 produce creditors \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased in interstate commerce during the period September 4, 2000, through February 20, 2001; (2) finding, as of the date the hearing began in December 2002, at least \$479,602.33 of Respondent’s produce purchases had not been paid; (3) finding, during the period April 1999 through August 1999,

Respondent's employee, Mark Alfisi, bribed a United States Department of Agriculture inspector by making payments in the amount of \$1,760 to the inspector in order to influence the outcome of United States Department of Agriculture inspections of fresh fruits and vegetables; (4) finding Respondent's employee, Mark Alfisi, used fraudulent information obtained from bribing a United States Department of Agriculture inspector to make false and misleading statements to produce sellers; (5) concluding Respondent engaged in 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 its produce creditors; and (6) ordering publication of the findings of fact and conclusion of law (Initial Decision and Order at 10-11).

On September 22, 2003, Complainant appealed to the Judicial Officer, and on September 23, 2003, Respondent appealed to the Judicial Officer. On October 14, 2003, Complainant filed "Complainant's Opposition to Respondent's Appeal Petition." On October 31, 2003, the Hearing Clerk transmitted the record, except Respondent's exhibit 20,¹ to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, except Respondent's exhibit 20,² I disagree with the Chief ALJ's conclusion that Respondent is not responsible for its employee's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Therefore, while I retain most of the Chief ALJ's Initial Decision and Order, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

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

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL

¹I explain the Hearing Clerk's failure to transmit Respondent's exhibit 20 in this Decision and Order, *infra*.

²I explain my failure to consider Respondent's exhibit 20 in this Decision and Order, *infra*.

COMMODITIES

....

§ 499b. Unfair conduct

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

....

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

....

§ 499e. Liability to persons injured

....

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

(1) It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in,

such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

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

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

(4) In addition to the method of preserving the benefits of the trust specified in paragraph (3), a licensee may use ordinary and

usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. .

(5) The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

. . . .

§ 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.

. . . .

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

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

dealer, or broker as that of such agent, officer, or other person.

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

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

.....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

.....

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or

because of any official act performed or to be performed by such official or person;

.....

shall be fined under this title or imprisoned for not more than two years, or both.

.....

CHAPTER 19—CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)-(2), (c)(1), 371.

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

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

.....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

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

7 C.F.R. § 46.2(aa)(5).

DECISION

Statement of Facts

Alleged Failure to Make Full and Prompt Payment

The United States Department of Agriculture issued Respondent, a New York corporation, PACA license number 182992. Respondent operated its business under that PACA license at 253-256 B NYC Terminal Market (Hunts Point), Bronx, New York 10474, during the times of the violations alleged in the Amended Complaint. Respondent's PACA license automatically terminated on September 10, 2002, when Respondent failed to pay the required annual PACA license renewal fee. (Amended Compl. ¶ II; Answer to Amended Compl. ¶ II; Tr. Dec. 18, 2002, at 69-71.)

In January 2001, several of Respondent's unpaid produce creditors filed

a civil action against Respondent in the United States District Court for the Southern District of New York under the statutory trust established in section 5(c) of the PACA (7 U.S.C. § 499e(c)) (CX 64). Respondent ceased business in or about February 2001.

In June 2001, Carolyn Shelby, a marketing specialist employed by the Agricultural Marketing Service, initiated an investigation of Respondent's produce transactions. Respondent provided Ms. Shelby with documents including its accounts payable and unpaid invoices. These documents showed Respondent owed 58 produce sellers \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period September 4, 2000, through February 20, 2001. (CX 3-CX 62.)

In May 2002, the United States District Court for the Southern District of New York found Respondent in default of its duty to its produce creditors under the PACA trust and supervised the payment of Respondent's assets to the produce creditors who were parties to the suit. The produce creditors were offered 75 cents on the dollar for their claims in return for waiving any further proceedings. Not all the produce creditors elected to pursue their claims in the court action. In some instances, the debts determined by the United States District Court for the Southern District of New York were the same as those set forth in Appendix A of the Amended Complaint; while, in other instances, the amounts differed. (CX 64-CX 65a; Tr. Dec. 17, 2002, at 66-71.)

In December 2002, during the week prior to commencement of the hearing in this proceeding, Ms. Shelby contacted Respondent's unpaid produce creditors and determined that full payment had not been made to them and that at least \$479,602.33 still remained unpaid (Tr. Dec. 17, 2002, at 82).

Alleged Unlawful Payments

In 1997, Respondent hired Mark Alfisi as a buyer to run its fruit department. Respondent paid Mark Alfisi a salary and bonus. William J. Cashin, a United States Department of Agriculture inspector, conducted inspections of produce purchased by Mark Alfisi for Respondent. William J. Cashin described his function as a United States Department of Agriculture inspector, as follows:

[BY MR. STANTON:]

Q. Mr. Cashin, what were your general duties as a U.S.D.A. produce inspector consequently?

[BY MR. CASHIN:]

A. In general terms, my job was to examine various fruits and vegetables, to be a disinterested third party and if they applied, to apply the U.S. standards for the various products.

Q. Now, what is the purpose in general of the U.S.D.A. produce inspection?

A. In general, the purpose was to prepare -- to examine the product, again, as a disinterested third party, and to prepare a document known as a certificate, basically to settle disputes between shippers, receivers, brokers and receivers and transportation companies.

Q. And how is the inspection used to settle disputes if you know?

A. It's my understanding that whoever called for the inspection, usually referring to the applicant, he would take the inspection by either fax or phone call, tell the parties involved the results and then they would renegotiate prices.

Tr. Dec. 19, 2002, at 65-66.

William J. Cashin had been secretly accepting money from produce wholesalers located at Hunts Point since 1980. William J. Cashin testified that, after Mark Alfisi's employment by Respondent, he began accepting \$50 payments from Mark Alfisi for each inspection he conducted for Mark Alfisi and that "[i]t was my understanding that he was giving me money helping him with various loads of produce that were reflected on the certificates. . . . I knew Mark from a previous place in the market and we had the same arrangement there and basically it was carried over to Post & Taback. William J. Cashin testified that under this arrangement the percentages of defects in the inspected produce were to go over the "good delivery marks and that "[i]t was my understanding that by having the amounts over the good delivery marks they could renegotiate prices with the shippers. He would also vary the temperature of the produce and report fewer boxes than

were actually in a load so that the price could be renegotiated by produce buyers. William J. Cashin testified he gave Mark Alfisi “help on 60 to 70 percent of his inspections. (Tr. Dec. 19, 2002, at 77-82.) William J. Cashin also said that sometimes Alan and Dana Taback, Respondent’s officials, pointed out decay or other problems with produce and that he would report on the United States Department of Agriculture inspection certificates that the produce was over the good delivery marks (Tr. Dec. 19, 2002, at 80).

In March 1999, William J. Cashin was arrested by agents from the Federal Bureau of Investigation and the United States Department of Agriculture’s Office of the Inspector General. He was charged with bribery and conspiracy to commit bribery by taking money from produce wholesalers at the Hunts Point market. William J. Cashin entered into an agreement with the United States Attorney for the Southern District of New York in which William J. Cashin agreed, *inter alia*, to assist the Federal Bureau of Investigation and United States Department of Agriculture’s Office of the Inspector General with their investigation of the Hunts Point produce market. William J. Cashin agreed to carry audio and video recording devices to surreptitiously record his contacts with various persons employed by produce companies, including his contacts with Mark Alfisi. (Tr. Dec. 19, 2002, at 58-60, 63-64, 83-85.) Subsequently, the United States District Court for the Southern District of New York found Mark Alfisi guilty of giving unlawful gratuities, in the total amount of \$1,400, to a United States Department of Agriculture inspector; bribing a public official by making cash payments to a United States Department of Agriculture inspector between April 1999 and August 1999, in the total amount of \$1,760, in order to influence the outcome of inspections of fresh fruit and vegetables; and conspiracy to commit bribery (CX 67-CX 68).

The audio and video recordings were played at the hearing (RX 4-RX 17). They covered the period March 1999 through August 1999. However, William J. Cashin could not associate the tapes with specific instances where he received payments from Mark Alfisi, except for testifying that, overall, his inspection reports “helped Mark Alfisi about 60 to 70 percent of the time (Tr. Dec. 19, 2002, at 81-82).

Discussion

Alleged Failure to Make Full and Prompt Payment

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for any

commission merchant, dealer, or broker to fail to make full payment promptly for perishable agriculture commodities received in interstate or foreign commerce. The Secretary of Agriculture may revoke a commission merchant's, dealer's, or broker's PACA license if the commission merchant, dealer, or broker fails to comply with the PACA's prompt payment requirement by the date of the hearing or within 120 days after the complaint is filed, whichever is sooner.³ If the commission merchant's, dealer's, or broker's PACA license is not in effect at the time a sanction for failure to comply with PACA's prompt payment requirement is imposed, the Secretary of Agriculture may publish the facts and circumstances of the violation.

Respondent had paid some of its produce creditors pursuant to the order of the United States District Court for the Southern District of New York in the trust action discussed in this Decision and Order, *supra*. However, most of Respondent's produce creditors received only 75 cents on the dollar. Such partial payment does not constitute full payment.⁴ As of the date that the hearing began in December 2002, Respondent still owed its produce creditors at least \$479,602.33. The exact amount Respondent owed, which is more than *de minimis*, is not important for purposes of finding a violation.⁵

Accordingly, I find Respondent failed to make full payment promptly to its produce creditors and Respondent was not in full compliance with the PACA either within 120 days after the Complaint was filed or by the date the hearing began. Respondent's failure to make full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). As Respondent's PACA license has terminated, the facts and circumstances of Respondent's violations shall be published.

³*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (1998).

⁴*In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 734 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

⁵*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 590 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3).

Alleged Unlawful Payments

At the hearing, Respondent contended that, notwithstanding the United States District Court for the Southern District of New York's judgment against Mark Alfisi after a trial in *United States v. Alfisi*, No. 01-0868 (S.D.N.Y. May 7, 2001), an independent determination had to be made in this proceeding whether Mark Alfisi bribed a United States Department of Agriculture inspector. Respondent also suggested that Mark Alfisi's payments were not bribes but gratuities to the United States Department of Agriculture inspector for such purposes as conducting timely inspections.

I disagree with Respondent's contention that Complainant must introduce evidence independent of the United States District Court for the Southern District of New York's judgment, to show that Mark Alfisi bribed William J. Cashin. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Similarly, section 1.141(h)(1)(iv) of the Rules of Practice provides for the admission of evidence, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence*—(1) *In general*. . . .

....

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

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.⁶ Moreover, responsible hearsay has long been admitted in the United States Department of Agriculture's administrative proceedings.⁷

The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in

⁶See, e.g., *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

⁷*In re Judie Hansen*, 57 Agric. Dec. 1072, 1110-11 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1066-67 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

accordance with the Rules of Practice.⁸ However, even if the Federal Rules of Evidence were applicable to this proceeding, the United States District Court for the Southern District of New York's judgment against Mark Alfisi would be admissible under Rule 803(22) which provides, as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Fed. R. Evid. 803(22).

Mark Alfisi was convicted after trial of giving unlawful gratuities to a public official which is punishable by imprisonment for not more than 2 years,⁹ bribery of a public official which is punishable by imprisonment for not more than 15 years,¹⁰ and conspiracy to commit bribery which is

⁸*In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), decision on remand, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 407 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182, 1196 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1060, 1079 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994).

⁹18 U.S.C. § 201(c).

¹⁰18 U.S.C. § 201(b).

punishable by imprisonment for not more than 5 years.¹¹

I, therefore, conclude the United States District for the Southern District of New York's judgment against Mark Alfisi (CX 68) is admissible and Complainant is not, independent of the Court's judgment, required to prove that Mark Alfisi gave unlawful gratuities to a public official in violation of 18 U.S.C. § 201(c), bribed a public official in violation of 18 U.S.C. § 201(b), and conspired to commit bribery in violation of 18 U.S.C. § 371.

The PACA does not specifically provide that giving unlawful gratuities to a public official in violation of 18 U.S.C. § 201(c), bribing a public official in violation of 18 U.S.C. § 201(b), and conspiring to commit bribery in violation of 18 U.S.C. § 371, are violations of the PACA. However, PACA states that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.¹²

Mark Alfisi's unlawful gratuities, bribery, and conspiracy to commit bribery were integral parts of his fraudulent scheme to use falsified United States Department of Agriculture inspection certificates to obtain an advantage in the renegotiation of prices with produce sellers. Conspiracy to commit bribery and bribery of a United States Department of Agriculture inspector to obtain fraudulent information for the purpose of making false or misleading statements to members of the produce industry and payment of unlawful gratuities to a United States Department of Agriculture inspector are corrupt practices that threaten the integrity of the inspection system, erode the produce industry's trust in the inspection system, and violate the duty of all commission merchants, brokers, and dealers to deal fairly with other members of the produce industry. Mark Alfisi's unlawful gratuities, conspiracy to commit bribery, and bribery are, therefore, violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent argues that its principals did not know of Mark Alfisi's

¹¹18 U.S.C. § 371.

¹²7 U.S.C. § 499(b)(4).

violations, that Mark Alfisi acted outside the scope of his employment, and that Respondent is therefore not responsible for Mark Alfisi's actions. The evidence is insufficient to establish that Respondent's principals had actual knowledge of Mark Alfisi's unlawful actions. However, the knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Mark Alfisi was acting within the scope of his employment when he knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Mark Alfisi are deemed to be knowing and willful violations by Respondent.¹³

Respondent suggests that because William J. Cashin had large expenditures, he extorted the money from Mark Alfisi. However, there is no evidence to support a finding of extortion. Respondent also argues that Complainant acted in "complicity" with William J. Cashin by allowing him to accept unlawful payments while surreptitiously recording the transactions and that William J. Cashin will still be eligible for a pension despite his unlawful activities and the termination of his employment with Complainant. The record does not show that Mark Alfisi was induced to make unlawful payments or that he was doing anything that he had not been doing before William J. Cashin agreed to cooperate with law enforcement officials. Respondent has not offered any evidence that there is any impropriety in William J. Cashin's eligibility for a pension. I, therefore, find that Complainant did not act in complicity with William J. Cashin.

¹³*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ____, slip op. at 26-27 (Oct. 29, 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

Complainant's Appeal Petition

Complainant raises six issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously concluded that Mark Alfisi's unlawful payments to William J. Cashin did not constitute PACA violations by Respondent (Complainant's Appeal Pet. at 5-14).

The Chief ALJ found that, since Respondent's principals did not authorize Mark Alfisi's violations of the PACA and had no actual knowledge of Mark Alfisi's violations of the PACA, Respondent did not violate the PACA (Initial Decision and Order at 8-9). I disagree with the Chief ALJ's conclusion; under the PACA, Mark Alfisi's violations of the PACA are deemed Respondent's violations of the PACA.

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

Respondent's employee, Mark Alfisi, was acting within the scope of employment when he knowingly and willfully paid unlawful gratuities to a public official and bribed a public official to falsify United States Department of Agriculture inspection certificates. Thus, as a matter of law, the knowing and willful violations by Mark Alfisi are deemed to be knowing and willful violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the unlawful gratuities, conspiracy, and bribery and would not have condoned the unlawful gratuities, conspiracy, and bribery had they known of them.¹⁴ The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States

¹⁴*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ____, slip op. at 37-38 (Oct. 29, 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, “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. § 499p. According to the Sixth Circuit, acts are “willful when “knowingly taken by one subject to the statutory provisions in disregard of the action’s legality. *Hodgins v. United States Dep’t of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). “Actions taken in reckless disregard of statutory provisions may also be considered ‘willful.’ *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions’ legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep’t of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler’s employee to a United States Department of Agriculture inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

Lastly, we address Koam’s equitable argument that our failure to

find in its favor would penalize Koam “simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections). . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam’s attempt to distance itself from Friedman’s criminality fails. Friedman was hardly a “faithless servant, since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, “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 7 U.S.C. § 499p. Thus, Friedman’s acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

The Chief ALJ relies on *In re JSG Trading Corp.* (Decision on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999); *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991); and *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), as support for his conclusion that a PACA licensee must have actual knowledge of its employee’s illegal payments and condone the illegal payments in order to conclude that the PACA licensee has itself violated the PACA (Initial Decision and Order at 9).

JSG Trading Corp., *Tipco, Inc.*, and *Sid Goodman & Co.* each involve a PACA licensee’s illegal payments to a produce buyer’s purchasing agent to induce the purchasing agent to purchase produce from the PACA licensee. None of the three cases hold, as the Chief ALJ states, that the PACA licensee must have actual knowledge that its employee made illegal payments or that the PACA licensee must have condoned its employee’s illegal payments in order to conclude that the PACA licensee violated the PACA.

Second, Complainant contends the Chief ALJ erroneously failed to find that Mark Alfisi paid unlawful gratuities to William J. Cashin during the period March 1999 through August 1999 (Complainant’s Appeal Pet. at 14-15).

Complainant alleges that Respondent’s employee, Mark Alfisi, paid

unlawful gratuities to a United States Department of Agriculture inspector during the period March 29, 1999, through August 5, 1999 (Amended Compl. ¶¶ IV-V). The evidence establishes that the grand jury indicted Mark Alfisi on one count of conspiracy to commit bribery and on 13 counts of bribing a United States Department of Agriculture inspector, in amounts totaling \$3,160, during the period March 29, 1999, through August 5, 1999. The indictment states that the object of the conspiracy to commit bribery and the bribery was to influence the outcome of inspections of fresh fruit and vegetables at Respondent's facility (CX 67). After trial, Mark Alfisi was convicted of: (1) giving unlawful gratuities in amounts totaling \$1,400 to a public official in violation of 18 U.S.C. § 201(c) with respect to six counts of the indictment; (2) paying bribes to a public official in amounts totaling \$1,760 in violation of 18 U.S.C. § 201(b) with respect to seven counts of the indictment; and (3) conspiracy to commit bribery in violation of 18 U.S.C. § 371 with respect to one count of the indictment (CX 68).

Despite the evidence supporting a finding that Respondent's employee paid unlawful gratuities to United States Department of Agriculture inspector William J. Cashin, the Chief ALJ did not make a finding with respect to these unlawful gratuities and did not explain his failure to find that Mark Alfisi paid these unlawful gratuities. Based on the record before me, I find that during the period March 29, 1999, through June 18, 1999, Mark Alfisi paid unlawful gratuities to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities that Respondent purchased from produce sellers.

Third, Complainant asserts Respondent's payments of unlawful gratuities to a United States Department of Agriculture inspector and payments of bribes to a United States Department of Agriculture inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are serious violations of the PACA (Complainant's Appeal Pet. at 15-18).

I agree with Complainant's assertion that Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are serious violations of the PACA.

Produce sellers often ship perishable agricultural commodities great distances to produce buyers. The value of perishable agricultural commodities may be greatly affected by the condition and quality of the produce. An objective and impartial produce inspection and an accurate determination of condition and quality of produce are essential to the proper adjustment of produce price. United States Department of Agriculture

inspectors provide these objective and impartial produce inspections and accurate determinations of the condition and quality of produce. The United States Department of Agriculture's inspection system is based upon the trust that produce buyers and sellers have in the ability, objectivity, impartiality, and integrity of United States Department of Agriculture inspectors.

A produce buyer's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Basil Coale, a senior marketing specialist employed by the Agricultural Marketing Service, testified as to the impact on the produce industry of unlawful payments to United States Department of Agriculture inspectors, as follows:

. . . [The] Fresh Products branch of the USDA issues over 150,000 [inspection] certificates in a given year. And the industry uses these certificates to quickly and equitably resolve their disputes directly amongst themselves. Making illegal payments to an inspector undermines the credibility of the inspection process. Any lack of confidence in the inspection process could impact how hundreds, literally hundreds of disputes across the country in any given day are resolved. In addition, produce markets tend to be very competitive. And if one supplier -- excuse me. If one firm on that market is making illegal payments to an inspector, then other firms may feel compelled to do the same thing just to compete. And that can undermine the credibility of the entire market.

Tr. Apr. 8, 2003, at 101-02.

I have addressed the harm that results from bribery in other contexts. For instance, in *JSG Trading Corp.*, I addressed the harm to fair competition caused by produce sellers' bribery of purchasing agents, as follows:

Commercial bribery offends both morality and the law. It is an

evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

In re JSG Trading Corp. (Decision on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1048 (1999) (quoting *In re Tipco, Inc.*, 50 Agric. 871, 885 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1186 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 961 (1992)).

Bribes and unlawful gratuities paid by PACA licensees to United States Department of Agriculture inspectors can similarly harm fair competition. Produce companies competing with PACA licensees that pay bribes and unlawful gratuities to United States Department of Agriculture inspectors will have a competitive disadvantage vis-a-vis the bribing PACA licensee, which will presumably receive preferential treatment by United States Department of Agriculture inspectors and pay less for produce as a result of falsified inspection results.

In *In re Greenville Packing Co.*, 59 Agric. Dec. 194 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002), as in the instant proceeding, the respondent's employee had been convicted of bribing a United States Department of Agriculture inspector. The Administrator, Food Safety and Inspection Service, United States Department of Agriculture, instituted an administrative proceeding against Greenville Packing Co., under the Federal Meat Inspection Act, as amended, and the Poultry Products Inspection Act, as amended, seeking to withdraw United States Department of Agriculture inspection services from Greenville Packing Co. In *Greenville*, I addressed the harmful effects of bribery on the

United States Department of Agriculture meat and poultry inspection system, as follows:

Bribery goes to the heart of the FMIA and the PPIA. The United States Court of Appeals for the Sixth Circuit has recognized that “[b]ribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated. *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986). In addition, Mr. Van Blargan testified as to the significance of bribery in regard to the inspection system:

[B]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. They have to take independent action with regard to the effect of their actions as it relates to the industry.

If they accept bribes, . . . it compromises their integrity, their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection.

In re Greenville Packing Co., 59 Agric. Dec. at 208.

Similarly, the payment of unlawful gratuities and bribes to a United States Department of Agriculture produce inspector strikes at the heart of the perishable agricultural commodities inspection system -- the United States Department of Agriculture produce inspector’s accurate and impartial assessment of the quality and condition produce. The payment of unlawful gratuities and bribes to a United States Department of Agriculture produce inspector negates impartiality, or gives the appearance of negating impartiality, and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by United States Department of Agriculture inspectors.

Commission merchants, dealers, and brokers have a duty to refrain from paying unlawful gratuities in connection with the inspection of perishable agricultural commodities, a duty to refrain from paying bribes to influence the outcome of United States Department Agriculture inspections of perishable agricultural commodities, and a duty to refrain from paying unlawful gratuities or bribes which will or could undermine the trust a produce seller places in the accuracy of the United States Department of

Agriculture inspection or the integrity of the United States Department of Agriculture inspector.

Fourth, Complainant asserts Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector are willful, flagrant, and repeated violations of the PACA (Complainant's Appeal Pet. at 19-20).

I agree with Complainant's assertion that Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector are willful, flagrant, and repeated violations of the PACA.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.¹⁵ The record

¹⁵See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent. "); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word

(continued...)

establishes that Mark Alfisi intentionally paid unlawful gratuities and bribes to William J. Cashin in connection with United States Department of Agriculture inspections of perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

Mark Alfisi was acting within the scope of his employment when he willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, willful violations by Respondent's employee are deemed to be willful violations by Respondent.¹⁶

Further, I conclude that Respondent's violations were flagrant. A violation of law is flagrant if it is "conspicuously bad or objectionable or so bad that it "can neither escape notice nor be condoned."¹⁷ The payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because, as discussed in this Decision and Order,

¹⁵(...continued)

is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.')

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness, as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

¹⁶See note 13.

¹⁷Merriam-Webster's Collegiate Dictionary 441 (10th ed. 1997).

supra, they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry.

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated because repeated means more than one.¹⁸ Mark Alfisi paid William J. Cashin multiple unlawful gratuities and bribes in connection with numerous inspections of perishable agricultural commodities (CX 67-CX 68).

Fifth, Complainant asserts that the appropriate sanction for Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the publication of the facts and circumstances of the violations (Complainant's Appeal Pet. at 21-22).

I agree with Complainant's assertion that the publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is appropriate.

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

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

Complainant's sanction witness, Basil Coale, an administrative official

¹⁸See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating that violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

charged with the responsibility for achieving the congressional purpose of the PACA, recommended publication of the facts and circumstances of Respondent's failure to make full payment promptly and Respondent's payments of unlawful gratuities and bribes in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. Apr. 8, 2003, at 96-103). Basil Coale based his recommendation on the number of violations, the seriousness of the violations, the impact that these types of violations have on the produce industry, and the need to deter Respondent and other potential violators from similar violations of the PACA (Tr. Apr. 8, 2003, at 101-02).

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons acting for or employed by Respondent. As discussed in this Decision and Order, *supra*, Mark Alfisi's payment of unlawful gratuities and bribes to a United States Department of Agriculture inspector constitute serious violations of the PACA.

If Respondent had a PACA license, revocation of Respondent's PACA license would be the appropriate sanction in this proceeding. However, Respondent's PACA license terminated on September 10, 2002, due to Respondent's failure to pay the required annual license fee (Tr. Dec. 18, 2002, at 70-71). Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture is authorized to publish the facts and circumstances of the violation. In light of the termination of Respondent's PACA license, the seriousness of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the recommendation of the administrative officials charged with carrying out the purposes of the PACA, I conclude that the appropriate sanction for Respondent's violations of the PACA is the publication of the facts and circumstances of Respondent's violations.

Sixth, Complainant contends the Chief ALJ erroneously denied Complainant's motion requesting that the Chief ALJ reconsider his ruling requiring Complainant to submit William J. Cashin's unredacted amended tax returns to accompany the record. Complainant asserts the release of the personal information on the amended tax returns "would be an unwarranted invasion of Mr. Cashin's personal privacy, and more dangerously, the release could place Mr. Cashin at grave risk of personal harm (Complainant's Appeal Pet. at 22-28).

In April 1999, William J. Cashin entered into a cooperation agreement

with the United States Attorney for the Southern District of New York in which, *inter alia*, William J. Cashin agreed to file amended tax returns for the years 1992 through 1998, which would reflect amounts he received in unlawful gratuities and bribes, and to pay past taxes owed to the Internal Revenue Service (CX 72). William J. Cashin testified that, in accordance with this cooperation agreement, he paid all past taxes owed to the Internal Revenue Service. Complainant introduced documents evidencing William J. Cashin's payments to the Internal Revenue Service (CX 73; Tr. Apr. 8, 2003, at 56-59). Respondent requested production of William J. Cashin's amended tax returns "so that they can be reviewed to see whether or not the witness has testified accurately and truthfully" (Tr. Apr. 8, 2003, at 75-76). Complainant objected to Respondent's request and offered to withdraw Complainant's evidence regarding William J. Cashin's tax payments and have the portion of William J. Cashin's testimony regarding the payment of past taxes stricken from the record in order to avoid having to supply William J. Cashin's amended tax returns. Nonetheless, the Chief ALJ instructed the witness to produce the amended tax returns (Tr. Apr. 8, 2003, at 80-94).

On April 9, 2003, Complainant renewed his objection to Respondent's request for the production of William J. Cashin's amended tax returns (Tr. Apr. 9, 2003, at 3-19). Complainant proposed redaction of the amended tax returns. The Chief ALJ accepted Complainant's proposed redactions and the redacted amended tax returns were marked "RX 19" and admitted into evidence. (Tr. Apr. 9, 2003, at 2, 81-90, 109, 138). Respondent moved that an unredacted version of William J. Cashin's amended tax returns be available for appellate review, as follows:

MR. GENTILE: . . . I would ask that the unredacted tax returns be in some way safeguarded for review because we have objected to the extent of the redactions that you have placed there, and for an appellate court to review the propriety of that act, they need to be preserved somehow, they can be sealed or whatever[.]

Tr. Apr. 9, 2003, at 129.

The Chief ALJ instructed the court reporter to mark the unredacted version of William J. Cashin's amended income tax returns "RX 20" and indicated that he would admit RX 20 into evidence under seal (Tr. Apr. 9, 2003, at 129-30). Complainant objected to the admission of RX 20 on the grounds that the United States Department of Agriculture has no method by

which to prevent the release of documents admitted into evidence under seal and the release of the information in RX 20 would constitute an unwarranted invasion of William J. Cashin's privacy and would present a risk to William J. Cashin's safety (Tr. Apr. 9, 2003, at 130-32). The Chief ALJ overruled Complainant's objections and admitted RX 20 into evidence under seal, as follows:

MR. STANTON: Your Honor, our position with respect to putting these unredacted documents under seal is this. We have to object strongly, strenuously to this procedure, and the reason why is that there is nothing in the rules of practice or any rule or regulation of the department that we know of that considers the possibility of documents being under seal, so if the documents are with the Department of Agriculture, and let's say somebody makes a FOIA request there's no way that we could prevent those documents from being released. Now if there was something that would provide any sense of security so we'd know that the general public couldn't see these documents then it would be a different story, but we don't know of anything of that nature. So it seems to me as long as these documents are with the department they can be released, and this is no security at all so we have to object to their admission in any way.

ADMINISTRATIVE LAW JUDGE: Under FOIA under privacy you couldn't protect them. There's nothing in the rules of practice that has happened before where there's been confidential information by businesses that didn't want information released to the public that they placed under seal the information that is not for public consumption.

MR. STANTON: I don't know that there's anything in the rules of practice that provides for it though.

ADMINISTRATIVE LAW JUDGE: There's nothing in the rules of practice providing that. It's just a procedure that has been used in other cases.

MR. STANTON: Unless there's something that would guarantee that they wouldn't be released. Even under the Privacy Act, there are exceptions to the Privacy Act, Your Honor, and we're very concerned about Mr. Cashin's privacy.

ADMINISTRATIVE LAW JUDGE: I appreciate that. I'm concerned about it too.

MR. STANTON: And he's testified in criminal trials. He could be a target of revenge in some way and that's obviously why we're concerned about it. So unless there's some guarantee that this information won't be made available we can't agree to it. We just can't do it.

ADMINISTRATIVE LAW JUDGE: *Well, notwithstanding, I will order that RX-20 be placed under seal and made part of the record, be at least sealed. The reporter will make it in a separate sealed envelope accompanying the record.*

MR. STANTON: Well, Your Honor, I've been instructed I'm not to comply with this order.

ADMINISTRATIVE LAW JUDGE: All right.

MR. STANTON: Unless there's a guarantee of security of these documents.

ADMINISTRATIVE LAW JUDGE: I can't require you to comply with it, Mr. Stanton. I have no authority to order you to comply. I can order you, but I have no way of enforcing that order.

MR. GENTILE: Well, I suggest that there is a way. If you would be good enough to order it, he refuses to do it, we'll make an application to hold him in contempt. It's an outrage that the Department of Agriculture would say to you they won't follow your order. That's an outrage.

ADMINISTRATIVE LAW JUDGE: Well, whatever you want to do, you may do, Mr. Gentile.

MR. GENTILE: Well, make the order. Make the order and have them in contempt. I'll go into federal court tomorrow.

ADMINISTRATIVE LAW JUDGE: *I've ordered that. I said*

that they'll be made part of the record. If he doesn't want to comply with it, then you do what you want to do, but I've issued the ruling that it will be made part of the record.

MR. STANTON: Your Honor, can you say for the record there will be any consequences as a result of not complying with your order?

ADMINISTRATIVE LAW JUDGE: As I said, there's no consequences that I can impose. Now whether there's other consequences, I don't know. I don't know what the procedures are but there's nothing I can do. There's nothing in the rules of practice that gives me any authority to do anything. *So make RX-20 -- the ruling is that RX-20 will be placed under seal and made part of the record.*

MR. STANTON: Your Honor, can I request that we have an opportunity to file a memorandum of law on this issue before making a final ruling on it?

ADMINISTRATIVE LAW JUDGE: No, but you can file your -- I don't want to hold things up. You can file your memorandum of law asking me to reconsider my ruling.

MR. STANTON: We would like that opportunity, Your Honor.

ADMINISTRATIVE LAW JUDGE: You may do that. You may file it.

MR. STANTON: Do you want to give us a date by which we should get that in?

ADMINISTRATIVE LAW JUDGE: Well, I don't want to delay briefing in the case so if you want to file it any time you wish until briefs are due.

MR. GENTILE: Well, I need the opportunity to take action against them so I mean we need to foreclose this thing. They're taking the position that they don't have to follow your order.

ADMINISTRATIVE LAW JUDGE: All right.

MR. GENTILE: It seems that they must not comprehend things --you're a Judge. You're going to be hold it secret. It goes to other judges.

ADMINISTRATIVE LAW JUDGE: All right. Okay, Mr. Gentile, let's see, the 9th, to give you time. If you want to do it by April 21, give me your memorandum or motion for reconsideration by April 21, and then, Mr. Gentile, you will have then until the 2nd of May to file your response. Any other matters before we set briefing dates?

Tr. Apr. 9, 2003, at 131-35 (emphasis added).¹⁹

On May 23, 2003, Complainant filed "Complainant's Motion to Reconsider Ruling Placing Documents Under Seal. Complainant requested, *inter alia*, that the Chief ALJ withdraw his order "that Complainant provide Mr. Cashin's unredacted amended tax returns for placement under seal unless procedures are established that would guarantee that this information will not be released to the general public, so as to protect Mr. Cashin's personal safety (Complainant's Motion to Reconsider Ruling Placing Documents Under Seal at 7).

¹⁹After the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision, I discovered that the Hearing Clerk failed to transmit RX 20. On inquiry, the Hearing Clerk informed the Office of the Judicial Officer's legal technician that Complainant's counsel had possession of RX 20. On December 4, 2003, I requested that Complainant's counsel provide me with RX 20. Complainant's counsel informed me that he had possession of William J. Cashin's unredacted amended tax returns, but that the unredacted amended tax returns are not part of the record. Complainant's counsel declined to provide me with William J. Cashin's unredacted amended tax returns. I find Complainant's position that William J. Cashin's unredacted amended tax returns are not part of the record perplexing. The record establishes that the Chief ALJ instructed the court reporter to mark William J. Cashin's unredacted amended tax returns RX 20 and admitted RX 20 into evidence (Tr. Apr. 9, 2003, at 2, 131-35).

Generally, the entire record must be transmitted to the Office of the Judicial Officer before I can decide a case. However, RX 20, as described in the record, is not relevant to Respondent's willful, flagrant, and repeated failures to make full payment promptly to its produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, my consideration of RX 20 would not alter the disposition of this proceeding. Moreover, as Respondent argues, RX 20 is relevant only to William J. Cashin's credibility (Tr. Apr. 8, 2003, at 75-76), and I find the record sans RX 20 is sufficient to determine William J. Cashin's credibility. Therefore, I find no reason to dismiss the proceeding or delay the proceeding merely because Complainant has declined to provide me with RX 20.

The Chief ALJ denied Complainant's Motion to Reconsider Ruling Placing Documents Under Seal stating:

At the hearing I ruled that Cashin's unredacted amended tax returns that purportedly showed his tax payments to the Internal Revenue Service for the unlawful money he received were not admissible. However, I also ruled that Respondent could make an offer of proof and that the rejected exhibits would be sealed and accompany the record. In a post hearing motion, Complainant asked that I reconsider the ruling on the ground that even if the documents were placed under seal Cashin would not be adequately protected from persons who may seek to obtain his social security number and current address. The Rules of Practice, 7 C.F.R. § 1.141, provide "(7) *Offer of proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording . . . If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record . . . Complainant's motion for reconsideration is denied.

Initial Decision and Order at 5 n.1.

As an initial matter, the record does not indicate that Respondent made an offer of proof with respect to RX 20; therefore, I reject the Chief ALJ's reasons for denying Complainant's Motion to Reconsider Ruling Placing Documents Under Seal.

Moreover, while administrative law judges have authority to restrict access to evidence by placing evidence under seal²⁰ and administrative law judges and the Judicial Officer have long exercised the authority to place evidence under seal,²¹ evidence placed under seal could be inadvertently

²⁰See 7 C.F.R. § 1.144(c). Cf. *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136, 1140-41 (9th Cir. 1999) (stating it is within the inherent powers of the administrative law judge to conduct hearings *in camera* upon a showing of good cause and to impose protective conditions upon materials submitted *in camera*).

²¹See *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ____, slip op. at 3 n.1 (Oct. 29, 2003) (stating that the chief administrative law judge placed complainant's exhibit number 9 under seal); *In re Miguel A. Machado* (Remand Order), 42 Agric. Dec. 793, 794 (1983) (containing the Judicial Officer's order that an investigative report and the administrative law judge's determination regarding (continued...)

released to the public, as Complainant suggests. My review of *The Hearing Clerk's Office Procedures Manual* reveals no procedures designed to prevent the inadvertent release of evidence placed under seal. Therefore, based on the significant threat that release of RX 20 could pose to William J. Cashin's safety, I conclude that the Chief ALJ's order that Complainant submit RX 20, without specifying procedures in addition to placing RX 20 under seal,²² is error. Complainant shall maintain RX 20 in a manner designed to prevent the inadvertent release of RX 20. Complainant shall maintain RX 20 in this manner until the Judicial Officer or a court of competent jurisdiction orders Complainant to submit RX 20 to the Hearing Clerk, the Judicial Officer, or the court. Complainant or Respondent may propose procedures for the Hearing Clerk's maintenance of RX 20 in a manner that would reduce the risk of the inadvertent release of RX 20 to an acceptable level.

Respondent's Appeal Petition

Respondent raises one issue in Respondent's Appeal Petition. Respondent contends the Chief ALJ's finding that Respondent owed its produce creditors \$479,602.33 as of the date the hearing began, is error. Respondent asserts the \$479,602.33 debt found by the Chief ALJ to have been unpaid at the time of the hearing had been extinguished by a prior proceeding between Respondent and its produce creditors; therefore, this case is a "slow-pay case, not a "no-pay case, and the case should be dismissed. (Respondent's Appeal Pet. at 3-6.)

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times.²³ In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with

²¹(...continued)

the release of the investigative report be sealed, delivered to the Hearing Clerk, and available for review only by the Judicial Officer and any reviewing court).

²²See, for example, the procedures adopted to prevent the inadvertent release of documents in *In re Miguel A. Machado*, 42 Agric. Dec. 793 (1983).

²³7 U.S.C. § 499b(4).

the PACA and is not in full compliance²⁴ with the PACA within 120 days after the complaint is served on that respondent or the date of the hearing, whichever occurs first, the case is 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, is revoked. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance²⁵ with the PACA within 120 days after the complaint is served on that respondent or the date of the hearing, whichever occurs first, the case is treated as a “slow-pay case. In any “slow-pay case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty is assessed against the PACA licensee or the PACA licensee’s license is suspended.²⁶ Therefore, even if I were to find that the instant case is a “slow-pay case, I would not dismiss this case, as Respondent requests.

Moreover, the facts in this proceeding do not support a conclusion that this case is a “slow-pay case. Respondent contends this is a “slow-pay case because Respondent made full payment to its produce creditors. Respondent asserts its produce creditors brought an action in the United States District Court for the Southern District of New York against Respondent for non-payment and the Court entered a judgment against Respondent. Respondent asserts that it paid the judgment in full; thereby extinguishing Respondent’s debt to Respondent’s produce creditors before the instant case became a “no-pay case. Respondent contends the doctrine of res judicata requires a finding that Respondent paid its produce debts in full before the date of the hearing and within 120 days after Respondent was served with the Complaint and requires the conclusion that this case is a “slow-pay case. (Respondent’s Appeal Pet. at 2-5.)

Under the doctrine of res judicata, a final judgment on the merits in a prior suit bars parties or their privies from litigating issues that were or

²⁴Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff’d*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), that a respondent have no credit agreements with produce sellers for more than 30 days.

²⁵See note 24.

²⁶See note 3.

could have been raised in that action.²⁷ Complainant was not a party to the action brought by Respondent's produce creditors in the United States District Court for the Southern District of New York. Moreover, the instant proceeding is a disciplinary action instituted against Respondent for alleged violations of the PACA, whereas Respondent describes its produce creditors' cause of action as "actions for non-payment. A PACA disciplinary proceeding does not deal with the relationship of a respondent to its produce creditors for the purpose of seeking compensation for the produce creditors but, instead, involves the relationship of the respondent to the public, at least that part of the public in the business of selling and buying perishable agricultural commodities.²⁸ Therefore, I reject Respondent's contentions that *res judicata* applies to the instant proceeding and that the judgment in the action instituted in the United States District Court for the Southern District of New York against Respondent by Respondent's produce creditors requires the conclusion that this case is a "slow-pay case and not a "no-pay case.

Finally, the record establishes that not all of Respondent's produce creditors were parties to the action against Respondent in the United States District Court for the Southern District of New York. Moreover, many of Respondent's produce creditors who were parties to the action against Respondent agreed to accept 75 cents on the dollar for their claims against Respondent. (CX 64-CX 65a.) While the United States District Court for the Southern District of New York ordered partial payment in accordance with these agreements and Respondent paid the judgment in full, the Judicial Officer has long held that a produce creditor's acceptance of partial payment in full satisfaction of a debt does not constitute full payment in accordance with the PACA.²⁹ Therefore, I agree with the Chief ALJ's

²⁷*Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996); *Flaherty v. Lang*, 199 F.3d 607, 612 (2d Cir. 1999); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); *Computer Associates International, Inc. v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998); *Harborside Refrigerated Services, Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992); *Sure-Snap Corp. v. State Street Bank and Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991).

²⁸*In re Edward M. Hall*, 12 Agric. Dec. 725, 733 (1953); *In re James L. (Lonnie) Cecil*, 7 Agric. Dec. 1105, 1112 (1948).

²⁹*In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 723-24 (1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 625-27 (1989); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (continued...)

finding that, as of the date of the hearing, Respondent had failed to make full payment for perishable agricultural commodities that Respondent purchased in interstate commerce and I reject Respondent's contention that this case is a "slow-pay case. Instead, I find that this case is a "no-pay case.

Findings of Fact

1. During the period of the violations alleged in the Amended Complaint, Respondent was a New York corporation whose business address was 253-256 B NYC Terminal Market (Hunts Point), Bronx, New York 10474.

2. During the period of the violations alleged in the Amended Complaint, Respondent operated under PACA license number 182992.

3. During the period September 4, 2000, through February 20, 2001, Respondent failed to make full payment promptly to 58 produce sellers in the total amount of \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce.

4. Respondent ceased operations in or about February 2001.

5. Respondent's PACA license terminated on September 10, 2002.

6. During the week prior to commencement of the hearing in this proceeding, a United States Department of Agriculture investigator contacted Respondent's unpaid produce sellers to determine the status of the debts listed in the Amended Complaint. This investigation revealed that Respondent continued to owe its produce sellers at least \$479,602.33 for perishable agricultural commodities that Respondent purchased, received,

²⁹(...continued)

(1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1250 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 590 (1983); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

and accepted in interstate commerce. Respondent had not made full payment for its perishable agricultural commodity purchases as of the date of the hearing.

7. In 1997, Respondent hired Mark Alfisi to be a produce buyer.

8. Prior to March 1999, Mark Alfisi made illegal payments to a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

9. During the period April 1999 through August 1999, Mark Alfisi bribed a public official by making cash payments in the total amount of \$1,760 to a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

10. During the period March 29, 1999, through June 18, 1999, Mark Alfisi gave unlawful gratuities to a public official by making cash payments in the total amount of \$1,400 to a United States Department of Agriculture inspector in connection with United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

11. Mark Alfisi used the fraudulent information obtained from unlawful payments made to a United States Department of Agriculture inspector to make false and misleading statements to Respondent's perishable agricultural commodity sellers.

Conclusions of Law

1. Respondent engaged in 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 its produce sellers.

2. Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector.

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

Order

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

Post & Taback
62 Agric. Dec. 802

843

after service of this Order on Respondent.

MISCELLANEOUS ORDERS

In re: JOHN J. KAPLAN, JR.
PACA-APP Docket No. 03-0001.
Order Dismissing the Petition for Review and Request for Hearing.
Filed August 19, 2003.

Charles E. Spicknall, for Complainant.
Robert G. Hibbert, for Petitioner.
Order issued by Marc R. Hillson, Administrative Law Judge.

Petitioner moved on July 10, 2003 to dismiss his "Complaint and Request for Hearing" in this matter. Since Petitioner actually filed a "Petition for Review" rather than a "Complaint" and there being no objection form opposing counsel, I am treating this as an unopposed motion to Dismiss the Petition for Review and Request for Hearing. The Motion is granted.

In re: WALTER R. DOYLE.
PACA-APP-03-0018.
Order Dismissing Case.
Filed November 24, 2003.

Andrew Y. Stantoon, for Respondent.
Petitioner, Micheal Messins.
Order issued by Leslie B. Holt, Administrative Law Judge.

Respondent, Chief of the Perishable Agricultural Commodities Act, has issued a new determination that Petitioner was not responsibly connected with Furr's Supermarkets, Inc. Therefore, the parties agree that Petitioner's Petition for Review is moot, and jointly request that the Petition for Review be dismissed.

Accordingly, this case is **DISMISSED.**

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

**In re: ALL WORLD FARMS, INC.
PACA Docket No. D-02-0013.
Decision Without Hearing by Reason of Default.
Filed March 12, 2003.**

PACA - Default.

Ann K. Parnes, for Complainant.
Respondent, Pro se.

Decision 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” or “PACA”), instituted by a complaint filed on March 28, 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 March 2001 through July 2001, Respondent All World Farms, Inc., (hereinafter “Respondent”) failed to make full payment promptly to 65 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,305,674.33 for 244 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent’s last known principal place of business by certified mail on March 29, 2002, but was returned unclaimed on April 20, 2002. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*, hereinafter “Rules of Practice”), the complaint is deemed served on the Respondent on May 7, 2002, the date on which the Hearing Clerk remailed the complaint by regular mail to Respondent’s last known principal place of business. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of

the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of New York. Its business address while operating was 336 New York City Terminal Market, Bronx, New York 10474. Its mailing address is 24 Louis Place, Nesconset, New York 11767.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 000406 was issued to Respondent on March 1, 2000. That license terminated on March 1, 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 March 2001 through July 2001, Respondent purchased, received, and accepted in interstate and foreign commerce 244 lots of perishable agricultural commodities from 65 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,305,674.33.

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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

Pursuant to the Rules of Practice, 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 April 21, 2003. - Editor]

**In re: A&L PRODUCE CO. AND HIGH DESERT DISTRIBUTING,
INC.**

PACA Docket No. 02-0019.

Decision Without Hearing by Reason of Default.

Filed March 27, 2003.

PACA - Default.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.

Decision issued by Jill S. Clifton, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the PACA), instituted by a complaint filed on July 10, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”).

The complaint claims that Respondent A & L Produce Co. and its direct successor, Respondent High Desert Distributing Inc., willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint alleges that Respondent A & L Produce Co., during the period March 1999 through May 1999, failed to make full payment promptly to two sellers of the agreed purchase prices of \$155,081.22 for 28 lots of perishable agricultural commodities purchased, received, and accepted in interstate commerce, and that Respondent High Desert Distributing Inc., during the period February 2000 through May 2001, failed to make full payment promptly to four sellers of the agreed purchase prices of \$181,384.15 for 50 lots of perishable agricultural commodities purchased, received, and accepted in interstate commerce.

Copies of the complaint were served upon Respondents, and Respondents did not file answers and are in default. Complainant moved for the issuance of a Decision Without Hearing by Reason of Default, and on January 10, 2003, Mr. Dave Young filed his response. Mr. Young was a partner in Respondent A & L Produce Co. Although Mr. Young's response does not provide grounds for setting aside the default, his response has been considered in issuing this Decision. This Decision is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent A & L Produce Co. (hereinafter "A & L ") is a partnership organized and existing under the laws of the State of California. At all times material herein, A & L's business address was 35651 80th Street East, Littlerock, California 93543, and its mailing address was P.O. Box 4, Littlerock, California 93543. A & L ceased operations in approximately August 1999.

2. At all times material herein, James David Young and Deborah Elyse Young were equal partners of A & L.

3. At all times material herein, A & L was licensed under the PACA. License number 962222 was issued to A & L on August 8, 1996. This license terminated on August 8, 1999, when the firm failed to pay the applicable annual license renewal fee.

4. Respondent High Desert Distributing, Inc. (hereinafter "High Desert ") is a corporation organized and existing under the laws of the State of Nevada. At all times material herein, High Desert's business address was 35651 80th Street East, Littlerock, California 93543 and its mailing address was P.O. Box 4, Littlerock, California 93543. High Desert's subsequent business address appears to be 1555 E. Flamingo, Suite 155, Las Vegas, Nevada 89119, or c/o Jonathan L. Ames, President, 7346 Sandpiper Dr., Quartz Hill, California 93536.

5. High Desert began operating in September 1999.

6. At all times material herein, High Desert was licensed under the PACA. License number 000236 was issued to High Desert on November 15, 1999. This license terminated on November 15, 2001, when the firm failed to pay the applicable annual license renewal fee.

7. As more fully set forth in paragraph III. of the complaint, A & L, during the period March 1999 through May 1999, failed to make full payment promptly to two sellers of the agreed purchase prices of \$155,081.22 for 28 lots of perishable agricultural commodities purchased, received, and accepted in interstate commerce.

8. As more fully set forth in paragraph IV. of the complaint, High Desert, during the period February 2000 through May 2001, failed to make full payment promptly to two sellers of the agreed purchase prices of \$164,120.15 for 48 lots of perishable agricultural commodities purchased, received, and accepted in interstate commerce.

Conclusions

Respondents' failures to make full payment promptly with respect to the transactions referred to in Findings of Fact 7 and 8 above, constitute 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

1. Respondents A & L and High Desert have committed willful, flagrant and repeated 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.

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

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

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, each in a separate envelope.

[This Decision and Order became final June 24, 2003. - Editor]

**In re: RLC PRODUCE, INC. a/t/a R&L PRODUCE.
PACA Docket No. 02-0029.
Decision Without Hearing by Reason of Default.
Filed April 21, 2003.**

PACA - Default.

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

Decision issued 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 September 30,

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 2001 through November 2001, Respondent RLC Produce, Inc., also trading as R & L Produce (hereinafter "Respondent"), failed to make full payment promptly to one seller of the agreed purchase prices in the total amount of \$769,309.80 for 107 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 November 21, 2002. The time for filing an answer expired on December 11, 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. RLC Produce, Inc., also trading as R & L Produce, is a corporation organized and existing under the laws of the State of Texas. Respondent's business address is 1900 Corinth Street, Dallas, Texas 75315, and its mailing address is P. O. Box 150065, Dallas, Texas 75315.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 950092 was issued to Respondent on October 17, 1994. This license has been renewed regularly and is next subject to renewal on or before October 17, 2003.

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

4. During the period from May 2001 through November 2001, Respondent purchased, received, and accepted in interstate commerce, from one seller, 107 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 \$769,309.80.

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 PACA license of Respondent is hereby revoked.

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 July 3, 2003. -Editor]

In re: U.S. TROPICALS L.L.C.
PACA Docket No. D-03-0009.
Decision Without Hearing by Reason of Default.
Filed May 28, 2003.

PACA - Default.

Ann K. Parnes, 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" or "PACA"), instituted by a complaint filed on January 27, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1999 through September 2001, Respondent U.S. Tropicals L.L.C., (hereinafter "Respondent") failed to make full payment promptly to 17 sellers of the agreed purchase prices, or balances thereof, in the total amount of

\$453,228.48 for 143 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business by certified mail on January 28, 2003, but was returned on February 10, 2003. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"), the complaint is deemed served on February 10, 2003, the date on which the Hearing Clerk remailed the complaint by regular mail to Respondent's last known principal place of business. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a limited liability company organized and existing under the laws of the State of Florida. Respondent's business mailing address is 159 S.W. 27th Avenue, Pompano Beach, Florida 33071.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 990260 was issued to Respondent on December 16, 1998. This license terminated on December 16, 2001, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period November 1999 through September 2001, Respondent purchased, received and accepted in interstate and foreign commerce, 143 lots of perishable agricultural commodities from 17 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$453,228.48.

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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

Pursuant to the Rules of Practice, 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 July 16, 2003.-Editor]

**In re: WORLD PRODUCE, INC.
PACA Docket No. D-02-0017.
Decision Without Hearing by Reason of Default.
Filed April 21, 2003.**

PACA - Default.

Ann K. Parnes, 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" or "PACA"), instituted by a complaint filed on May 16, 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 January 2001 through June 2001, Respondent World Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 27 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$518,329.45 for 117 lots of

perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business by certified mail on May 17, 2002, but was returned unclaimed on June 6, 2002. It was then remailed to that same address by regular mail on June 6, 2002. In addition, a copy of the complaint was mailed to a second address by certified mail on August 6, 2002, and was returned on August 11, 2002. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"), the complaint is deemed served on the Respondent on September 20, 2002, the date of remailing by regular mail to Respondent's last known principal place of business. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Georgia. Its mailing address is 209 Edgewood Avenue, S.E., #116, Atlanta, Georgia 30303.

2. At all times material herein, Respondent operated subject to the PACA. Pursuant to the licensing provisions of the PACA, license number 980985 was issued to Respondent on April 14, 1998. That license terminated on April 14, 2001, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

3. During the period January 2001 through June 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, 117 lots of fruits and vegetables from 27 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$518,329.45.

Conclusions

Respondent's failure to make full payment promptly with respect to the 117 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

Pursuant to the Rules of Practice, 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 July 22, 2003.-Editor]

**In re: THE MILES SMITH FAMILY CORP. d/b/a CAL FRESH
PRODUCE.
PACA Docket No. D-03-0005.
Decision Without Hearing by Reason of Default.
Filed June 6, 2003.**

PACA - Default.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.

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

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on October 30, 2002, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that Respondent, during the period December 22, 2000, through October 17, 2001, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of \$303,441.12 for 235 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. §

499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was served upon Respondent, and Respondent has not filed an answer. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice").

Findings of Fact

1. The Miles Smith Family Corp. d/b/a Cal Fresh Produce (hereinafter "Respondent") is a corporation incorporated in the State of California. At all times material herein, Respondent's business address was 2705 5th Street, Sacramento, California 95818. Respondent's business mailing address is currently 385 Inverness Drive, Englewood, Colorado 80112.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 920961 was issued to Respondent on April 7, 1992. This license was renewed on an annual basis, but terminated on April 7, 2002, due to Respondent's failure to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period December 22, 2000, through October 17, 2001, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of \$303,441.12 for 235 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce.

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

A finding is made that Respondent The Miles Smith Family Corp. d/b/a Cal Fresh Produce 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 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 August 4, 2003.-Editor]

**In re: BEAR KODIAK PRODUCE, INC.
PACA Docket No. D-03-0011.
Decision Without Hearing by Reason of Default.
Filed July 11, 2003.**

PACA - Default.

Charles Spicknall, for Complainant.
Respondent, Pro se.
Decision and Order 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 February 14, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of January through December 2001, Respondent Bear Kodiak Produce, Inc. [hereinafter "Respondent"] failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$546,461.90 for 199 lots of

perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

Copies of the complaint filed on February 14, 2003, were sent by certified mail to the Respondent at 3529 East Golf Links Road, Tucson, Arizona 85713 and to P.O Box 28888, Tucson, Arizona 85726 on the filing date. The envelope containing the complaint copy sent to the 3529 East Golf Links Road address was stamped "Attempted, Not Known and Returned To Sender" by the United States Postal Service (USPS) and returned to the Hearing Clerk. On March 4, 2003, a copy of the complaint was sent by regular mail to 3529 East Golf Links Road, Tucson, Arizona 85713.

The complaint is deemed received by Respondent on the remaining date of March 4, 2003, by regular mail to Respondent's last known principal place of business in accordance with section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the "Rules of Practice"] (7 C.F.R. § 1.147(c)).

The envelope containing the complaint copy sent to P.O. Box 28888, Tucson, Arizona 85726 was returned by the USPS showing a forwarding address of 177 N. Church Ave., Suite 625, Tucson, Arizona 85701-1115. Another complaint copy was sent via certified mail to the forwarding address at 177 N. Church Ave., Suite 625, Tucson, Arizona 85701-1115. That copy was served on Respondent on March 10, 2003, when received by the Respondent's agent who signed the Return Receipt, which was then returned to the Hearing Clerk by the USPS.

The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further proceedings 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 Arizona. Its business address was 3529 East Golf Links Road, Tucson, Arizona 85713. Its mailing address was P.O Box 28888, Tucson, Arizona 85726.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 911693 was issued to Respondent on September 10, 1991.

This license terminated on September 10, 2002, pursuant to Section 4(a) of

the Act (7 U.S.C § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period of January through December 2001, Respondent purchased, received and accepted in interstate commerce, from seven sellers, 199 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 \$546,461.90.

Conclusions

Respondent's failure to make full payment promptly with respect to the 199 transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b(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 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 August 22, 2003, and effective September 2, 2003 – Editor]

**In re: METRO BROKERAGE & DISTRIBUTING, INC.
PACA Docket No. D-03-0007.
Decision Without Hearing by Reason of Default.
Filed May 29, 2003.**

PACA - Default.

Charles L. Kendall, 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 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 January 13, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period August 7, 2001, through November 11, 2001 Respondent Metro Brokerage & Distributing, Inc. failed to make full payment promptly to 16 sellers of the agreed purchase prices in the total amount of \$331,723.45 for 149 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 January 14, 2003, and was received by the Respondent on January 29, 2003. The time for filing an Answer to the Complaint expired on February 18, 2003. 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 Texas. Respondent's business mailing address is 2000 Gerald Lane, Arlington, Texas 76001-8417.

2. At all times material herein, Respondent was licensed under the PACA. License number 810075 was issued to Respondent on October 20, 1980. This license terminated on October 20, 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 August 7, 2001, through November 11, 2001, failed to make full payment promptly to 16 sellers of the agreed

purchase prices in the total amount of \$331,723.45 for 149 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 149 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 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 September 5, 2003.-Editor]

In re: GOLDEN GEM GROWERS, INC.
PACA Docket No. D-03-0019.
Decision Without Hearing by Reason of Default.
Filed August 25, 2003.

PACA - Default.

Ann K. 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 complaint filed on May 9, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, of Fruit and Vegetable Programs of the Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period October 2000 through October 2001, Respondent Golden Gem Growers, Inc., (hereinafter “Respondent”) failed to make full payment promptly to 80 growers of the agreed purchase prices, or balances thereof, in the total amount of \$597,525.73 for 162 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served on Respondent by certified mail on May 21, 2003. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a decision without hearing based upon Respondent’s default, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Florida. Its business address is 39017 Golden Gem Drive, Umatilla, Florida 32784. Its mailing address is P. O. Box 9, Umatilla, Florida 32784.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 132908 was issued to Respondent on March 20, 1951. This license terminated on March 20, 2002, 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. During the period October 2000 through October 2001, Respondent purchased, received and accepted in interstate and foreign commerce, 162 lots of perishable agricultural commodities from 80 growers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$597,525.73.

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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

This order shall take effect on the 11th day after this Decision becomes final. Pursuant to the Rules of Practice, 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 October 7, 2003.-Editor]

**In re: SPECIALTY PRODUCE COMPANY, INC.
PACA Docket No. D-03-0016.
Decision Without Hearing by Reason of Default.
Filed August 28, 2003.**

PACA - Default.

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

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

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), [hereinafter referred to as the "Act"], instituted by a complaint filed on April 22, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of December 1999 through September 2002, Respondent Specialty Produce Company, Inc., [hereinafter the "Respondent"], failed to make full payment promptly to thirty-one sellers of the agreed purchase prices in the total amount of \$1,306,890.58 for 358 lots of perishable agricultural commodities which it purchased, received and

accepted in interstate and foreign commerce.

A copy of the complaint filed on April 22, 2003 was sent to the Respondent at 716 East 12th Street, Farmers Market, Chattanooga, Tennessee 37403 by certified mail on the filing date and was received by the Respondent on May 2, 2003. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, 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 (7 C.F.R. § 1.139).

Finding of Fact

1. The Respondent is a corporation organized and existing under the laws of Tennessee. Its business mailing address is 716 East 12th Street, Farmers Market, Chattanooga, Tennessee 37403.

2. At all times material herein, the Respondent was licensed and/or operating in a manner subject to the provisions of the Act. License number 811522 was issued to the Respondent on August 6, 1981. The Respondent's license terminated on August 6, 2002, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when the Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period December 1999 through September 2002, the Respondent purchased, received and accepted in interstate and foreign commerce, from thirty-one sellers, 358 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,306,890.58.

Conclusions

The Respondent's failure to make full payment promptly with respect to the 358 transactions described 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 the Respondent has committed willful, flagrant

and repeated violations of Section 2 of the 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 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 October 10, 2003.-Editor]

**In re: SEMINOLE PRODUCE, INC.
PACA Docket No. D-03-0010.
Decision Without Hearing by Reason of Default.
Filed August 26, 2003.**

PACA - Default.

Andrew Y. Stanton, 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 complaint filed on February 6, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period March 1998 through February 2002, Respondent Seminole Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 5 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$236,493.90 for 144 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business by certified mail on February 7, 2003, but was refused and

returned with a forwarding address on February 25, 2003. The copy of the complaint was then re-mailed to that forwarding address by certified mail on February 26, 2003, but was again returned on March 17, 2003. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 et seq., hereinafter "Rules of Practice"), the complaint is deemed served on March 21, 2003, the date on which the Hearing Clerk remailed the complaint by regular mail to the same forwarding address provided by the Respondent. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of Virginia. Respondent's last known business address is 2151 Richmond Road, Charlottesville, Virginia 22911.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the PACA. License number 010456 was issued to Respondent on January 26, 2001. This license terminated on January 26, 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. During the period March 1998 through February 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 144 lots of perishable agricultural commodities from 5 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$236,493.90.

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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

Pursuant to the Rules of Practice, 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 October 14, 2003.-Editor]

**In re: WABASH DISTRIBUTING COMPANY.
PACA Docket No. D-03-0013.
Decision Without Hearing by Reason of Default.
Filed November 3, 2003.**

PACA - Default.

Christopher P. Young-Morales, 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", instituted by a Complaint filed on March 25, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period September 29, 2001 through January 21, 2002, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 42 sellers, 558 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,839,131.99.

A copy of the Complaint was served upon Respondent by regular mail on April 17, 2003; Respondent did not answer the Complaint.¹ The time for filing an answer having expired, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Indiana. Its business mailing address is 1st and Eagle Street, Terre Haute, Indiana 47808.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 811613 was issued to Respondent on August 25, 1981. This license terminated on August 25, 2002, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.

3. As more fully set forth in paragraph III of the Complaint, during the period September 29, 2001 through January 21, 2002, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 42 sellers, 558 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,839,131.99.

Conclusions

Respondent's failure to make full payment promptly with respect to the 558 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

¹ The Complaint was mailed to Respondent by certified mail on March 31, 2003, and returned to the Hearing Clerk's Office, marked by the postal service as unclaimed, on April 10, 2003. Pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147), hereinafter referred to as the "Rules of Practice", the Complaint was subsequently re-mailed by ordinary mail to the same address on April 17, 2003, and is deemed served upon Respondent as of that date.

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the 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 11th day after this Decision becomes final.

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

Copies hereof shall be served upon parties.

[This Decision and Order became final December 26, 2003.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

International Exports Unlimited, Inc. PACA Docket No. D-00-0005.
8/12/03.

Arkoosh Produce, Inc. PACA Docket No. D-02-0003. 9/22/03.

Gooding Potato Packers, Inc. PACA Docket D-02-0004. 9/30/03.

M.A. Gedney Company. PACA Docket No. 03-0033. 10/1/03.

John Cope's Food Product, Inc. PACA Docket No. D-02-0027. 10/7/03.