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AGRICULTURE DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

MYRNA K. JACOBSON. v. USDA.
No. 03-1157.
Filed June 1, 2004.
Rehearing Denied Aug. 5, 2004.

(Cite as: 99 Fed. Appx. 238).

PACA – Payment, failure to make prompt – "Responsibly connected" – Presumption, rebutable, if holding more than 10% ownership – "Actively involved," when not.

Plaintiff owned more than 11.95% of a PACA licensee which failed to make prompt payment to its produce suppliers. The court cited *Norinsberg v. USDA,* 162 F. 3rd 1194 as the standard for articulation that Plaintiff was not "actively involved." Plaintiff failed to rebut the presumption that an owner of more than 10% of a PACA licensee is responsibly connected with the licensee and subjected her to employment sanctions under PACA regulations.

United States Court of Appeals,
District of Columbia Circuit

Before GINSBURG, Chief Judge, and SENTELLE and ROBERTS, Circuit Judges.

JUDGMENT

This petition for review of an order of the Department of Agriculture was considered on the briefs and appendix filed by the parties. *See* Fed. R.App. P. 34(a)(2); D.C.Cir. Rule 34(j). It is

ORDERED and **ADJUDGED** that the petition for review be denied for the reasons stated in the memorandum accompanying this judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.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

MEMORANDUM

Under the Perishable Agricultural Commodities Act (PACA), the Secretary of Agriculture may suspend or revoke the required license of any commission merchant, dealer, or broker who employs "any person who is or has been *responsibly connected"* with a licensee found to have committed "any flagrant and repeated violation of section 499b." 7 U.S.C. § 499h(b)(2) (emphasis added). That section makes it unlawful for covered entities to, *inter alia,* "fail ... [to] make full payment promptly" for perishable agricultural commodities. *Id.* § 499b(4). The statute creates a presumption that a person who holds more than 10 percent of the outstanding stock of a PACA violator is "responsibly connected," but also allows a person to rebut that presumption: "A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was *not actively involved in the activities resulting in a violation* ... and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee...." *Id.* § 499a(b)(9) (emphasis added).

In response to our decision in *Norinsberg v. United States Dep't of Agriculture,* 162 F.3d 1194, 1200 (D.C.Cir.1998), the Secretary has articulated the standard for "not actively involved," requiring a petitioner to "demonstrate[ ] by a preponderance of the evidence that his or her participation [in activities resulting in a PACA violation] was limited to the performance of ministerial functions only." *In re Norinsberg,* 58 Agric. Dec. 604, 610-11 (1999). "Ministerial" has been further defined as "not exercis[ing] judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA." *Id.* at 611.

From June 1999 through January 2000, Jacobson Produce failed to make full payment promptly for perishable agricultural commodities, resulting in a violation of 7 U.S.C. § 499b(4). During that period, Mrs. Jacobson was manager of the Jacobson Produce frozen food department. Agriculture determined that she was "responsibly connected" because she owned 11.95 percent of Jacobson Produce's outstanding stock. Mrs. Jacobson seeks to carry her burden of rebutting the presumption triggered by that ownership by arguing that she was not actively involved in activities resulting in a violation--her actions involved only placing orders to *buy* produce, while it is *not paying* for the produce that gives rise to a PACA violation.

Substantial evidence, however, supports the Judicial Officer's determination that Mrs. Jacobson knew or should have known, when she placed orders for produce, that Jacobson Produce was not meeting its obligations to produce sellers. *In re Janet S. Orloff* et al., Decision and Order as to Merna K. Jacobson, Docket No. 01-0002, at 21 (Jan. 7, 2003); *see Veg-Mix, Inc. v. United States Dep't of Agriculture,* 832 F.2d 601, 612 (D.C.Cir.1987). The question thus becomes whether it is reasonable for the agency to conclude that an individual who places orders for produce, with the knowledge that the buyer is having or will have difficulties paying for the produce, has not carried the burden of showing she was not actively involved in activities resulting in the subsequent failure to make full payment promptly. Under *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we cannot say that such a reading of the statute is unreasonable.

AVOCADOS PLUS INCORPORATED, ET AL., v. USDA.
No. 03-5086.
Filed June 18, 2004.

(Cite as: Cite as: 370 F.3d 1243).

HAPRIA – First amendment – Administrative remedies, failure to exhaust – Jurisdictional (mandatory) exhaustion – Non-jurisdictional (permissive) exhaustion.

Relying on *United Foods, Inc.*, the case was initially brought under a constitutional claim of impermissible violation of First Amendment right of free speech by forcing the (importers of Hass avocados) to pay for speech which they disagreed. Under the Hass Avocado Promotion, Research, and Information Act (HAPRIA) ("Act"), the case was remanded to the lower court after discussing the nature of the jurisdictional exhaustion of remedies. Where the statute is not explicit as to the jurisdictional requirements, a reviewing court may impose a judicially created doctrine on non-jurisdictional exhaustion of remedies by conducting a inquiry as to whether certain tests are met under *EEOC v. Lutheran Soc. Servs.*, 186 F. 3d 959, 963-64 (D.C. Cir. 1999). Alternately, if the statute requires exhaustion of remedies (jurisdictional), the court may not excuse it. The court found that the Act at 7 USC ¶ 7806 did not contain the explicit language requiring mandatory exhaustion of administrative remedies.

United States Court of Appeals,
District of Columbia Circuit.

Before: EDWARDS, RANDOLPH, and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

The Hass Avocado Promotion, Research, and Information Act, 7 U.S.C. §§ 7801-7813, authorizes the Department of Agriculture to collect assessments from avocado growers and importers and to transfer the assessments to a board charged with promoting domestic consumption of avocados of the Hass variety. Two importers of avocados and two importers of avocado products sued in district court alleging that the Act

violated their First Amendment right to be free of compelled speech.[1] The district court dismissed the complaint because the importers had not exhausted the administrative remedies the Act provides.

I.

The Avocado Act, one of more than a dozen federal statutes aimed at promoting the sale of various agricultural commodities, requires the Secretary of Agriculture to issue an implementing order that takes effect if the majority of affected growers and importers approve it in a referendum. § 7805. The order establishes a Hass Avocado Board consisting of industry representatives. § 7804. The function of the Board is to "administer the order," § 7804(c)(1), "develop budgets for the implementation of the order," § 7804(c)(5), and "develop" and "implement plans and projects for Hass avocado promotion, industry information, consumer information, or related research [.]" § 7804(c)(5)-(6). The Board may not implement any budget, plan or project without the prior approval of the Secretary, but these are "deemed to be approved" if the Secretary does not act within 45 days. § 7804(d)(3).

The Act also requires the Secretary to impose assessments on growers and importers to pay for the Board's activities. § 7804(h). The Board must pay 85 percent of a grower's assessments to its state grower organization, if such an organization exists. § 7804(h)(8). If an importer belongs to an importers' association, the Board must pay 85 percent of its assessment to that group. § 7804(h)(9). The Board must also reimburse the Secretary for expenses incurred conducting the referendum and

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[1]Two of the plaintiffs - Avo-King International, Inc. and Sunny Avocado, Ltd. - import only processed or frozen avocado products. The Secretary has not imposed assessments on such products, and it is not clear she ever will. We therefore affirm the dismissal of the complaint with respect to these plaintiffs on the ground that their claims are, so to speak, not ripe. *See Clean Air Implementation Project v. EPA,* 150 F.3d 1200 (D.C.Cir.1998). This opinion only concerns the remaining two importers - Avocados Plus, Inc. and LGS Specialty Sales Ltd.

supervising the Board. § 7804(i). The rest of the money pays for Board programs, although at least some of it must fund a promotion program conducted by the California Avocado Commission. *See* § 7804(e)(1) (requiring Board to enter contract with "avocado organization ... in a State with the majority of Hass avocado production in the United States"); § 7801(a)(2) (stating that "virtually all domestically produced avocados for the commercial market are grown in the State of California").

Under the § 7806 of the Act, any "person subject to an order" may file a petition with the Secretary "stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law; and ... requesting a modification of the order or an exemption from the order." § 7806(a)(1). The Secretary must rule on the petition after a hearing. § 7806(a)(3). The Act further provides that the "district courts of the United States ... shall have jurisdiction to review the ruling of the Secretary on the petition[,]" § 7806(b)(1), and must remand it if it "is not in accordance with law[.]" § 7806(b)(3).

Rather than invoking § 7806, the importers filed a complaint in district court claiming that the mandatory assessments were unconstitutional and seeking an injunction against enforcement of the Act.[2] The importers relied principally on *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), in which the Supreme Court ruled that an identical provision in the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6101-6112, violated the free speech rights of mushroom growers by forcing them to pay for speech with which they disagreed.

The government had argued in *United Foods* that the mushroom promotion program was government speech, and that the government

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[2]It is unclear whether, if the importers can go forward with their suit, they should be relegated to an as-applied rather than a facial challenge to the Act.

therefore could force growers to pay for it. The Supreme Court refused to consider the argument because the government had not raised it in the court of appeals. 533 U.S. at 416-17, 121 S.Ct. at 2340-41. *United Foods* triggered a series of challenges against other agricultural commodity promotion programs. In each case the government relied on the government speech defense and in each case the court of appeals rejected it. *See Cochran v. Veneman,* 359 F.3d 263 (3d Cir.2004) (dairy); *Michigan Pork Producers Ass'n v. Veneman,* 348 F.3d 157 (6th Cir.2003) (pork); *Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir.2003), *cert. granted,* 2004 WL 303634 (May 24, 2004) (beef); see also Pelts & Skins, LLC v. Landreneau, 365 F.3d 423 (5th Cir.2004) (striking down state alligator products promotion program); *but see Charter v. USDA,* 230 F.Supp.2d 1121 (D.Mont.2002) (sustaining beef program as government speech).

The avocado importers moved for a preliminary injunction. The government opposed the motion, arguing that the avocado program was government speech. The government also moved to dismiss the complaint for failure to exhaust administrative remedies. The district court initially addressed the importers' First Amendment claims, holding that they were not required to exhaust the administrative remedy provided in § 7806. Then, in response to a government motion, the court reconsidered its decision, ruled that importers must exhaust their administrative remedy, and dismissed the complaint for lack of subject matter jurisdiction.

II.

The word "exhaustion" now describes two distinct legal concepts. The first is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court. *See generally* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (4th ed.2002). We will call this doctrine "non-jurisdictional exhaustion." Non-jurisdictional exhaustion serves three functions: "giving agencies the opportunity to correct their own errors, affording parties and courts the

benefits of agencies' expertise, [and] compiling a record adequate for judicial review[.]" *Marine Mammal Conservancy, Inc. v. Dep't of Agric.,* 134 F.3d 409 (D.C.Cir.1998); *McCarthy v. Madigan,* 503 U.S. 140, 145-46, 112 S.Ct. 1081, 1086-87, 117 L.Ed.2d 291 (1992).

Occasionally, exhaustion will not fulfill these ends. There may be no facts in dispute, *see McKart v. United States,* 395 U.S. 185, 198 n. 15, 89 S.Ct. 1657, 1665 n. 15, 23 L.Ed.2d 194 (1969), the disputed issue may be outside the agency's expertise, *see id.* at 197-98, 89 S.Ct. at 1660-61, or the agency may not have the authority to change its decision in a way that would satisfy the challenger's objections, *see McCarthy,* 503 U.S. at 147-48, 112 S.Ct. at 1087-88. Also, requiring resort to the administrative process may prejudice the litigants' court action, *see id.* at 146-47, 112 S.Ct. at 1086- 87, or may be inadequate because of agency bias, *see id.* at 148-49, 112 S.Ct. at 1088. In these circumstances, the district court may, in its discretion, excuse exhaustion if "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Id.* at 146, 112 S.Ct. at 1086 (quoting *West v. Bergland,* 611 F.2d 710, 715 (8th Cir.1979)).

The second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to judicial review. This "jurisdictional exhaustion" is rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts. *See EEOC v. Lutheran Soc. Servs.,* 186 F.3d 959, 963-64 (D.C.Cir.1999). Whether a statute requires exhaustion is purely a question of statutory interpretation. *See McCarthy,* 503 U.S. at 144, 112 S.Ct. at 1085. If the statute does mandate exhaustion, a court cannot excuse it. *See Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 13, 120 S.Ct. 1084, 1093, 146 L.Ed.2d 1 (2000).[3]

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[3]General federal question jurisdiction under 28 U.S.C. § 1331 does not empower the court to proceed to the merits in a jurisdictional exhaustion case. *See Heckler v.*

(continued...)

While the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry, jurisdictional exhaustion requires much more. In order to mandate exhaustion, a statute must contain " '[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Weinberger v. Salfi,* 422 U.S. 749, 757, 95 S.Ct. 2457, 2462, 45 L.Ed.2d 522 (1975); 2 PIERCE, ADMINISTRATIVE LAW TREATISE § 15.3, at 986. We presume exhaustion is non-jurisdictional unless "Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision," *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.,* 727 F.2d 1204, 1208 (D.C.Cir.1984).

For example, the Supreme Court decided that the Social Security Act mandated exhaustion in light of this statutory language: "No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employer thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h). *See Salfi,* 422 U.S. at 756-67, 95 S.Ct. at 2462-63. Similarly, we found jurisdictional exhaustion in the following language from the Federal Power Act: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.... No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged

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[3](...continued)
Ringer, 466 U.S. 602, 616, 104 S.Ct. 2013, 2022, 80 L.Ed.2d 622 (1984). In a non-jurisdictional exhaustion case, if the court decides not to require exhaustion, the case may proceed under § 1331. If the court rules that the plaintiff must exhaust, and the plaintiff proceeds to do so, judicial review of the agency's decision will be under the relevant provision for review of that agency's action.

before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." 16 U.S.C. § 825l. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC,* 876 F.2d 109, 112-13 (D.C.Cir.1989).

The Avocado Act contains no comparable "sweeping and direct" language. It neither mentions exhaustion nor explicitly limits the jurisdiction of the courts. It merely creates an administrative procedure for challenging the Secretary's orders. In this respect, the Avocado Act is therefore more like the statute we considered in *Lutheran Social Services.* In that case, we excused a party challenging an EEOC subpoena from exhausting administrative remedies, even though the statute creating the subpoena power provided such a remedy. We rejected the EEOC's argument that exhaustion was jurisdictional, observing that "nowhere does [the statute] even imply, much less expressly state, that courts lack jurisdiction to hear objections not presented to the Commission." 186 F.3d at 963.

The government argues that *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946), compels the opposite conclusion. In *Ruzicka,* the Supreme Court ruled that milk handlers challenging marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, must exhaust administrative remedies before coming to court. The relevant provisions of the AMAA are nearly identical to those in the Avocado Act. *Compare* 7 U.S.C. § 608c(6) & (15) *with* 7 U.S.C. §§ 7806-7807(a). To the government, it follows that the Avocado Act mandates exhaustion.

Two unstated premises are behind the government's argument. The first is that when Congress uses the language of one statute in another statute it usually intends both statutes to have the same meaning. *See Energy Research Found. v. Defense Nuclear Facilities Safety Bd.,* 917 F.2d 581, 582-83 (D.C.Cir.1990). The second is that Congress knew of the interpretation given the earlier statute in *Ruzicka.* For this proposition, the government could have cited *Cannon v. Univ. of*

Chicago, 441 U.S. 677, 694-98, 99 S.Ct. 1946, 1955-57, 60 L.Ed.2d 560 (1979), in which the Court endorsed the assumption that Congress knows "the law"- by which the Court meant judicial decisions. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990). The government's argument has some force but we believe there is an equally forceful argument on the other side. If we are to assume that Congress knew of the law handed down in *Ruzicka,* we should also assume that Congress knew of the law set forth in *Salfi, McCarthy, I.A.M.*, and other cases distinguishing non-jurisdictional and jurisdictional exhaustion. In other words, Congress' failure to include in § 7806 of the Avocado Act the sort of "sweeping and direct" language mandating exhaustion and thereby depriving the courts of jurisdiction tends to indicate that we are dealing here with non-jurisdictional exhaustion.

The most telling point against the government's position is that the *Ruzicka* Court did not find the exhaustion requirement in the text of the AMAA's provisions cited above and duplicated in § 7806. Standing alone that text was, as the Court saw it, inconclusive, which is why the Court stated that "Congress did not say in words" that exhaustion was mandatory. 329 U.S. at 292, 67 S.Ct. at 209. In nevertheless requiring exhaustion, the Court looked elsewhere, relying on the complex statutory enforcement scheme in the AMAA, a scheme Congress would not have wanted disrupted by "the contingencies and inevitable delays of litigation," *id.* at 292-93, 67 S.Ct. at 209-10. Unlike the AMAA, the Avocado Act does not provide for comprehensive market regulation that could be disrupted by ill-timed judicial interference. It simply transfers money from growers and importers to the Board. *Cf. United Foods,* 533 U.S. at 411-12, 121 S.Ct. at 2338-39 (distinguishing the AMAA, where "the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy," from the Mushroom Act, where "advertising itself ... is the principal object of the regulatory scheme"). One therefore cannot conclude much of anything about exhaustion from the apparent fact that Congress decided to use the language of the AMAA review provisions as a model for the Avocado

Act.

We also question the Secretary's characterization of *Ruzicka* as a case in which the statutory language made exhaustion jurisdictional. Certainly, under the modern precedents discussed above, the AMAA's lack of anything close to explicit jurisdictional language would render any exhaustion requirement non-jurisdictional. The fact that *Ruzicka* focused on congressional intent tells us little, for even in non-jurisdictional exhaustion cases courts owe "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court." *McCarthy,* 503 U.S. at 144, 112 S.Ct. at 1085. The *Ruzicka* Court did not distinguish between jurisdictional and non-jurisdictional exhaustion because the current doctrinal framework did not exist at the time. The Court itself recognized the limited precedential effect of its holding: "Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant." 329 U.S. at 295, 67 S.Ct. at 210.

The district court relied primarily on *Gallo Cattle Co. v. USDA,* 159 F.3d 1194 (9th Cir.1998), which construed language in the Dairy and Tobacco Adjustment Act of 1983, 7 U.S.C. § 4509 ("the Dairy Act"), identical in all relevant respects to § 7806. The court of appeals found that the language mandated exhaustion and that the district court had no jurisdiction to consider the plaintiff's challenge until it exhausted administrative remedies. 159 F.3d at 1197-98. Despite the Ninth Circuit's terminology, *Gallo Cattle* was not so much an exhaustion case as a case about finality. *See* 2 PIERCE, ADMINISTRATIVE LAW TREATISE § 15.1, at 966 ("Finality and exhaustion are particularly difficult to distinguish."). The plaintiffs had already filed a petition with the Secretary challenging the order. A judicial officer had denied the petition, and the plaintiffs were asking the court for interim relief pending their appeal to the Secretary. Under the statute, only the Secretary's

ruling was final and subject to judicial review. *See* 7 U.S.C. § 4509(a)-(b). The court therefore ruled that there was no jurisdiction to consider the challenge to the judicial officer's ruling *pursuant to § 4509*. 159 F.3d at 1198. This does not necessarily mean exhaustion would be jurisdictional if the plaintiffs had brought their challenge directly to district court. True, the *Gallo Cattle* court stated in dicta that the Dairy Act mandated exhaustion, citing a Ninth Circuit case interpreting the AMAA. *Id.* at 1197 (citing *Rasmussen v. Hardin,* 461 F.2d 595, 597-98 (9th Cir.1972)). But that case, like *Ruzicka,* did not say whether the AMAA exhaustion requirement was jurisdictional or non-jurisdictional.

While the matter is not free from doubt, we therefore hold - particularly in light of our decision in *Lutheran Social Services* - that the language of the Avocado Act does not make exhaustion jurisdictional.

III.

Our precedent demands that we review non-jurisdictional exhaustion decisions for abuse of discretion. *See Ogden v. Zuckert,* 298 F.2d 312, 317 (D.C.Cir.1961). Whether in this case the district court thought it had discretion is not so clear. The first part of the court's analysis clearly states that the Avocado Act "mandates exhaustion," and that "Congress has given the Court *jurisdiction* over only 'the ruling of the Secretary.' " J.A. 107-08 (italics added, underline in the original). Having concluded that the Avocado Act mandated exhaustion, the court could have stopped there, but did not. In the next section of its opinion, the court - responding to the importers' argument that the constitutional nature of their claim should excuse exhaustion - explained how requiring exhaustion would serve the policies underlying the doctrine. In doing so, the court applied a portion of the non-jurisdictional exhaustion analysis. This would have been unnecessary if the court believed the statute mandated exhaustion as a jurisdictional matter. *See Salfi,* 422 U.S. at 762-64, 95 S.Ct. at 2465-66 (applying jurisdictional exhaustion to constitutional claim). One could argue, therefore, that notwithstanding the district court's earlier absolute language, and its dismissal of the complaint for lack of subject

matter jurisdiction, it was requiring exhaustion as a matter of discretion.

Despite these uncertainties we believe the district court thought it had no power to excuse exhaustion. Otherwise there is no explaining why the court did not complete the non-jurisdictional exhaustion analysis by "balanc[ing] the interest of the individual in retaining prompt access to a federal judicial forum against the countervailing institutional interests favoring exhaustion." *McCarthy,* 503 U.S. at 147, 112 S.Ct. at 1087. "Application of this balancing principle is intensely practical ... because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative remedy." *Id.* (quotation marks and citations omitted). We see no signs the district court attempted to make either of these inquiries.

"[T]he district court was entitled to determine, in the first instance, whether exhaustion was required and, if so, whether, in its discretion, it should retain jurisdiction pending exhaustion. Because the district [court] was apparently unaware that these decisions were open to [it], we find it appropriate to vacate [its] order dismissing the action and to remand the case so that [the court] may address them." *Montgomery v. Rumsfeld,* 572 F.2d 250, 254 (9th Cir.1978). *See also Ogden,* 298 F.2d at 317.[4]

The importers in this case are fortunate. The time limit in §

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[4]In many cases the time limits for challenging an order before the agency may be relatively short. In non-jurisdictional (and jurisdictional) exhaustion cases, those who bypass administrative remedies and bring an action in court therefore run a substantial risk. If the court decides that the plaintiff had to exhaust, by then it may be too late for the plaintiff to seek relief from the agency. While unusual circumstances may warrant dispensing with exhaustion when the time limits have run, *see Bowen v. City of New York,* 476 U.S. 467, 482-86, 106 S.Ct. 2022, 2030-33, 90 L.Ed.2d 462 (1986), we held in *American Federation of Government Employees v. Loy,* 367 F.3d 932, 936 (D.C.Cir.2004), that the court will not "excuse non-compliance with the requirement that one must exhaust administrative remedies on the basis that the party failed to comply." *See Steadman v. Governor, U.S. Soldiers' & Airmen's Home,* 918 F.2d 963, 968 (D.C.Cir.1990).

7806(a)(4) of the Avocado Act is generous. They have until early September 2004 to file a petition with the Secretary challenging the order. *See* § 7806(a)(4). They should be allowed to do so without prejudicing their right to argue to the district court that exhaustion should be excused.

So ordered.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JOEL TABACK.
PACA-APP Docket No. 02-0002.
Decision and Order.
Filed February 27, 2004.

PACA-APP – Perishable Agricultural Commodities Act – Failure to make full payment promptly – Bribery – Unlawful gratuities – Responsibly connected.

The Judicial Officer (JO) reversed Chief Administrative Law Judge James W. Hunt's decision holding that Joel Taback (Petitioner) was not responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The JO concluded that during the period March 29, 1999, through August 1999, and during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., violated 7 U.S.C. § 499b(4). Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The JO found that, while Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Post & Taback, Inc.'s violations, Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, director, and shareholder of Post & Taback, Inc., or that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc. Thus, the JO concluded Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA.

Andrew Y. Stanton and Charles E. Spicknall, for Respondent.
Paul T. Gentile, for Petitioner.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On December 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Joel Taback [hereinafter Petitioner] was responsibly connected with Post & Taback, Inc., during the period September 4,

2000, through October 10, 2000, when Post & Taback, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On January 18, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000.

On September 9, 2002, Respondent issued a determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999, when Post & Taback, Inc., violated the PACA.[2] On October 17, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999.

On December 17-19, 2002, January 28-30, 2003, and April 8-9, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the

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[1]During the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly for perishable agricultural commodities, which Post & Taback, Inc., purchased, received, and accepted in interstate commerce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

[2]During the period March 29, 1999, through August 5, 1999, Post & Taback, Inc., bribed 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 Post & Taback, Inc., purchased from produce sellers and Post & Taback, Inc., paid unlawful gratuities to a United States Department of Agriculture inspector in connection with United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

Chief ALJ] conducted an oral hearing in New York, New York. The Chief ALJ consolidated the oral hearing in this proceeding with the oral hearing in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[3] Andrew Y. Stanton and Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent in this proceeding and Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[4] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner in this proceeding and Post & Taback, Inc., in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[5]

On July 1, 2003, Petitioner and Respondent each filed proposed findings of fact, proposed conclusions of law, and a proposed order. On July 7, 2003, Respondent filed a reply to Petitioner's proposed findings of fact, proposed conclusions of law, and proposed order.

On July 29, 2003, the Chief ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which the Chief ALJ concluded Petitioner was not responsibly connected with Post & Taback, Inc., during a period in which Post & Taback, Inc., violated the PACA (Initial Decision and Order at 3).

On September 22, 2003, Respondent appealed to the Judicial Officer. On December 2, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's conclusion that Petitioner was not responsibly connected

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[3]*In re Post & Taback, Inc.*, PACA Docket No. D-01-0026, is an administrative disciplinary proceeding in which I concluded that Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

[4]*See* note 3.

[5]*See* note 3.

with Post & Taback, Inc., during a period in which Post & Taback, Inc., violated the PACA. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Respondent's exhibits are designated by "CX" and exhibits included in the agency record, which is part of the record of this proceeding,[6] are designated by "EX."[7] Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A)

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[6]*See* 7 C.F.R. § 1.136(a).

[7]The court reporter marked the entire agency record RX 18, and the Chief ALJ admitted RX 18 into evidence. The agency record includes 13 separate exhibits marked "Exhibit No.1" through "Exhibit No.13" (Tr. Apr. 9, 2003, at 30, 39).

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

. . . .

§ 499b. Unfair conduct

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

. . . .

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

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.]

(b) Refusal of license; grounds

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

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

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

. . . .

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

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

§ 499h. Grounds for suspension or revocation of license

. . . .

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

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

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

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

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

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

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

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

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;

. . . .

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

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Summary

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.[8] The record establishes that Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Post & Taback, Inc., despite his positions as president and director and his ownership of 36 percent of the outstanding shares of Post & Taback, Inc. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a

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[8] 7 U.S.C. § 499a(b)(9).

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

I find that Petitioner carried his burden of proof that: (1) he was not actively involved in the activities resulting in Post & Taback, Inc.'s failures to make full payment promptly for perishable agricultural commodities in accordance with the PACA; and (2) he was not actively involved in activities resulting in Post & Taback, Inc.'s payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA. However, Petitioner failed to carry his burden of proving that he was only nominally an officer, director, or shareholder of Post & Taback, Inc. Further, as a holder of 36 percent of the outstanding shares of Post & Taback, Inc., Petitioner cannot show that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc.

Findings of Fact

1. Post & Taback, Inc., was incorporated in the State of New York on June 1, 1959. At all times material to this proceeding, Post & Taback, Inc.'s business address was 253-256 B NYC Terminal Market, Bronx, New York 10474. (CX 1 at 1, 4, and 5.)

2. Post & Taback, Inc., first received a PACA license in 1959. At all times material to this proceeding, Post & Taback, Inc., held PACA license number 182992. Post & Taback, Inc.'s PACA license automatically terminated on September 10, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Post & Taback, Inc., failed to pay the annual PACA license renewal fee. (CX 1; Tr. Dec. 17, 2002, at

51; Tr. Dec. 18, 2002, at 70-71.)

3. During the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of $31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8). Specifically, Post & Taback, Inc., failed to make full payment promptly to: (a) Rose Valley Group, Inc., Woodland, California, in the amount of $1,080 for honeydews (CX 3 at 1, CX 4); (b) All-Star Truck Brokers, Inc., Immokalee, Florida, in the amount of $2,570.45 for egg plant (CX 3 at 1, CX 5 at 1-3); (c) Maxwell Farms, Lee, Maine, in the amount of $9,057.60 for two lots of broccoli (CX 3 at 1, CX 6 at 1-6); (d) Sunnyside Packing Company, Selma, California, in the amount of $9,922.50 for Kabocha squash (CX 3 at 1, CX 7 at 1-4); and (e) Mayrsohn International, Inc., Hialeah, Florida, in the amount of $9,302.40 for lemons (CX 3 at 1, CX 8).

4. In 1997, Post & Taback, Inc., hired Mark Alfisi to be a produce buyer (Tr. Dec. 19, 2002, at 76-77; Tr. Apr. 9, 2003, at 23-25).

5. 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 Post & Taback, Inc., purchased from produce sellers (Tr. Dec. 19, 2002, at 77-82).

6. 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 Post & Taback, Inc., purchased from produce sellers (CX 67-CX 68).

7. 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 Post & Taback, Inc., purchased from produce sellers (CX 67-CX 68).

8. 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 Post & Taback, Inc.'s perishable agricultural commodity sellers (Tr. Dec. 19, 2002, at 78-82).

9. Petitioner first joined Post & Taback, Inc., in 1958 or 1959 (Tr. Apr. 9, 2003, at 21-22).

10. During the period 1997 to October 11, 2000, Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc. Petitioner resigned as Post & Taback, Inc.'s president and director and tendered his stock to Post & Taback, Inc., on October 11, 2000. (CX 1; EX 2-EX 4, EX 10 at 3, EX 12 at 1; Tr. Apr. 9, 2003, at 27-28, 32-36, 49-50.)

11. As president of Post & Taback, Inc., Petitioner hired and fired employees and signed the bank signature card for Post & Taback, Inc.'s account with Marine Midland Bank. Petitioner was a guarantor of Post & Taback, Inc.'s business line of credit with HSBC. Petitioner was a trustee of Post & Taback, Inc.'s retirement trust. Petitioner was listed as a principal on Post & Taback, Inc.'s produce dealer licenses for the State of Texas, the State of Florida, and the State of New York. Petitioner regularly came to Post & Taback, Inc.'s place of business. Petitioner examined Post & Taback, Inc.'s produce. Petitioner sold produce for Post & Taback, Inc. (EX 3 at 5-9, EX 10 at 3, EX 11 at 1, EX 12 at 1, and EX 13 at 2; Tr. Apr. 9, 2003, at 33-34, 63-65.)

12. Petitioner did not buy produce for Post & Taback, Inc.; Petitioner was not in charge of Post & Taback, Inc.'s finances; and Petitioner did not examine Post & Taback, Inc.'s books (Tr. Apr. 9, 2003, at 62-65).

Conclusions of Law

1. Post & Taback, Inc.'s failures to make full payment promptly with respect to the transactions described in Finding of Fact 3 are willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), the acts of Post & Taback, Inc.'s employee, Mark Alfisi, within the scope of his employment, are deemed the acts of Post & Taback, Inc.

3. Post & Taback, Inc.'s payment of bribes and unlawful gratuities described in Findings of Fact 5, 6, and 7 are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Post & Taback, Inc.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, director, and shareholder of Post & Taback, Inc.

6. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc.

7. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Post & Taback, Inc., during the period when Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to conclude that Post & Taback, Inc., 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 during the period March 29, 1999, through August 5, 1999 (Respondent's Appeal Pet. at 3).

The Chief ALJ found that, during the period April 1999 through August 1999, Mark Alfisi, an employee of Post & Taback, Inc., bribed a public official by making cash payments to a United States Department of Agriculture inspector in order to influence the outcome of inspections of fruits and vegetables. Moreover, the Chief ALJ found that Mark Alfisi

used the fraudulent information obtained from bribing the United States Department of Agriculture inspector to make false and misleading statements to produce sellers. However, the Chief ALJ also found that Post & Taback, Inc.'s officials did not authorize and had no knowledge of Mark Alfisi's bribery. The Chief ALJ concluded that, since Post & Taback, Inc.'s officials had no knowledge of the bribery and did not authorize the bribery, Post & Taback, Inc., did not violate the PACA by the payment of bribes to a United States Department of Agriculture inspector. (The Chief ALJ's initial Decision and Order at 6-10 filed July 28, 2003, in *In re Post & Taback, Inc.*, PACA Docket No. 01-0026.[9])

I disagree with the Chief ALJ 's conclusion that Post & Taback, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes to a United States Department of Agriculture inspector because Post & Taback, Inc.'s officials did not authorize the bribery and did not know of the bribery.

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 unambiguously 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.

Post & Taback, Inc.'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 Post & Taback, Inc., even

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[9]*See* note 3.

if Post & Taback, Inc.'s officers, directors, and owners had no actual knowledge of the unlawful gratuities and bribery and would not have condoned the unlawful gratuities and bribery had they known of them.[10] 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 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

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[10]*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. 763, 789-90 (2003), *appeal docketed*, No. 03-4008 (8th Cir. Dec. 16, 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).

> (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).

I find the plain language of section 16 of the PACA (7 U.S.C. § 499p) supports my view that PACA provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Moreover, both the Court in *H.C. MacClaren, Inc. v. United States Dep't of Agric.* and the Court in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, construe section 16 of the PACA (7 U.S.C. § 499p) as providing that a willful violation of the PACA by a PACA licensee's employee is deemed the willful violation of the PACA licensee. Therefore, I conclude that, during the period March 29, 1999, through August 1999, Post & Taback, Inc., 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. As discussed in this Decision and Order, *supra*, Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 1999. Therefore, Petitioner was responsibly connected with Post & Taback, Inc., during the period that Post & Taback, Inc., 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.

Second, Respondent contends the Chief ALJ erroneously found that the record contained no reliable evidence establishing the dates that Post & Taback, Inc., accepted produce for which it failed to make full payment promptly during the period that Petitioner was responsibly connected with Post & Taback, Inc. (Respondent's Appeal Pet. at 3-6).

I disagree with the Chief ALJ. Respondent introduced substantial evidence which establishes that during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of $31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8).

Carolyn Shelby, a marketing specialist with the Agricultural Marketing Service, United States Department of Agriculture, testified that she conducted an investigation at Post & Taback, Inc.'s place of business and that Post & Taback, Inc.'s employees provided her with numerous unpaid invoices for produce. Ms. Shelby explained that she determined the dates Post & Taback, Inc., accepted produce by examining Post & Taback, Inc.'s receiving records. Ms. Shelby testified that she determined the dates Post & Taback, Inc.'s payments were due by the payment terms found on the face of each invoice. Ms. Shelby further testified, if no payment terms were on an invoice, she used the prompt payment requirement of 10 days[11] to calculate when Post & Taback, Inc.'s payment was due. Ms. Shelby stated that she included the dates Post & Taback, Inc., accepted produce and the dates Post & Taback, Inc.'s payments were due in a table. Respondent introduced this table into evidence.[12] (Tr. Dec. 17, 2002, at 53-58.)

I find nothing in the record rebutting Ms. Shelby's testimony regarding the dates Post & Taback, Inc., accepted the produce in question or the dates Post & Taback, Inc.'s payments for the produce were due. Therefore, I conclude the Chief ALJ's finding that the record contains no reliable evidence establishing the dates that Post & Taback, Inc., accepted produce for which it failed to make full payment promptly during the period that Petitioner was responsibly connected with Post & Taback, Inc., error. Instead, I find, during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of $31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8). Specifically, Post & Taback, Inc., failed to make full payment promptly to: (a) Rose Valley Group, Inc., Woodland, California, in the amount of $1,080 for honeydews which Post & Taback, Inc., accepted on August 25, 2000, and for which Post & Taback, Inc.'s payment was due

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[11]*See* 7 C.F.R. § 46.2(aa)(5).

[12]*See* CX 3.

on September 4, 2000 (CX 3 at 1, CX 4); (b) All-Star Truck Brokers, Inc., Immokalee, Florida, in the amount of $2,570.45 for egg plant which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 5 at 1-3); (c) Maxwell Farms, Lee, Maine, in the amount of $4,780.80 for broccoli which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 6 at 1-3); (d) Maxwell Farms, Lee, Maine, in the amount of $4,276.80 for broccoli which Post & Taback, Inc., accepted on September 28, 2000, and for which Post & Taback, Inc.'s payment was due on October 8, 2000 (CX 3 at 1, CX 6 at 1-3); (e) Sunnyside Packing Company, Selma, California, in the amount of $9,922.50 for Kabocha squash which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 7 at 1-4); and (f) Mayrsohn International, Inc., Hialeah, Florida, in the amount of $9,302.40 for lemons which Post & Taback, Inc., accepted on September 26, 2000, and for which Post & Taback, Inc.'s payment was due on October 7, 2000 (CX 3 at 1, CX 8).

Third, Respondent contends Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA from March 29, 1999, through August 5, 1999, when Post & Taback, Inc., paid bribes and unlawful gratuities to a United States Department of Agriculture inspector and from September 4, 2000, through October 10, 2000, when Post & Taback, Inc., failed to make full payment promptly of $31,932.95 to five produce sellers for the purchases of six lots of perishable agricultural commodities (Respondent's Appeal Pet. at 6-10).

As fully explained in this Decision and Order, *supra*, I agree with Respondent's contention that Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA from March 29, 1999, through August 5, 1999, when Post & Taback, Inc., paid bribes and unlawful gratuities to a United States Department of Agriculture inspector and from September 4, 2000, through October 10, 2000, when Post & Taback, Inc., failed to

make full payment promptly of $31,932.95 to five produce sellers for the purchases of six lots of perishable agricultural commodities. I find no reason to reiterate the reasons for my conclusion that Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA.

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

ORDER

I affirm Respondent's December 21, 2001, and September 9, 2002, determinations that Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

In re: BENJAMIN SUDANO AND BRIAN SUDANO.
PACA-APP Docket No. 02-0001.
Decision and Order.
Filed May 21, 2004.

PACA-APP – Perishable Agricultural Commodities Act (PACA) – Failure to make full payment promptly – Responsibly connected – Actively involved – Nominal officer and shareholder.

The Judicial Officer (JO) affirmed Chief Administrative Law Judge James W. Hunt's decision holding that Benjamin Sudano and Brian Sudano (Petitioners) were responsibly connected with Lexington Produce Co. when Lexington Produce Co. violated the PACA. The JO concluded that, during the period May 1999 through January 2000, Lexington Produce Co. violated 7 U.S.C. § 499b(4). During the violation period, Benjamin Sudano was the vice president, secretary, and holder of 50 percent of the outstanding stock of Lexington Produce Co. and Brian Sudano was the president, treasurer, and holder of 50 percent of the outstanding stock of Lexington Produce Co. Petitioners failed to prove by a preponderance of the evidence that:

(1) they were not actively involved in the activities resulting in Lexington Produce Co.'s PACA violations; and (2) they were only nominally officers and shareholders of Lexington Produce Co. or they were not owners of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co. The JO found that, during part of the violation period, Petitioners shared control over Lexington Produce Co. with John Alascio, but that, even during this period of shared control, Petitioners were responsibly connected with Lexington Produce Co.

Christopher P. Young-Morales, for Respondent.
Kenneth D. Federman, for Petitioners.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On September 27, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued determinations that Benjamin Sudano and Brian Sudano [hereinafter Petitioners] were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] Petitioner Brian Sudano and Petitioner Benjamin Sudano each filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under

[1]During the period May 1999 through January 2000, Lexington Produce Co. failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of $915,115.25 for 731 lots of perishable agricultural commodities, which Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).

Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determinations that Petitioners were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing on November 13-14, 2002, in Philadelphia, Pennsylvania, on January 6, 2003, in Baltimore, Maryland, and on April 23, 2003, in Wilmington, Delaware. Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent. Kenneth D. Federman, Rothberg & Federman, P.C., Bensalem, Pennsylvania, represented Petitioners.

On July 30, 2003, after Petitioners and Respondent filed post-hearing briefs, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ concluded Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA (Initial Decision and Order at 15).

On September 2, 2003, Respondent appealed to the Judicial Officer, and on September 3, 2003, Petitioners appealed to the Judicial Officer. On October 24, 2003, Respondent filed a response to Petitioners' appeal petition and Petitioners filed a response to Respondent's appeal petition. On October 30, 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 conclusion that Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA. However, I also conclude that Petitioners were responsibly connected with Lexington Produce Co. during the entire period that Lexington Produce Co. violated the PACA, May 1999 through January 2000. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Petitioners' exhibits are designated by "A"; Respondent's exhibits are designated by "CX"; and exhibits included in the agency record, which is part of the record of this proceeding,[2] are designated by "RX." The transcript is divided into four volumes, one volume for each day of the hearing. Each volume begins with page one and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the November 13, 2002, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the November 14, 2002, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the January 6, 2003, segment of the hearing; and references to "Tr. IV" are to the volume of the transcript that relates to the April 23, 2003, segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

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[2]*See* 7 C.F.R. § 1.136(a).

. . . .

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

. . . .

§ 499b. Unfair conduct

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

. . . .

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

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

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

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

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

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

. . . .

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

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

increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

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

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

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

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

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under

section 499g(c) of this title.

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

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

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

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Summary

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.[3] The record establishes that Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. The record also establishes that Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. The burden is on each Petitioner to demonstrate by a preponderance of

[3] 7 U.S.C. § 499a(b)(9).

the evidence that he was not responsibly connected with Lexington Produce Co. despite his being an officer of Lexington Produce Co. and his ownership of 50 percent of the outstanding stock of Lexington Produce Co. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

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

I find that neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano carried his burden of proof that he was not actively involved in the activities resulting in Lexington Produce Co.'s failures to make full payment promptly for perishable agricultural commodities in accordance with the PACA. To the contrary, the evidence establishes that each Petitioner used Lexington Produce Co.'s funds for purposes other than paying produce sellers in accordance with the PACA and purchased and supervised the purchase of produce during the period when Lexington Produce Co. failed to make full payment promptly for produce in violation of the PACA. Petitioners were thereby actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA. Moreover, I find that neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano carried his burden of proof that he was only nominally an officer and shareholder of Lexington Produce Co. To the contrary, the evidence establishes that, during the period May 1999 through November 24, 1999, the Petitioners and John Alascio controlled Lexington Produce Co. and, during the period November 25, 1999, through January 2000, Petitioners alone controlled Lexington Produce Co. Further, each Petitioner held 50 percent of the outstanding stock of Lexington Produce Co.; therefore, neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano can demonstrate that he was not an owner of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co.

Findings of Fact

1. At all times material to this proceeding, Lexington Produce Co. was a corporation whose address is 2221 Berlin Street, Baltimore, Maryland. *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).

2. Lexington Produce Co. was issued PACA license number

900223 on November 9, 1989. At all times material to this proceeding, Lexington Produce Co. was a PACA licensee. Lexington Produce Co.'s PACA license automatically terminated on November 9, 2000, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Lexington Produce Co. failed to pay the annual PACA license renewal fee. *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).

3. Petitioners purchased Lexington Produce Co. in September 1998. In order to purchase Lexington Produce Co., Petitioners used $300,000 of their own money. Petitioners also: borrowed $1,250,000 and received a $1,000,000 line of credit from the Bank of Maryland; borrowed $500,000 from John Alascio; borrowed $500,000 from the City of Baltimore; and borrowed $20,000 from a friend named "Angelo." At the time Petitioners purchased Lexington Produce Co., Petitioners hired John Alascio as Lexington Produce Co.'s produce manager. (Tr. I at 9, 47-48; Tr. II at 42-49, 58-59; Tr. IV at 15-20; A 35.)

4. Lexington Produce Co. defaulted on the loan made by the Bank of Maryland. In order to avoid a shutdown of Lexington Produce Co. and to obtain additional funds for Lexington Produce Co.'s continued operation, on February 8, 1999, Petitioner Benjamin Sudano, Petitioner Brian Sudano, Lexington Produce Co., and John Alascio entered into a management agreement. The management agreement gave John Alascio binding input in all areas of Lexington Produce Co.'s business operations, including, but not limited to, accounting, payables, receivables, stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, taxes, transportation, and utilities. (Tr. I at 19-21, 81, 141-42; Tr. II at 100-01, 111-13; Tr. IV at 61-65; A 53; CX 4; *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).)

5. During the period May 1999 through January 2000, Lexington Produce Co. failed to make full payment promptly to 21 produce sellers in the total amount of $915,115.25 for 731 lots of perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Tr. II at 33-34; *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002)).

6. Petitioners had the authority to pay for produce even after the management agreement described in finding of fact number 4 was in effect. Petitioners had the authority to terminate the management agreement described in finding of fact number 4 at any time and effectively terminated the management agreement no later than November 25, 1999, when Petitioners fired John Alascio. During the period in which the management agreement was in effect, February 8, 1999, to November 25, 1999, Petitioners and John Alascio controlled Lexington Produce Co. After Petitioners fired John Alascio, Petitioners alone controlled Lexington Produce Co. (Tr. I at 50-60, 108-14; Tr. III at 70, 114-18, 175-76; Tr. IV at 73-74, 92-107.)

7. After November 25, 1999, during the period in which the management agreement described in finding of fact number 4 was no longer in effect, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of $242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, Lexington Produce Co. failed to make full payment promptly to: (1) G. Cefalu & Bro. Inc., in the amount of $46,498 for produce purchased during the period November 29, 1999, through December 19, 1999 (CX 7 at 40-90); (2) Parade Produce, Inc., in the amount of

$15,670 for produce purchased during the period November 26, 1999, through December 12, 1999 (CX 11 at 13-16); (3) Edward G. Rahll & Sons, Inc., in the amount of $60,835.50 for produce purchased during the period November 29, 1999, through December 14, 1999 (CX 14 at 32-33); (4) First Class Produce, Inc., in the amount of $44,338.50 for produce purchased during the period December 2, 1999, through December 6, 1999 (CX 15 at 45-48); (5) Cardile Bros. Mushroom Pkg., Inc., in the amount of $7,395.75 for produce purchased during the period November 26, 1999, through December 14, 1999 (CX 16 at 37-50); (6) J.C. Banana & Co. in the amount of $11,041 for produce purchased during the period November 29, 1999, through December 10, 1999 (CX 17 at 9-10); (7) McDonnell, Inc., in the amount of $12,209.50 for produce purchased during the period November 29, 1999, through December 20, 1999 (CX 20 at 8-15); (8) Reddy Raw in the amount of $2,932.40 for produce purchased on December 7, 1999 (CX 21 at 2); (9) L & M Produce in the amount of $1,635.50 for produce purchased during the period November 26, 1999, through December 13, 1999 (CX 22 at 9-19); (10) Dayoub Marketing, Inc., in the amount of $9,729.50 for produce purchased during the period November 29, 1999, through December 14, 1999 (CX 23 at 2-3); (11) Atlantic Coast Produce, Inc., in the amount of $26,564 for produce purchased during the period November 26, 1999, through December 8, 1999 (CX 24 at 4-7); (12) The L. Holloway & Bro. Co. in the amount of $3,895.50 for produce purchased during the period December 2, 1999, through December 14, 1999 (CX 25 at 2-11); and (13) Imperial Produce in the amount of $121.75 for produce purchased during the period December 1, 1999, through December 7, 1999 (CX 26 at 1-4).

8. Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of

Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77.)

9. During the period May 1999 through January 2000, Petitioner Benjamin Sudano supervised the night shift at Lexington Produce Co. and was present at Lexington Produce Co.'s place of business for up to 10 to 13 hours every day of the week, including weekends. Petitioner Benjamin Sudano's duties during the night shift included dealing with produce customers and buying produce. At all times material to this proceeding, Petitioner Benjamin Sudano had authority to hire and fire Lexington Produce Co.'s employees. At all times material to this proceeding, Petitioner Benjamin Sudano had access to Lexington Produce Co.'s records. During the period May 1999 through January 2000, Petitioner Brian Sudano supervised the day shift at Lexington Produce Co. and was present at Lexington Produce Co.'s place of business for up to 10 to 13 hours every day of the week, including weekends. Petitioner Brian Sudano's duties during the day shift included supervising Lexington Produce Co.'s employees, overseeing the shipment and receipt of produce, and dealing with produce customers. At all times material to this proceeding, Petitioner Brian Sudano had authority to hire and fire Lexington Produce Co.'s employees. At all times material to this proceeding, Petitioner Brian Sudano had access to Lexington Produce Co.'s records. (Tr. I at 13-16, 22-23, 83, 88-89, 141; Tr. III at 93-95, 114-16, 120-21, 143, 175; Tr. IV at 52-54, 83-84.)

10. During the period May 1999 through January 2000, Petitioner Benjamin Sudano had an office in the "front office" section of Lexington Produce Co. During the period May 1999 through January 2000, Petitioner Brian Sudano had an office in the "front office" section of Lexington Produce Co. (Tr. II at 72-73; Tr. III at 93-94.)

11. During the period May 1999 through January 2000, Petitioner Benjamin Sudano knew of Lexington Produce Co.'s financial situation and knew that Lexington Produce Co. failed to make full payment

promptly to its produce sellers. Despite his knowledge of Lexington Produce Co.'s failures to make full payment promptly to produce sellers, Petitioner Benjamin Sudano reduced Lexington Produce Co.'s resources available to pay produce sellers by writing and signing a check on Lexington Produce Co.'s payroll account to "cash" in the amount of $7,700. During the period May 1999 through January 2000, Petitioner Brian Sudano knew of Lexington Produce Co.'s financial situation and knew that Lexington Produce Co. failed to make full payment promptly to its produce sellers. Despite his knowledge of Lexington Produce Co.'s failures to make full payment promptly to produce sellers, Petitioner Brian Sudano reduced Lexington Produce Co.'s resources available to pay produce sellers by writing and signing a check on Lexington Produce Co.'s payroll account to "cash" in the amount of $2,203.74. (Tr. I at 49-51, 88-89, 106-07, 156-57; Tr. II at 99-101; Tr. III at 165-66; Tr. IV at 73-74; RX 87-RX 88.)

12. During the period May 1999 through January 2000, Petitioner Benjamin Sudano made management decisions on behalf of Lexington Produce Co. and spoke to various produce sellers regarding money owed by Lexington Produce Co. to the produce sellers. During the period May 1999 through January 2000, Petitioner Brian Sudano made management decisions on behalf of Lexington Produce Co. and spoke to various produce sellers regarding money owed by Lexington Produce Co. to the produce sellers. (Tr. I at 88-89; Tr. II at 101-02; Tr. III at 116-20, 130-31, 174-76; Tr. IV at 53-54, 65.)

13. During the period May 1999 through January 2000, Petitioner Benjamin Sudano bought and sold produce on behalf of Lexington Produce Co. and supervised the buying and selling of produce on behalf of Lexington Produce Co. During the period May 1999 through January 2000, Petitioner Brian Sudano bought and sold produce on behalf of Lexington Produce Co. and supervised the buying and selling of produce on behalf of Lexington Produce Co. (Tr. I at 88-90, 93-95, 110-14; Tr. IV at 92-107.)

Conclusions of Law

1. Lexington Produce Co.'s failures to make full payment promptly with respect to the transactions described in findings of fact numbers 5 and 7 are willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Petitioners failed to prove by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3 Petitioners failed to prove by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co.

4. Petitioners failed to prove by a preponderance of the evidence that they were not owners of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co.

5. Petitioners were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Lexington Produce Co., during the period when Lexington Produce Co. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises three issues in "Respondent's Appeal to the Decision and Order" [hereinafter Appeal Petition]. First, Respondent contends the Chief ALJ erroneously failed to conclude that Petitioners were responsibly connected with Lexington Produce Co. during the entire period that Lexington Produce Co. violated the PACA (Respondent's Appeal Pet. at 10-32).

The Chief ALJ concluded that during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA, Petitioners were responsibly connected with Lexington Produce Co. However, the Chief ALJ found that Petitioners were not responsibly

connected with Lexington Produce Co. during the period May 1999 through November 24, 1999. The Chief ALJ based his finding that Petitioners were not responsibly connected with Lexington Produce Co. on the management agreement that was in effect during the period February 8, 1999, through November 24, 1999. (Initial Decision and Order.)

The management agreement gave John Alascio wide-ranging authority over Lexington Produce Co.'s operations from the date the management agreement became effective, February 8, 1999, through the date Petitioners effectively terminated the agreement, November 24, 1999, by firing John Alascio. However, John Alascio's authority during the period in which the management agreement was effective is not determinative of whether Petitioners were responsibly connected with Lexington Produce Co. during the same period. Despite John Alascio's wide-ranging authority, I find that Petitioners failed to prove by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and failed to prove by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co. Instead, as set forth in the findings of fact, the record establishes that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and were not merely nominal officers and shareholders of Lexington Produce Co. during the period that the management agreement was in effect. Moreover, even if I were to conclude that Petitioners were not responsibly connected with Lexington Produce Co. during the period February 8, 1999, through November 24, 1999, but were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, that conclusion would not affect the disposition of this proceeding.

Second, Respondent contends the Chief ALJ erroneously concluded that, during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to at least four produce sellers in the total amount of $33,936.50 for perishable

agricultural commodities (Respondent's Appeal Pet. at 32-34).

The Chief ALJ found, during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to four produce sellers in the total amount of $33,936.50, in violation of the PACA (Initial Decision and Order at 13-15). I disagree with the Chief ALJ's finding. The record establishes that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of $242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce or in contemplation of resale in interstate or foreign commerce (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

Third, Respondent contends the Chief ALJ's failure to discuss the statutory test set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) with respect to each Petitioner, is error (Respondent's Appeal Pet. at 34-39).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as affiliated or connected with a commission merchant, dealer, or broker as: (1) a partner in a partnership; or (2) an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association. The definition includes a two-pronged test that a person, who is a partner in a partnership or an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association, must meet in order to rebut a presumption that he or she is responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected,

without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.

The Chief ALJ quotes the test set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), finds Petitioners failed to meet the first prong of the two-pronged statutory test, and concludes Petitioners were responsibly connected with Lexington Produce Co. during a period when Lexington Produce Co. failed to make full payment promptly to produce sellers for perishable agricultural commodities, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 13-15). I do not find that the Chief ALJ's failure to apply the two-pronged test to each Petitioner individually, is error. Further, since failure to meet the first prong of the two-pronged test results in a petitioner's failure to demonstrate that he or she was not responsibly connected, I do not find the Chief ALJ's failure to apply the second prong of the statutory test to each Petitioner individually, is error.

Petitioners' Appeal Petition

Petitioners raise six issues in Petitioners' "Appeal Petition." First, Petitioners assert the Chief ALJ's finding that they were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is logically inconsistent with the finding that, during the period from May 1999 through January 2000, Lexington Produce Co. was under the direction, management, and control of John Alascio (Petitioners' Appeal Pet. at first and second unnumbered pages).

Administrative Law Judge Dorothea A. Baker issued consent decisions on August 30, 2002, in which she found, during the period

when Lexington Produce Co. violated the PACA: (1) John Alascio was a manager of Lexington Produce Co.; (2) John Alascio had binding input in all areas of Lexington Produce Co.'s business operations; and (3) John Alascio directed, managed, and controlled Lexington Produce Co.[4] The Chief ALJ took official notice of Administrative Law Judge Dorothea A. Baker's August 30, 2002, consent decisions (Tr. II at 33).

I do not agree with Petitioners' contention that the Chief ALJ's finding that Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is "logically inconsistent" with Administrative Law Judge Dorothea A. Baker's findings regarding John Alascio's role in Lexington Produce Co. Administrative Law Judge Dorothea A. Baker did not find that Lexington Produce Co. was exclusively under John Alascio's direction, management, and control or that Petitioners had no responsibility for the direction, management, or control of Lexington Produce Co. During the entire period when Lexington Produce Co. violated the PACA, Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. and Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). As set forth in the findings of fact, during the entire period when Lexington Produce Co. violated the PACA, Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and were not merely nominal officers and shareholders of Lexington Produce Co.

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[4]*In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007, referenced at 61 Agric. Dec. 869 (2002); and *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent John Alascio), PACA Docket No. D-01-0007, referenced at 61 Agric. Dec. 869 (2002).

Second, Petitioners contend the Chief ALJ's conclusion that they were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is against the weight of the evidence and an abuse of discretion (Petitioners' Appeal Pet. at second unnumbered page).

I disagree with Petitioners' contention that the Chief ALJ's conclusion that Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is against the weight of the evidence and an abuse of discretion. During the entire period when Lexington Produce Co. violated the PACA, Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. and Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). As discussed in this Decision and Order, *supra*, Petitioners failed to demonstrate by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and failed to demonstrate by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co. Moreover, as Petitioners were owners of Lexington Produce Co., the defense that they were not owners of Lexington Produce Co., which was the alter ego of its owners, is not available to Petitioners.[5]

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[5]*In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who admittedly held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only

(continued...)

The record establishes that Petitioners fired John Alascio no later than November 25, 1999, and after Petitioners fired John Alascio, Petitioners alone controlled Lexington Produce Co. (Tr. I at 50-60, 108-14; Tr. III at 70, 114-18, 175-76; Tr. IV at 73-74, 92-107). During the period November 25, 1999, through January 2000, when Lexington Produce Co. was controlled solely by Petitioners, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of $242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

Third, Petitioners contend the Chief ALJ's finding, that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA during the period November 25, 1999, through January 2000, is error. Petitioners assert that John Alascio had de facto control over Lexington Produce Co. and, because Petitioners lacked control over Lexington Produce Co.'s funds, they cannot be properly found to have been actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA. (Petitioners' Appeal Pet. at second and third unnumbered pages.)[6]

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[5](...continued)
that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who, at all times material to the proceeding, held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

[6]Petitioners cite "112 Agric. Dec. 1, 7-8 (2003)" as a basis for their argument; (continued...)

The Chief ALJ found that during the period November 25, 1999, through January 2000, Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA (Initial Decision and Order at 15). I agree with the Chief ALJ. The record contains no evidence to support Petitioners' contention that John Alascio had de facto control over Lexington Produce Co. during the period November 25, 1999, through January 2000. To the contrary, the record establishes that Petitioners fired John Alascio no later than November 25, 1999, and Petitioners controlled Lexington Produce Co. with no input from John Alascio (Tr. I at 49-60). Moreover, Petitioners' contention that they lacked control over Lexington Produce Co. during the period November 25, 1999, through January 2000, is contrary to their stipulation that during this period Petitioners were in charge of Lexington Produce Co. and in charge of the ordering and receipt of produce (Tr. IV at 104-06). During the period that Petitioners alone controlled Lexington Produce Co. and the purchase and receipt of produce, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of $242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of the PACA (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4). Petitioners' control of the purchase and receipt of produce for which Lexington Produce Co. failed to make full payment promptly in accordance with the PACA is a sufficient basis for a finding that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA.

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[6](...continued)
however, Agriculture Decisions volumes are numbered sequentially from volume 1, which contains decisions issued in 1942, to volume 62, which contains decisions issued in 2003.

Fourth, Petitioners contend the Chief ALJ's failure to find that John Alascio used Lexington Produce Co. as his alter ego after November 25, 1999, is error (Petitioners' Appeal Pet. at third unnumbered page).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of the violating PACA licensee or entity subject to a PACA license; or *(2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners*. Petitioners contend the Chief ALJ's failure to find that they meet the second alternative of the second prong of the responsibly-connected test, is error.

The record establishes that at all times material to this proceeding, each Petitioner held 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). Since each Petitioner was an owner of Lexington Produce Co. during the period that Lexington Produce Co. violated the PACA, Petitioners cannot meet the second alternative of the second prong of the responsibly-connected test.[7] Moreover, in order to meet the second alternative of the second prong of the responsibly-connected test, Petitioners must demonstrate by a preponderance of the evidence that John Alascio was an owner of Lexington Produce Co. during the period in which Lexington Produce Co. violated the PACA. The record contains no evidence that John Alascio owned Lexington Produce Co. during the period in which Lexington Produce Co. violated the PACA. To the

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[7]See note 5.

contrary, the record establishes that, at all times material to this proceeding, Petitioners owned 100 percent of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77).

Fifth, Petitioners contend they should not be charged with willful conduct because they did not intentionally fail to pay for produce ordered after November 25, 1999. Petitioners assert John Alascio made payment for produce impossible by freezing Lexington Produce Co.'s bank accounts. (Petitioners' Appeal Pet. at fourth unnumbered page.)

Petitioners do not reference any document filed in this proceeding in which they were charged with willfully or intentionally violating the PACA. I have carefully reviewed Respondent's September 27, 2001, determinations that Petitioners were responsibly connected with Lexington Produce Co. when it violated the PACA and the Chief ALJ's conclusion that Petitioners were responsibly connected with Lexington Produce Co. when it violated the PACA. I do not find that Respondent determined or that the Chief ALJ concluded that Petitioners willfully or intentionally violated the PACA.

Moreover, a conclusion that a person is *responsibly connected*, as defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), is not dependent on a finding that the allegedly responsibly connected person willfully or intentionally violated the PACA. Further still, as Respondent is not seeking to withdraw, suspend, revoke, or annul Petitioners' PACA license, the willfulness provisions of the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable.[8]

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[8]*Joe Phillips & Associates, Inc. v. United States Dep't of Agric.*, 923 F.2d 862, 1991 WL 7136 n.9 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847, 853 n.9 (1991) (not to be cited as precedent under 9th Circuit Rule 36–3); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 993-94 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 628 (1996); *In re SWF Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573 (1993); *In re Full*

(continued...)

Sixth, Petitioners contend the Chief ALJ's conclusion that Lexington Produce Co. failed to make full payment promptly for produce ordered during the period November 25, 1999, through January 2000, is not supported by the evidence (Petitioners' Appeal Pet. at fourth unnumbered page).

The Chief ALJ found that during the period November 25, 1999, through January 2000, Lexington Produce Co. violated the PACA "by failing to pay four sellers for produce it purchased in the amount of $33,936.50" (Initial Decision and Order at 15). While I disagree with the number of produce sellers and the total purchase price involved in Lexington Produce Co.'s post November 24, 1999, PACA violations, I agree with the Chief ALJ's finding that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to produce sellers in violation of the PACA.

The record establishes that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of $242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

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

ORDER

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[8](...continued)
Sail Produce, Inc., 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1428 (1992); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980).

I affirm Respondent's September 27, 2001, determinations that Petitioners were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. Accordingly, Petitioners are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

MISCELLANEOUS ORDERS

In re: ATLANTA EGG & PRODUCE CO., INC., AND CHARLES R. BRACKETT AND TOM D. OLIVER.
PACA Docket No. D-03-0003.
PACA Docket No. D-03-0004.
Filed December 5, 2003.
Three Rulings.

Andrew Y. Stanton, for Complainant.
Andrew M. Greene, for Respondent.
Order issued by Marc Hillson, Chief Administrative Law Judge.

I grant the parties' joint motion for extension of time for prehearing exchanges. I deny the Motion of Petitioners Brackett and Oliver to intervene in the Atlanta Egg proceeding. I am today signing the default judgment against Atlanta Egg. However, in order to provide Petitioners with due process in their responsibly connected proceedings, I will allow them, as part of their case presentation, to demonstrate that Atlanta Egg did not commit violations that were charged in the complaint against Atlanta Egg.

Ruling I

The parties have requested that the exchanges ordered in the Brackett and Oliver cases, as ordered by Judge Jill Clifton on May 8, 2003, be delayed until ten days after I issue a decision on the Motion to Intervene in Atlanta Egg. Since I am issuing that decision today, I order that the submission by Counsel for Brackett and Oliver originally scheduled for November 26, 2003 is now due fifteen days after the date I sign this Ruling, and that the submission by Counsel for AMS originally scheduled for December 19, 2003 be scheduled 30 days after Petitioners' submissions.

Ruling II

The complaint against Atlanta Egg was filed in October, 2002, approximately eight months after the company had filed for bankruptcy. No response to the complaint was ever filed by Atlanta Egg and Complainant in February, 2003 filed a Motion for Decision Without Hearing by Reason of Default. No response to this Motion was ever received from Atlanta Egg, although they apparently were properly served on May 20, 2003. In the meantime, Petitioners Brackett and Oliver were also notified in February
2003, by the Chief of the PACA Branch, that they were responsibly connected with Atlanta Egg. They filed a timely petition challenging the responsibly connected determination in March. Then, in May, with the Atlanta Egg Default Motion still pending, Brackett and Oliver filed a Motion to Intervene in the Atlanta Egg proceeding.

The gist of Petitioners' argument for intervention is that the decision by Atlanta Egg not to respond to the Complaint was outside of their hands, since Atlanta Egg is bankrupt and Petitioners have no authority to tell the bankruptcy trustee what to do, and that it would be a denial of due process for the findings in the default decision to apply to their responsibly connected cases. If they were unable to defend Atlanta Egg against the many violations alleged by Complainant, they contend, then they would effectively be denied any defense, unless they could show that they were not responsibly connected to Atlanta Egg. In other words, any violations that Atlanta Egg was found to have committed would automatically be attributed to them, if they were responsibly connected with Atlanta Egg at the time of the violations' occurrence.

Complainant, on the other hand, argues that Petitioners receive all the due process they are entitled to in the course of the responsibly connected hearing, even though the violations committed by Atlanta Egg would be held against them without their having an opportunity to contest them.

Further, Complainant points out that there is no provision for intervention in PACA cases, and that, as officers in Atlanta Egg, Petitioners had the ability to cause Atlanta Egg to timely contest the complaint.

USDA case law is clear on this issue. There is no right to intervene in "responsibly connected" proceedings, whether brought under PACA or other statutes. I agree with Complainant that *Syracuse Sales Co*., 52 Agric. Dec. 1511, 1513 (1993) and *In re Bananas, Inc.*, 42 Agric. Dec. 426 (1983), unequivocally hold that in the absence of a specific provision in the rules of practice allowing intervention in disciplinary cases, as opposed to reparation cases, there is no authority to allow intervention. Although I have no basis to find, as urged by Complainant, that Petitioners, as officers of a bankrupt corporation whose affairs are now being handled by a trustee, somehow had the ability to cause Atlanta Egg to timely contest its disciplinary case, any such finding would not affect my disposition of this matter, given that I simply have no authority to allow intervention.

Since Petitioners have no right to intervene, I am today signing the default decision against Atlanta Egg.

Ruling III

Even though I denied Petitioners the right to intervene in the Atlanta Egg matter, I believe that due process considerations require that they be given some leeway to attack or explain the violation findings against Atlanta Egg, to the extent that they can demonstrate, in the event they are found to be responsibly connected, that certain violations did not occur, or that the violations were of lesser severity than alleged. I believe this approach is necessary so that deciding officials will be better able to impose appropriate sanctions in the event I do find Petitioners to be responsibly connected. The very close relationship between disciplinary proceedings and responsibly connected proceedings has been recognized by the USDA

for a number of years, and was a basis for the 1996 changes in the Rules of Procedure requiring consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996). Petitioners' ability to challenge the underlying violations, when such violations can lead directly to a sanction against Petitioners, should not rise or fall solely based on whether the company charged in the disciplinary proceeding elects to contest the charges, particularly where, as here, the company has filed for bankruptcy and is under the supervision of a bankruptcy trustee.

I am not unmindful that, as pointed out by the PACA Branch in its October 15 Brief, many of the allegations raised by Petitioners in defense of Atlanta Egg, such as the making of partial or late payments, would not change the sanctions against Atlanta Egg, even if they had contested the complaint. However, to the extent it might impact the Secretary's decision on sanctions against Petitioners, I anticipate that some development of the record in this area is appropriate.

In re: JAN U. FRIDERICH.
PACA-APP Docket No. 03-0016.
Order Dismissing Case.
Filed January 26, 2004.

Andrew Y. Stanton, for Respondent.
L. Michael Messina, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Chief of the PACA Branch 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.

In re: POST & TABACK, INC.
PACA Docket No. D-01-0026.
Order Denying Petition to Reconsider.
Filed February 13, 2004.

PACA – Petition for reconsideration – Res judicata – Bribery – Substantial evidence – Responsibility for employee's actions.

The Judicial Officer (JO) denied Respondent's petition to reconsider. The JO concluded that the doctrine of res judicata does not preclude Complainant from bring a disciplinary action against Respondent for failure to pay produce sellers where Respondent's produce sellers brought a prior action against Respondent for non-payment and Respondent paid the judgment rendered against it. The JO also found that the record contained substantial evidence that one of Respondent's employees bribed a United States Department of Agriculture inspector and Respondent failed to rebut that evidence. The JO concluded that, as a matter of law (7 U.S.C. § 499p), Respondent was responsible for its employee's violations of 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.
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 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 Respondent made illegal payments to United States Department of Agriculture inspectors on numerous occasions prior to March 29, 1999; (4) alleging 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.

Complainant and Respondent filed post-hearing briefs, and 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).

Complainant and Respondent appealed to the Judicial Officer, and on December 16, 2003, I issued a "Decision and Order" in which I: (1) concluded that 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) concluded that 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; and (3) ordered the publication of the facts and circumstances

set forth in the Decision and Order.[1]

On January 22, 2004, Respondent filed a "Petition to Reconsider." On February 10, 2004, Complainant filed "Complainant's Opposition to Respondent's Petition to Reconsider." On February 12, 2004, the Hearing Clerk transferred the record to the Judicial Officer for reconsideration of the December 16, 2003, Decision and Order.

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

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in Respondent's Petition to Reconsider. First, Respondent contends I erroneously concluded that at the commencement of the hearing Respondent owed its produce sellers at least $479,602.33 for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce. Respondent asserts its produce sellers brought an action against Respondent for non-payment. After a judgment against Respondent, Respondent paid the judgment in full; thereby extinguishing Respondent's debt to Respondent's produce sellers prior to the commencement of the hearing in this proceeding. Respondent contends the doctrine of res judicata requires a finding that Respondent paid its produce debts in full before the date of the hearing. (Respondent's Pet. to Recons. at 1-3, 5.)

Respondent, citing 73A NY Jur. 2d *Judgments* § 328, states, under the doctrine of res judicata or claim preclusion, an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue as to the parties in all other actions. The doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents parties from subsequently relitigating any questions that

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[1]*In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 842-43 (2003).

were necessarily decided therein. (Respondent's Pet. to Recons. at 2.)

I agree with Respondent that, under the doctrine of res judicata, a final judgment on the merits in a prior suit bars parties (or their privies) from litigating questions decided in that prior action.[2] However, the doctrine of res judicata does not preclude Complainant from litigating the issue of Respondent's failure to pay its produce sellers prior to the commencement of the hearing in this proceeding because Complainant was not a party to the action brought by Respondent's produce sellers. Moreover, the instant proceeding is a disciplinary action instituted against Respondent for alleged violations of the PACA, whereas Respondent's produce sellers' cause of action was for non-payment for produce. A PACA disciplinary proceeding does not deal with the relationship of a respondent to its produce sellers for the purpose of seeking compensation for the produce sellers 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.[3] Therefore, I reject Respondent's contention that the judgment in the action instituted against Respondent by Respondent's produce sellers and Respondent's payment of that judgment requires a finding in this proceeding that Respondent paid its produce debts in full before the date of the hearing.

Finally, the record establishes that not all of Respondent's produce sellers were parties to the action against Respondent for non-payment for produce. Moreover, many of Respondent's produce sellers who were

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[2]*See 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).

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

parties to the action against Respondent agreed to accept 75 cents on the dollar for their claims against Respondent. (CX 64-65a.) The Judicial Officer has long held that a produce seller's acceptance of partial payment in full satisfaction of a debt does not constitute full payment in accordance with the PACA.[4] Therefore, I reject Respondent's contention that, as of the date of the hearing, Respondent made full payment for perishable agricultural commodities that Respondent purchased in interstate commerce.

Second, Respondent contends Complainant did not prove bribery and the Judicial Officer's finding that Respondent's employee, Mark Alfisi, committed bribery, is error (Respondent's Pet. to Recons. at 3-4).

Complainant introduced evidence to show 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

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[4]*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 (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).

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 fruits 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). Mark Alfisi appealed his conviction to the United States Court of Appeals for the Second Circuit which affirmed the conviction.[5]

Moreover, a United States Department of Agriculture inspector, William J. Cashin, testified that, after Mark Alfisi's employment by Respondent, he (Cashin) 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 the 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 more 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

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[5]*United States v. Alfisi*, 308 F.3d 144 (2d Cir. 2002).

inspection certificates that the produce was over the good delivery marks (Tr. Dec. 19, 2002, at 80).

Respondent failed to rebut Complainant's evidence that Mark Alfisi had committed bribery; therefore, I found, *inter alia*, that the record contained substantial evidence that Mark Alfisi paid bribes to a public official in amounts totaling $1,760 in violation of 18 U.S.C. § 201(b). Nothing in Respondent's Petition to Reconsider convinces me that my finding that 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, is error.

Third, Respondent contends it is not responsible for its employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector. Respondent asserts the Judicial Officer misconstrued and misinterpreted section 16 of the PACA (7 U.S.C. § 499p) and suggests that *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003), was wrongly decided. (Respondent's Pet. to Recons. at 4.)

I disagree with Respondent's contention that it is not responsible for its employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector. 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 unambiguously 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 and bribery and would not have condoned the unlawful gratuities and bribery had they known of them.[6] 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 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

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[6]*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. 763, 789-90 (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).

> 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).

Respondent provides no basis for its contention that I misconstrued and misinterpreted section 16 of the PACA (7 U.S.C. § 499p). I find the plain language supports my view that, 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. Moreover, both the Court in *H.C. MacClaren, Inc. v. United States Dep't of Agric.* and the Court in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, construe section 16 of the PACA (7 U.S.C. § 499p) as providing that a willful violation of the PACA by a PACA licensee's employee is deemed the willful violation of the PACA licensee. Respondent raises no meritorious argument to support its suggestion that *H.C. MacClaren, Inc. v. United States Dep't of Agric.* was wrongly decided.

For the foregoing reasons and the reasons set forth in *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), Respondent's Petition to Reconsider is denied.

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

for reconsideration.[7] Respondent's Petition to Reconsider was timely filed and automatically stayed the December 16, 2003, Decision and Order. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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 *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), and in this Order Denying Petition to Reconsider shall be published, effective 60 days after service of this Order on Respondent.

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[7]*In re Janet S. Orloff*, 62 Agric. Dec. 281, 292 (2003) (Order Denying Pet. for Recons. as to Merna K. Jacobson); *In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. 389, 404 (2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

In re: PHILIP D. CONANT.
PACA-APP Docket No. 04-0006.
Order Dismissing Case.
Filed March 2, 2004.

Andrew Y. Stanton, for Respondent
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

The Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, has reconsidered and determined that Petitioner was not responsibly connected with Golden Gem Growers, 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.

In re: JOEL TABACK.
PACA-APP Docket No. 02-0002.
Order Denying Petition for Reconsideration.
Filed April 28, 2004.

PACA-APP – Perishable Agricultural Commodities Act – Failure to make full payment promptly – Bribery – Unlawful gratuities – Responsibly connected.

The Judicial Officer (JO) denied Petitioner's petition to reconsider. The JO rejected Petitioner's contentions that the JO was bound to adopt the Chief Administrative Law

Judge's findings of fact and that the JO's decision in *In re Joel Taback*, 63 Agric. Dec. ___ (Feb. 27, 2004), was error.

Andrew Y. Stanton and Charles E. Spicknall, for Respondent.
Paul T. Gentile, for Petitioner.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On December 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Joel Taback [hereinafter Petitioner] was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000, when Post & Taback, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].[1] On January 18, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000.

On September 9, 2002, Respondent issued a determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999, when Post &

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[1]During the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly for perishable agricultural commodities, which Post & Taback, Inc., purchased, received, and accepted in interstate commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Reconsider).

Taback, Inc., violated the PACA.[2] On October 17, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999.

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. The Chief ALJ consolidated the oral hearing in this proceeding with the oral hearing in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[3] Andrew Y. Stanton and Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent in this proceeding and Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[4] Paul T.

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[2]During the period March 29, 1999, through August 5, 1999, Post & Taback, Inc., bribed 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 Post & Taback, Inc., purchased from produce sellers and Post & Taback, Inc., paid unlawful gratuities to a United States Department of Agriculture inspector in connection with United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Reconsider).

[3]*In re Post & Taback, Inc.*, PACA Docket No. D-01-0026, is an administrative disciplinary proceeding in which I concluded that Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. ___ (Feb. 13, 2004) (Order Denying Pet. to Reconsider).

[4]*See* note 3.

Gentile, Gentile & Dickler, New York, New York, represented Petitioner in this proceeding and Post & Taback, Inc., in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.[5]

On July 29, 2003, after Petitioner and Respondent filed post-hearing briefs, the Chief ALJ issued a "Decision" [hereinafter Initial Decision and Order] concluding Petitioner was not responsibly connected with Post & Taback, Inc., during a period in which Post & Taback, Inc., violated the PACA (Initial Decision and Order at 3).

Respondent filed an appeal petition, and on February 27, 2004, I issued a Decision and Order affirming Respondent's December 21, 2001, and September 9, 2002, determinations that Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA.[6]

On April 5, 2004, Petitioner filed a "Petition to Reconsider." On April 21, 2004, Respondent filed "Respondent's Response to Petitioner's Petition to Reconsider." On April 23, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the February 27, 2004, Decision and Order.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

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[5]*See* note 3.

[6]*In re Joel Taback*, 63 Agric. Dec. ___, slip op. at 25 (Feb. 27, 2004).

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

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

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or

contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.]

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if

he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

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

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

. . . .

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

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the

date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

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

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

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

(2) who has been found after notice and opportunity for

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

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

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

connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

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

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

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

DEFINITIONS

. . . .

§ 46.2 Definitions.

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

. . . .

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

. . . .

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

. . . .

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

7 C.F.R. § 46.2(aa)(5), (11).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Petitioner raises five issues in his Petition to Reconsider. First, Petitioner contends I erroneously concluded that he was responsibly connected with Post & Taback, Inc., during the period that Mark Alfisi made unlawful payments in connection with inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers (Pet. to Reconsider at 1-2).

As fully discussed in the February 27, 2004, Decision and Order, the evidence establishes that, during the period March 29, 1999, through August 1999, when Petitioner was responsibly connected with Post & Taback, Inc., Mark Alfisi, an employee of Post & Taback, Inc., bribed a United States Department of Agriculture inspector in order to influence the outcome of inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers and gave unlawful gratuities to a United States Department of Agriculture inspector in connection with inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers.[7] Therefore, I reject Petitioner's contention that I erroneously concluded that he was responsibly connected with Post & Taback, Inc., during the period that Mark Alfisi made unlawful payments in connection with inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers.

Second, Petitioner contends I incorrectly found that "because [s]ection 16 of the PACA (7 U.S.C. § 499[p]) provides identity of action between the licensees and its agents, the liability of the Petitioner in the matter extends to his status as 'responsibly connected'" (Pet. to Reconsider at 1).

I am not certain that I understand Petitioner's contention; however, I believe Petitioner contends I erroneously held that Petitioner was

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[7]*In re Joel Taback*, 63 Agric. Dec. ___, slip op. at 14-22 (Feb 27, 2004).

responsibly connected with Post & Taback, Inc., because section 16 of the PACA (7 U.S.C. § 499p) makes Petitioner responsible for Post & Taback, Inc.'s employee's PACA violations. I reject Petitioner's contention because I did not hold in the February 27, 2004, Decision and Order that section 16 of the PACA (7 U.S.C. § 499p) makes Petitioner responsible for Post & Taback, Inc.'s employee's PACA violations. Instead, I held that knowing and willful PACA violations by Mark Alfisi, an employee of Post & Taback, Inc., are, as a matter of law, deemed to be Post & Taback, Inc.'s knowing and willful violations of the PACA. My reasons for holding that Mark Alfisi's violations are deemed to be Post & Taback, Inc.'s PACA violations are fully explained in the February 27, 2004, Decision and Order.[8] I find no reason to repeat that explanation here.

Third, Petitioner contends, "[b]ased upon the determination by Administrative Law Judge Hunt, the law of the case is that the principals of the Petitioner had no knowledge of the actions of Mr. Alfesi [sic]" (Pet. to Reconsider at 1).

Petitioner provides no citation to the Chief ALJ's purported determination that Petitioner's principals had no knowledge that Mark Alfisi bribed and paid unlawful gratuities to a United States Department of Agriculture inspector in connection with inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers. Moreover, I have thoroughly reviewed the Chief ALJ's Initial Decision and Order and other filings, and I cannot find any determination by the Chief ALJ which relates to "principals of the Petitioner."

Fourth, Petitioner contends "[i]t is impermissible to hold a person who lacks knowledge <u>and</u> involvement in the company's affairs responsible for the criminal acts of an employee" (emphasis in original) (Pet. to Reconsider at 1-2).

The issue in this proceeding is whether Petitioner was *responsibly*

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[8]*In re Joel Taback*, 63 Agric. Dec. ___, slip op. at 17-22 (Feb. 27, 2004).

connected, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Post & Taback, Inc., during a period when Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The first sentence of the two-sentence definition of the term *responsibly connected* provides that a person is responsibly connected if he or she is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.[9] The second sentence of the definition of the term *responsibly connected* provides that a petitioner shall not be deemed responsibly connected, even if the petitioner falls within the parameters of the first sentence, if the petitioner demonstrates by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA and that he or she either was only nominally a partner, officer, director, or shareholder of the violating PACA licensee or entity subject to a PACA license or was not an owner of the violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.[10] The definition of the term *responsibly connected* does not provide that "[i]t is impermissible to hold a person who lacks knowledge <u>and</u> involvement in the company's affairs" responsibly connected with a commission merchant, dealer, or broker, as Petitioner contends.

Fifth, Petitioner asserts the Chief ALJ found Respondent did not prove the dates Post & Taback, Inc., accepted the produce for which it failed to make full payment. Petitioner contends that I impermissibly substituted my "theory" for the Chief ALJ's fact finding, that my "interpretation" of the evidence is based upon conjecture and surmise, and that, under the circumstances, I am bound to adopt the Chief ALJ's finding that Respondent did not prove Post & Taback, Inc., failed to make full

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[9]7 U.S.C. § 499a(b)(9).

[10]*See* note 9.

payment promptly for produce during the period that Petitioner was responsibly connected with Post & Taback, Inc. (Pet. to Reconsider at 2.)

Respondent determined Petitioner was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000, when Post & Taback, Inc., failed to make full payment promptly for perishable agricultural commodities, which Post & Taback, Inc., purchased, received, and accepted in interstate commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the regulations issued under the PACA (7 C.F.R. § 46.2(aa)(5)) defines the term *full payment promptly* as payment for produce purchased by a buyer within 10 days after the day on which the produce is *accepted*. The Chief ALJ found the record contains no reliable evidence establishing the dates Post & Taback, Inc., accepted produce for which it failed to make full payment. The Chief ALJ, therefore, concluded that Respondent did not establish that Post & Taback, Inc., failed to make full payment promptly for produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period that Petitioner was responsibly connected with Post & Taback, Inc. (Initial Decision and Order at 2-3.)

I disagree with the Chief ALJ's finding that the record contains no reliable evidence establishing the dates Post & Taback, Inc., accepted produce for which it failed to make full payment promptly. Respondent introduced substantial evidence which establishes that during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of $31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce. Petitioner cites no basis for, and I cannot find a basis for, Petitioner's contention that my finding that Post & Taback, Inc., failed to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period September 4, 2000, through October 10, 2000, is based upon conjecture and surmise. Instead, the

February 27, 2004, Decision and Order contains a discussion of and references to the evidence I relied upon as the basis for my finding that Post & Taback, Inc., failed to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period September 4, 2000, through October 10, 2000.[11]

I disagree with Petitioner's contention that I am bound to adopt the Chief ALJ's findings of fact. The Judicial Officer is not bound by an administrative law judge's initial decision and order and may reject the initial decision and order in whole or in part. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

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[11]*In re Joel Taback*, 63 Agric. Dec. ___, slip op. at 22-24 (Feb. 27, 2004).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

Similarly, section 1.145(i) of the Rules of Practice provides that the Judicial Officer *may* adopt the administrative law judge's initial decision and order, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
>
> (i) *Decision of the judicial officer on appeal*. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the

> proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

7 C.F.R. § 1.145(i).

Therefore, I reject Petitioner's contention that my failure to adopt the Chief ALJ's findings of fact, is error.

For the foregoing reasons and the reasons set forth in *In re Joel Taback*, 63 Agric. Dec. ___ (Feb. 27, 2004), Petitioner's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration. Petitioner's Petition to Reconsider was timely filed and automatically stayed the February 27, 2004, Decision and Order. Therefore, since Petitioner's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Joel Taback*, 63 Agric. Dec. ___ (Feb. 27, 2004), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

I affirm Respondent's December 21, 2001, and September 9, 2002, determinations that Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

In re: MAZIE FARACI.
PACA-APP Docket No. 04-0004.
Order Dismissing Case.
Filed May 12, 2004.

Ruben D. Rudolph, Jr., for Respondent
Petitioner, Linda Strumpf.
Order issued by Marc R. Hillson, Chief Administrative Law Judge

Petitioner's Motion to Withdraw Petition for Review of the Responsibly Connected Determination is **GRANTED.** It is hereby ordered that the Petition for Review, filed herein on January 2, 2003, be withdrawn.

Accordingly, this case is **DISMISSED.**

In re: ANTHONY SPINALE.
PACA-APP Docket No. 04-0005.
Order Dismissing Case.
Filed May 12, 2004.

Ruben D. Rudolph, Jr., for Respondent
Petitioner, Linda Strumph.
Order issued by Marc R. Hillson, Chief Administrative Law Judge

Petitioner's Motion to Withdraw Petition for Review of the Responsibly Connected Determination is **GRANTED.** It is hereby

ordered that the Petition for Review, filed herein on January 2, 2003, be withdrawn.

Accordingly, this case is **DISMISSED.**

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: LANDRUM WHOLESALE PRODUCE, LLC.
PACA Docket No. D-03-0017.
Decision Without Hearing.
Filed November 24, 2003.

PACA-Default.

David A. Richman, for Complainant.
Respondent, Luke Dove.
Decision issued by Leslie B. Holt, 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 April 28, 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 February 2002 through October 2002, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 40 sellers, 243 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $1,192,628.84.

The complaint also asserts that, on October 22, 2002, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq*.) in the United States Bankruptcy Court for the Southern District of Mississippi (Case No. 02-06023JEE). Respondent admitted in its bankruptcy schedules that the 40 sellers listed in the complaint hold unsecured claims in amounts greater

than or equal to the amounts alleged in the complaint. The complaint requests the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA, and publication of the facts and circumstances of the violations.

Respondent has filed an answer in which Respondent admits that it has failed to make full payment promptly to the produce sellers listed in the complaint. Respondent denies that its failure to pay as required by the Act was willful. Despite this denial, however, Respondent's admissions warrant the immediate issuance of a Decision Without Hearing Based on Admissions.

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

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

The complaint in this case was served on the Respondent on May 5, 2003 by certified U.S. mail, as evidenced by the posting date of the return receipt which was attached to the complaint. Respondent admits in its answer that it has failed to pay produce vendors the amounts alleged in the complaint. Under *Scamcorp*, Respondent was required to be in full compliance with the PACA by September 2, 2003, 120 days after service of the complaint. The affidavit of William Wesley Hammond of the

PACA Branch, Agricultural Marketing Service, attached to Complainant's Motion for Decision Without Hearing Based on Admissions, indicated that on September 25, 2003 Mr. Hammond contacted five of the produce sellers listed in the complaint, and found that those five sellers were still owed $524,884.40 for purchases of various perishable agricultural commodities. This case, therefore, shall be treated as a "no-pay" case which, as the Judicial Officer stated in *Scamcorp*, warrants the revocation of Respondent's PACA license. Since Respondent's license has terminated due to its failure to pay the annual renewal fee (complaint, paragraph II(b)), the appropriate sanction here is the issuance of a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA, and publication of the facts and circumstances of the violations.

Respondent argues in its answer that its failure to pay promptly was not willful because the failure resulted from the fact that "Respondent was experiencing severe financial difficulties and was financially unable to comply with the statutory requirements." Judicial Officer William G. Jensen addressed this issue in *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622 (1996), stating that the respondent's failure to pay its produce obligations were willful, despite the respondent's claim that financial difficulties forced the violations to occur. The Judicial Officer held that a "violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute." *Id.* at 626. The Judicial Officer again addressed the issue in *Scamcorp*, stating that the respondent in that case knew, or should have known, that it could not make prompt payment for amount of perishable agricultural commodities it ordered, and by continuing to order such goods, it intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA. *Scamcorp*, 57 Agric. Dec. at 553. The same analysis can be applied to the Respondent in the instant case.

As stated by the Judicial Officer in *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

> [B]ecause of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

In view of Respondent's admission that it has failed to make full payment promptly to 40 sellers in the total amount of $1,192,628.84 for 243 lots of perishable agricultural commodities, and the fact that Respondent has not paid the aggrieved sellers in full within 120 days of service of the complaint, Complainant's Motion for a Decision Without Hearing Based On Admissions is granted, and an order shall be issued finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that the facts and circumstances of the violations be published.

Findings of Fact

1. Landrum Wholesale Produce, LLC (hereinafter "Respondent") is a limited liability company organized and existing under the laws of the State of Mississippi. Its business mailing address is P.O. Box 4826, Jackson, Mississippi, 39296.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 021022 was issued to Respondent on April 5, 2002. This license terminated on April 5, 2003, when the firm failed to renew the license.

3. During the period February 2002 through October 2002, Respondent purchased, received and accepted, in interstate commerce, from 40 sellers, 243 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,192,628.84.

4. On October 22, 2002, Respondent filed a voluntary petition

pursuant to Chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1101 *et seq*.) in the United States Bankruptcy Court for the Southern District of Mississippi. In that matter, case number 02-06023JEE, Respondent admitted in its bankruptcy schedules that the 40 sellers listed in Attachment A of the complaint hold unsecured claims in an amount greater than or equal to the amounts alleged in the complaint.

5. Respondent failed to pay the produce debt described above, and failed to come into full compliance with the PACA within 120 days of service of the complaint against it.

Conclusions

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

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations 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 January 5, 2004.-Editor]

In re: ATLANTA EGG & PRODUCE CO., INC.
PACA Docket No. D-03-0003.
Decision and Order.
Filed December 5, 2003.

PACA - Default.

Andrew Y. Stanton, for Complainant.
Andrew M. Greene, for Respondent.
Decision and Order issued by Marc R. Hillson, 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 23, 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 February 2001, through March 2002, failed to make full payment promptly to 80 sellers of the agreed purchase prices in the total amount of $923,475.96 for 683 lots 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. Atlanta Egg & Produce Co., Inc. (hereinafter "Respondent") is a corporation incorporated in the State of Georgia. At all times material herein, Respondent's business and address was 16 Forest Park Highway, Hamper House Shed, Forest Park, Georgia 30050.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 950781 was issued to Respondent on February 21, 1995. This license was renewed on an annual basis, but terminated on February 21, 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 February 2001, through March 2002, failed to make full payment promptly to 80 sellers of the agreed purchase prices in the total amount of $923,475.96 for 683 lots 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, Atlanta Egg & Produce Co., Inc., 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 January 14, 2004.-Editor]

In re: ENGEBRETSON GRUPE CO., INC.
PACA Docket No. D-03-0025.
Decision Without Hearing by Reason of Default.
Filed January 28, 2004.

PACA-Default.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.; hereinafter "Act" or "PACA"), instituted by a Complaint filed on June 4, 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 January 2001 through July 2001, Respondent Engebretson Grupe Co., Inc., (hereinafter "Respondent") failed to make full payment promptly to 22 sellers of the agreed purchase prices in the total amount of $276,178.41 for 126 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

On June 4, 2003, a copy of the Complaint was mailed to Respondent via certified mail to its last known business address. The Complaint was returned unclaimed by the U.S. Postal Service. On June 17, 2003, a copy of the Complaint was re-sent to Respondent's business address via regular mail by the Hearing Clerk. Pursuant to Section 1.147(c) (7 C.F.R. § 1.147(c)) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*; hereinafter "Rules of Practice"), service is deemed made on the date of remailing by regular mail. The copy of the Complaint sent by regular mail was returned unclaimed by the U.S. Postal Service on July 2, 2003. On October 16, 2003, a copy of the Complaint was mailed via certified mail to Respondent's representative of record, Henry Zipf, Bankruptcy Court Trustee. The Complaint was served upon Respondent's representative of record on October 20, 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 investigation or hearing pursuant to Section 1.139 (7 C.F.R § 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 Arizona. Its business address while operating was Rio Rico Industrial Park, 883 East Frontage Road, Nogales, Arizona 85621. Its mailing address while operating was P.O. Box 1147, Nogales, Arizona 85628-1147.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 820551 was issued to Respondent on February 4, 1982. That license terminated on February 4, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual fee.

3. During the period January 2001 through July 2001, Respondent purchased, received, and accepted in interstate and foreign commerce, from 22 sellers, 126 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 $276,178.41.

Conclusions

Respondent's failure to make full payment promptly with respect to the 126 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 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 shall become final March 3, 2004.-Editor]

In re: ELLIOTTS' PRODUCE, INC.
PACA Docket No. D-03-0030.
Decision Without Hearing by Reason Default.
Filed January 30, 2004.

PACA-Default.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision issued by Marc R. Hillson, 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 "Act" or "PACA"), instituted by a Complaint filed on July 24, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch of Fruit and Vegetable Programs of the Agricultural Marketing Service. The Complaint alleges that during the period September 2000 through December 2002, Respondent Elliott's Produce, Inc., (hereinafter "Respondent") failed to make full payment promptly to 14 sellers of the agreed purchase prices, or balances thereof, in the total amount of $878,067.50 for 171 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent on August 8, 2003. 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 (7 C.F.R. § 1.139) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*; hereinafter "Rules of Practice").

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Alabama. Its business address while operating was 2278 Halls Mill Road, Mobile, Alabama 36606. Its current address is P.O. Box 1265, Theodore, Alabama 36590.

2. At all times material herein, Respondent was licensed or operating subject to license under the PACA. PACA license number 830189 was issued to Respondent on October 29, 1982. That license has been renewed annually and is next subject for renewal on or before October 29, 2003.[1]

3. During the period September 2000 through December 2002, Respondent purchased, received, and accepted in interstate and foreign commerce, from 14 sellers, 171 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $878,067.50.

Conclusions

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[1]Licensees are notified within 30 days of the due date of the annual fees that such fees are due. Following the due date, there is a "grace period" within which a licensee may pay the required fee plus a $50 penalty without effect on Respondent's license. That grace period is generally 30 days after the due date (7 C.F.R. § 46.9(i)).

Respondent's failure to make full payment promptly with respect to the 171 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 PACA license of Respondent is 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 April 2, 2004.-Editor]

In re: TOMATOES N CHILES R US.
PACA Docket No. D-03-0032.
Decision and Order.
Filed March 16, 2004.

PACA - Default.

Jeffrey Armistead, for Complainant.
Rozendo Gonzales, for Respondent.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

Decision

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.; hereinafter, the "Act" or "PACA"), the Regulations issued pursuant to the Act (7 C.F.R. Par 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 *et seq*.**;** hereinafter, the "Rules of Practice"). This proceeding was instituted by the filing of a Notice to Show Cause and Motion for Expedited Hearing, on September 8, 2003, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("Complainant"). The Notice required Respondent to Show Cause why Respondent's August 8, 2003, application for a license under the Act should not be refused. The Notice to Show Cause alleged that Respondent had engaged in practices of the character prohibited by the Act by failing to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of $65,737.95 for 61 lots of perishable agricultural commodities, $27,883.75 of which Respondent purchased, received, and accepted in foreign commerce. The Notice to Show Cause requested that the Administrative Law Judge find Respondent unfit to engage in the business of a commission merchant, dealer, or broker and, on behalf of the Secretary of Agriculture, refuse to issue a license to Respondent. The Motion for Expedited Hearing cited the requirement that a PACA license applicant be given an opportunity for a hearing within 60 days of the date of its initial application—in this case, October 7, 2003—as per section 4(d) of the Act, 7 U.S.C. § 499d(d).

Procedural Background

A copy of the Notice to Show Cause and the Motion for Expedited Hearing were served upon Respondent, which filed an answer to the

Notice to Show Cause on September 16, 2003. On September 29, 2003, I conducted a telephone conference with the parties. During the telephone conference, Patricia Mendez-Romero, president and sole stockholder of the Respondent, represented herself. Since Ms. Mendez-Romero does not speak English, Tom Leming of the PACA Branch provided English-Spanish translation for her. At this conference, Ms. Mendez-Romero waived Respondent's right to a hearing within 60 days of the filing of its application and agreed to a hearing date on November 5, 2003. Ms. Mendez-Romero stated that she needed the extension so that she could have time to retain counsel.

On October 30, 2003, I conducted another telephone conference with the parties in this case. Ms. Mendez-Romero was again unrepresented by counsel. Everett Gonzales of the PACA Branch provided translation services, and PACA was represented, as they were at the previous conference, by Christopher Young-Morales and Jeffrey Armistead. Once again the Respondent requested a continuance so that she could hire an attorney. Although Complainant vigorously opposed her request, citing the fact that she already had sufficient time to hire an attorney, and that license denial proceedings are required to be conducted expeditiously, I granted her request, emphasizing that no additional continuance would be granted to Respondent under any circumstances. Ms. Mendez-Romero indicated that she understood that no further continuances would be granted. The hearing was set for December 15, 2003 through December 17, 2003 in Los Angeles, California. On December 12, 2003, all parties were notified via Fax that the hearing was set to commence on December 16, 2003, instead of December 15, 2003.

On December 15, 2003, literally as I was preparing to board a flight to Los Angeles, I received notice by telephone that a motion was filed by Rosendo Gonzalez, Esq. informing Complainant and me for the first time that he had been retained to represent Respondent. The Motion requested a continuance. Mr. Gonzalez stated that because he was scheduled to appear in five different hearings on December 16, 2003, he would be unable to attend the hearing in this case. I denied the motion on

December 15, 2003.[1]

Respondent failed to appear at the oral hearing on December 16, 2003, either in person or by counsel. Complainant was represented by Jeffrey Armistead and David Richman. Failure of a respondent to appear at a hearing triggers the provision of §1.141(e)(1) of the Rules, which allows Complainant to elect whether to "follow the procedure set forth in 1.139 or whether to present evidence in whole or in part, in the form of affidavits or by oral testimony before the Judge." In this case, Complainant elected to present evidence. Two witnesses testified and thirteen exhibits were admitted.

On February 11, 2004, Respondent's attorney was mailed the Complainant's proposed Findings of Fact, Conclusions of Law, and Proposed Order. Respondent did not file a response within the allotted time.

Discussion

Respondent has failed to show cause as to why Complainant's denial of its application for a license to buy and sell perishable commodities under PACA should be overturned. The evidence overwhelmingly shows that Complainant properly denied Respondent's PACA license application because Respondent is unfit to engage in the business of a commission merchant, dealer or broker because its failure to make full payment promptly for produce in both foreign and intrastate commerce and its financial irresponsibility are practices of the character prohibited by the Act.

Complainant may deny the license application of a corporation, such as Respondent, if it finds that the applicant, prior to the date of filing of the application, has "engaged in any practice of the character prohibited by the Act." 7 U.S.C. § 499d(d). *See In re Power Tomato, Inc., and Power Produce Co.*, 52 Agric. Dec. 662 (1993); *In re Tony Kastner and*

[1]I dictated an order denying the motion from the airport, which was served by fax that afternoon.

Sons Produce Co., Inc., 51 Agric. Dec. 741 (1992); *In re Williamsport Purveyors, Inc.*, 48 Agric. Dec. 1092 (1989) [*aff'd*, 916 F.2d 82 (3d Cir. 1990), reprinted in 49 Agric. Dec. 1148 (1990)]; *In re Robert W. Casto, d/b/a Prima Citrus & Fruit Exchange*, 46 Agric. Dec. 602 (1987); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684 (1977); *In re Ludwig Casca*, 34 Agric. Dec. 1917 (1975).

Complainant's investigation established that from July 19, 2003 through August 11, 2003, Respondent purchased, received, and accepted eight lots of perishable agricultural commodities from Sergio Guzman Ramirez of Tijuana, Mexico in the amount of $27,883.75. (CX 4; CX 10; Tr. 34-40).[2] Brian Wright, an investigator for the PACA Branch, testified that he asked Respondent to submit to PACA past due and unpaid invoices for produce from Mr. Guzman. Tr. 36-37. In response to this request, Ms. Mendez-Romero, on behalf of Respondent, submitted invoices used to determine the above past due debt in the amount of $27,883.75 for shipments of produce due on July 29, 2003 through August 29, 2003. (Tr.36-40). Mr. Guzman corroborated that Respondent owed him at least this amount. (Tr. 45-46).

Section 2(4) of the Act (7 U.S.C. § 499b(4)) requires that full payment be made promptly for transactions made in interstate and foreign commerce. The Regulations promulgated pursuant to the PACA define prompt payment generally as payment made within 10 days of acceptance, unless the parties agree to other terms in writing prior to the transaction. (7 C.F.R. § 46.2(aa)). This failure by Respondent to pay promptly for produce in foreign commerce violated Section 2(4) of the Act.

Failing to make full payment promptly for produce in interstate and foreign commerce is unlawful under the Act, and therefore a practice of the character prohibited by the Act. *See In re Fresh Approach*, 44 Agric. Dec. 2043, 2058 (1985). In transactions in interstate or foreign

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[2]Complainant's exhibits will be referred to as "CX" and the hearing transcript will be referred to as "Tr."

commerce, "failure to pay for produce is a very serious violation of the Act." *In re Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 123 (1984). The prompt payment provisions of the PACA are meant to ensure that produce shipped cross country or great distances, transactions that are subject to "opportunities for sharp practices and irresponsible business conduct," are paid for expeditiously. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *see also Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987). The Act's requirement of expeditious payment is necessary to prevent a domino effect where the failure to pay one seller leads to that seller's inability to pay its suppliers, with the potential to cause great harm to the produce industry. (Tr. 60-61). Indeed, the Judicial Officer has repeatedly confirmed that failure to pay for produce is a violation of the PACA, for which only the most severe sanction is appropriate. *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 570 (1998); *In re H. Schnell & Company, Inc.*, 58 Agric. Dec. 1002, 1010 (1999). Respondent's failure to pay for produce in foreign commerce in violation of Section 2(4) is alone sufficient grounds to deny it a PACA license.

In addition to failing to pay promptly for produce in **foreign** commerce, Respondent also failed to make full payment promptly for produce in **intrastate** commerce. This, too, is a practice of the character prohibited by the Act. Respondent failed to make full payment promptly to three sellers—V & L Produce (CX 8), Jalisco Fresh Produce (CX 9), and Del Sur Fresh (CX 11)-- of the agreed purchase prices, or balances thereof, in the total amount of $37,854.20 for 53 lots of perishable agricultural commodities, which Respondent purchased, received and accepted in intrastate commerce. CX 4, CX8, CX 9, CX 11; Tr 19-33, 41-46. While intrastate produce transactions themselves are not subject to the PACA absent a showing that they were in contemplation of interstate or foreign commerce, the failure to pay for such produce is encompassed by the phrase "any practice of the character prohibited by the Act."

Moreover, Complainant has broad discretion to refuse to issue a

license to applicants who pose a risk to the produce industry. "The Act confers broad discretion upon the Secretary to bar from the industry, inter alia, persons with a history of financial irresponsibility or other conduct of the type proscribed by the PACA." *See In re Williamsport Purveyors, Inc*., 48 Agric. Dec. 1092, 1098 (1989). Failing to pay for produce in intrastate commerce is analogous to the very serious violation of failure to pay for produce in interstate and foreign commerce. Not only is failing to pay for produce in intrastate commerce a practice of a character prohibited by the Act, it also is an indication of financial irresponsibility. As such, it is a legitimate indicator as to how Respondent will conduct business with produce suppliers in interstate and foreign commerce if permitted to do so under the Act**.** Tr. 57-58.

Only those persons "financially responsible" should be engaged in the perishable agricultural commodities industry. *See In re The Caito Produce Company*, 48 Agric. Dec. 602, 612 (1989). It is the Agency's responsibility to prevent future instances of harm to the produce industry because the "primary purpose of the PACA is to protect growers and producers from the 'sharp practices of financially irresponsible and unscrupulous brokers' in the produce industry." *In re Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery*, 55 Agric. Dec. 1204, 1211 (1996) *quoting In re Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 745 (1992). Regardless of whether produce crosses state boundaries, the failure to pay promptly is an indication of financial irresponsibility that the Secretary may consider in any decision as to whether a license should be granted.

Respondent further demonstrated financial irresponsibility by failing to establish adequate financial reserves. Respondent began conducting business subject to the Act on June 30, 2003, but did not deposit any money into a bank account until July 23, 2003. CX 7, Tr. 50-53. The $3,000 deposited on this date was left untouched until August 12, 2003 when all but $100 of that amount was withdrawn. These funds were facially insufficient relevant to the high volume of produce purchased by Respondent in July and August, 2003. Thus, in July Respondent purchased produce in the amount of $285,664.84 and from August 1,

2003 though August 14, 2003, Respondent purchased produce in the amount of $97,959.97. For the period of August 1 through August 14, 2003, Respondent's Profit and Loss Statement showed a net loss in the amount of $26, 962.59. Tr 50. Obviously, the $100 in Respondent's bank account was insufficient to cover the net loss. (CX 3; CX 6; CX 7; Tr. 46-53). Undercapitalization is a "circumstance that is never condoned under the Act." *In re Green Village Fruit and Vegetable, Inc.*, 45 Agric. Dec. 1202, 1210 (1986). In the produce industry, the financial circumstance of not paying promptly for produce because of undercapitalization has frequently led to the revocation of PACA licenses. *See In re Potato Sales Co., Inc., TSL Trading, Inc., d/b/a SL International, an Ever Justice Corporation*, 54 Agric. Dec. 1382, 1400 (1995); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 631 (1996). Respondent's financially irresponsible act of not adequately capitalizing its business, in conjunction with its failure to pay timely for produce, is a practice of the character prohibited by the Act and supports Complainant's refusal to issue a license to Respondent.

Findings of Fact

1 Tomatoes N Chiles R Us, Inc. (hereinafter, "Respondent"), is a corporation that is organized and incorporated under the laws of the State of California. Its business address is 746 Market Court, Los Angeles, California 90021. (CX 3).

2. Respondent is not and never has been licensed under the PACA.

3. Complainant received Respondent's PACA license application on August 8, 2003. Complainant has withheld the issuance of a PACA license based on its determination that Respondent is unfit to engage in the business of a commission merchant dealer or broker because it has engaged in practices of the character prohibited by the Act. (Tr. 57-61).

4. From July 29, 2003 to August 21, 2003, Respondent failed to make full payment promptly to Sergio Guzman of Tijuana, Mexico, of the agreed purchase prices in the total amount of $27,883.75 for eight lots of perishable agricultural commodities, which Respondent purchased,

received and accepted in foreign commerce. (CX 4; CX 10; Tr. 34-40).
5. From July 24, 2003 to September 1, 2003, Respondent failed to make full payment promptly to three other sellers of the agreed purchase prices in the total amount of $37,854.20 for 53 lots of perishable agricultural commodities, which Respondent purchased, received and accepted in intrastate commerce. (CX 4; CX 8; CX 9; CX 11; Tr. 19-33, 41-46).
6. For the month of July, 2003, Respondent showed a net loss of $174.73 on income from sales of $310,378.72. For the period of August 1 to August 14, 2003, Respondent had a net loss of $26,962.59 on income from sales of $82,642.57. Respondent purchased produce during this period in a total amount of $285,664.84 for July and $97,959.97 for the period of August 1, 2003 to August 14, 2003. (CX 6, CX 12; CX 13; Tr 46-50).
7. Respondent began conducting business subject to the PACA on June 30, 2003, but did not open a checking account until July 23, 2003. On that date Respondent deposited an amount of $3,000 and then on August 12, 2003, Respondent withdrew $2,900 from this sole bank account, leaving a balance of $100. From the time the account was opened to August 12, 2003 there was no other activity in this account. (CX 3; CX 7; Tr. 51-53).

Conclusion and Order

Respondent's failure to promptly pay for produce in foreign commerce, along with its failure to pay promptly for produce in intrastate commerce, and its failure to establish adequate financial reserves, support the decision of Complainant to deny it a PACA license.

Complainant's withholding of the issuance of a license to Respondent was proper and the issuance of a PACA license is denied.

This Order shall take effect 20 days 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 section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

* * *

APPENDIX

Pertinent Statutory Provisions

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

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal court.... If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, ... or in case applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by the Act or was convicted of a felony in any State or Federal court, ... the Secretary may refuse to issue a

license to the applicant.

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

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

* * * *

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

In re: FRESH SOLUTIONS, INC.
PACA Docket No. D-04-0004.
Decision and Order.
Filed April 12, 2004.

PACA - Default.

Charles Spicknall, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

[1] This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) [hereinafter often referred to as "the PACA"], instituted by the Notice to Show Cause and Complaint filed on December 3, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter often referred to as "Complainant"].

[2] The Notice to Show Cause and Complaint [hereinafter often referred to as "Complaint"] alleges that during the period of August 16, 2002, through April 29, 2003, Respondent Fresh Solutions, Inc. [hereinafter often referred to as "Respondent"] failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of $351,968.50 for 1,483 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

[3] A copy of the Complaint filed on December 3, 2003 was sent to Respondent at 3850 Holcombe Bridge Road, Suite 210, Norcross, Georgia 30093, by certified mail on December 4, 2003, and was received by Respondent on December 15, 2003.

[4] Respondent failed to file an answer to the Notice to Show Cause and Complaint within 10 days, the time prescribed in the Rules of

Practice, 7 C.F.R. § 1.136(a); to date, Respondent has still not filed an answer.

[5] The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.

Findings of Fact

[6] Respondent Fresh Solutions, Inc. is a corporation organized and existing under the laws of Georgia with a business address of 3850 Holcombe Bridge Road, Suite 210, Norcross, Georgia 30093.

[7] Pursuant to the licensing provision of the PACA, license number 20020211 was issued to Respondent on October 26, 2001. This license terminated on October 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.

[8] As more fully set forth in paragraph III of the Notice to Show Cause and Complaint, during the period August 16, 2002, through April 29, 2003, Respondent Fresh Solutions, Inc. purchased, received and accepted in interstate commerce, from eight sellers, 1,483 lots of fruits and vegetables, all being perishable agricultural commodities, but willfully failed to make full payment promptly of the agreed purchase prices in the total amount of $351,968.50.

[9] On November 5, 2003, Complainant received a completed application for a PACA license from Respondent. Pursuant to Section 4(d) of the PACA (7 U.S.C. § 499d(d)), Complainant withheld the issuance of a PACA license to Respondent, pending an investigation, which revealed that Respondent had willfully failed to make full payment promptly for perishable agricultural commodities, as set forth in

paragraph [8] above, and that Respondent was not in full compliance with the PACA at the time of Respondent's licensing application.

Conclusions

[10] Respondent's failure to make full payment promptly with respect to the 1,483 transactions described in paragraph [8] above, constitutes willful, repeated and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

[11] The acts of Respondent in failing to make full payment promptly of the agreed purchase prices, or balances thereof, as described in paragraph [8] above, for the perishable agricultural commodities that it purchased, received and accepted, constitute practices of the character prohibited by the PACA.

Order

[12] Respondent Fresh Solutions, Inc. has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[13] Respondent Fresh Solutions, Inc. has engaged in practices of a character prohibited by the PACA and, pursuant to Section 4 of the PACA (7 U.S.C. § 499d(d)), is unfit to be licensed. Respondent's application for a PACA license is, therefore, refused.

[14] This Order shall take effect on the 11th day after this Decision becomes final. This Decision becomes final without further proceedings 35 days after service, unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145,*See*attached Appendix A).

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

[This Decision and Order became final June 30, 2004.-Editor]

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in
§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied

upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement*. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument*. The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs*. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal*. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: GARY L. COMELLA d/b/a SOUTHWEST PRODUCE.
PACA Docket No. D-03-0024.
Decision Without Hearing by Reason of Default.
Filed April 15, 2004.

PACA-Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.
Decision issued by Marc R. Hillson, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(hereinafter referred to as the "Act"), instituted by a complaint filed on May 29, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1999 through January 2001, Gary L. Comella, d/b/a Southwest Produce, (hereinafter "Respondent") failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of $387,011.02 for 93 lots of perishable agricultural commodities that he purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was mailed to Respondent by certified mail at his last known principal place of business on May 29, 2003, and was returned to the office of the Hearing Clerk. A copy of the complaint was remailed to Respondent by regular mail on June 17, 2003 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice"). 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

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 (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Gary L. Comella, doing business as Southwest Produce, (hereinafter "Respondent") is an individual operating as a sole proprietor under the laws of the state of Arizona. His business address was 7423 West Highway 95, Somerton, Arizona 85350. His mailing address is P. O. Box 1339, Somerton, Arizona 85350.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 980062 was issued to Respondent on October 10, 1997. This license terminated on October 10, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required renewal fee.
3. During the period November 1999 through January 2001, Respondent purchased, received, and accepted in the course of interstate and foreign commerce, 93 lots of perishable agricultural commodities from 11 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $387,011.02.

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 June 2, 2004.-Editor]

In re: G&B PRODUCE COMPANY, INC.
PACA Docket No. D-03-0028.
Decision Without Hearing by Reason of Default.
Filed May 4, 2004.

PACA - Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.
Decision issued by Marc R. Hillson, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)(hereinafter referred to as the "Act"), instituted by a complaint filed on June 24, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period March 2002 through August 2002, G & B Produce Company, Inc., (hereinafter "Respondent")

failed to make full payment promptly to eight sellers of the agreed purchase prices, or balances thereof, in the total amount of $209,740.75 for 55 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 regular mail on July 25, 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 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 (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Florida. Respondent's business address is 150 S.W. 12th Avenue, Suite 430, Pompano Beach, Florida 33069.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 830838 was issued to Respondent on April 18, 1983. This license terminated on April 18, 2003, 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 2002 through August 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 55 lots of perishable agricultural commodities from eight sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $209,740.75.

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 June 29, 2004.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

NWF Acquisition Corp. PACA Docket No. D-03-0018. 1/12/04.

A.J. Kennedy's Fruit & Produce, Inc. PACA Docket No. D-03-0002. 4/15/04.

American Produce, Inc. PACA Docket No. 04-0002. 5/28/04.