AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

**PACIFIC INTERNATIONAL MARKETING, INC. v.
A & B PRODUCE, INC., ET AL.
NO. 03-3564, CIVIL ACTION NO. 03-5556.
Filed July 21, 2004.**

**UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

PACA – Trust *res* – Administrative costs not allowed.

Court declined to allow a claim for Administrative expenses out of the PACA trust *res* holding that Congress sought to move unpaid producer creditors to the head of the line with respect to any distributors of a produce purchaser's assets.

JUDGES: M. FAITH ANGELL, UNITED STATES MAGISTRATE JUDGE.

**OPINION
MEMORANDUM AND ORDER**

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was referred to me by the Honorable Louis H. Pollak for resolution of all nondispositive pretrial matters by Order dated June 17, 2003. Subsequently, the parties consented to the exercise of jurisdiction by a United States Magistrate Judge, and Judge Pollak referred the action to me to conduct all proceedings and order the entry of judgment by Order dated October 1, 2003. Presently before me is Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim and Plaintiffs' opposition to the claim.

Plaintiffs have instituted this action against A&B Produce, Inc. and Anthony G. Badolato, the President of A&B Produce, claiming that Defendants violated provisions of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a.

II. PACA

PACA was passed into law to encourage fair trading in the marketing of produce and to prevent unfair and fraudulent practices in the industry. *See* H. R. Rep. No. 543, 1984 U.S.C.C.A.N. 405, 406; *see also* Plaintiffs' Opposition to Administrative Expense Claim of Intervenor Excel Transportation Services, Inc. at 1-2. The Act was amended in 1984 by the creation of a statutory trust "to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them[.]" 1984 U.S.C.C.A.N. at 406.

Under the 1984 provision, a buyer's produce, products derived from that produce, and the proceeds gained therefrom are held in a non-segregated, floating trust for the benefit of unpaid suppliers who have met the applicable statutory requirements. *See* 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46(b). Thus, the provision gives certain unpaid sellers of produce an interest in the PACA trust assets superior to that of a perfected, secured creditor. *Idahoan Fresh v. Advantage Produce*,157 F.3d 197, 199 (3d Cir. 1998).

Though United States District Courts maintain jurisdiction to hear actions by trust beneficiaries to enforce payment from the trust and actions by the Secretary to prevent and restrain the dissipation of the trust, *see* 7 U.S.C. § 499e(c)(4), "PACA contains no mechanism for the administration and distribution of trust assets". *In the Matter of United Fruit and Produce Co., Inc.*, 119 B.R. 10, 11 (Bankr. 1990).

In order to implement a procedure for the administration of the PACA Trust in the instant matter, a Stipulation and Agreed Order for Preliminary Injunction and PACA Claims Procedure was entered on September 30, 2003. Pursuant to that Order, the PACA Trust Assets of A&B Produce were to be identified, liquidated, and distributed to A&B Produce's qualified PACA trust beneficiaries on a pro-rata basis. Kenneth Federman, Esquire was appointed the PACA Trustee responsible for identification, recovery and liquidation of A&B Produce's assets.

III. INTERVENOR EXEL TRANSPORTATION SERVICES,

INC.'S ADMINISTRATIVE EXPENSE CLAIM

Exel Transportation Services (Exel) filed a complaint in intervention in which it seeks the payment of administrative expenses chargeable against the *res* of the PACA Trust. Exel arranged and paid for the transportation of shipments of PACA-qualified produce in interstate commerce for delivery to A&B Produce prior to the instant lawsuit. As part of its services, Exel paid the freight charges of the carriers that provided the actual transportation services on behalf of A&B Produce. *See* Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim at 1-2.

There is no PACA statutory provision which defines "administrative expenses"; however, in support of its claim, Exel relies upon the *United Fruit* case. That case differs from the within matter in that it addresses compensating a bankruptcy trustee of a debtor's estate whose incurred expenses came about as direct result of services he rendered, as trustee, which benefitted the trust and its beneficiaries. The services involved the actual administration of the trust. Exel's services were not utilized by the PACA trustee in the administration of the trust, and, therefore, cannot be called administrative expenses. Rather, Exel is simply an unsecured creditor.

As previously noted, Congress amended the PACA in 1984, creating a statutory trust in 7 U.S.C. § 499e(c). The purpose of this trust was "to increase the legal protection for the unpaid sellers and suppliers of agricultural commodities until full payment of sums due have been received by them". 1984 U.S.C.C.A.N. at 406. Congress recognized an increase in non-payment or slow payment by buyers that unfairly burdened produce suppliers. *Id.*

Courts have recognized that the PACA statute grants PACA trust beneficiaries priority even over secured creditors. "Clearly the primary purpose of the PACA trust provisions is to 'move the unpaid produce creditor to the head of the line with respect to any distribution of a produce purchaser's assets.'" *Frio Ice, S.A. v. Sunfruit, Inc., et al.,* 724 F. Supp. 1373, 1377 (S.D. Fla. 1989) *quoting In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D.Tex. 1985). "Thus, the provision gives certain unpaid sellers of produce an interest in the PACA trust assets superior to that of a perfected, secured creditor." *Idahoan Fresh*,

157 F.3d at 199.

The Third Circuit has continuously recognized Congress' intent in enacting the PACA amendment was to protect the rights and priority of unpaid sellers and suppliers. "PACA's purpose, as Congress had crystallized, is to ensure payment to the unpaid seller in the perishable agricultural commodities industry." *Tanimura & Antle v. Packed Fresh Produce*, 222 F.3d 132, 138 (3d Cir. 2000) (citations omitted). "In 1984, Congress amended PACA to protect further certain unpaid suppliers of produce by including a statutory trust provision which provides an additional remedy for sellers against a buyer failing to make prompt payment." *Idahoan Fresh*, 157 F.3d at 199.

Contrary to Excel's characterization of their claim as mere payment of an administrative expense, this Court correctly recognized the issue as a question of preferential standing. *See Pacific International Marketing, Inc. v. A&B Produce, Inc., et al.*, CA. No. 03-3564, Order (E.D.Pa. March 17, 2004). In its claim for payment of administrative expenses, Exel is requesting priority payment ahead of the PACA trust beneficiaries. To do so would defeat the purpose of the PACA amendment to place unpaid sellers in a priority position and expand the term "administrative expense" too far. The claim of Exel for payment of administrative expenses shall be denied.

ORDER

AND NOW, this 20th day of July, 2004, upon consideration of Intervenor Exel Transportation Services, Inc.'s Brief in Support of its Administrative Expense Claim and Plaintiffs' Opposition to Administrative Expense Claim of Intervenor Exel Transportation Services, Inc., it is hereby **ORDERED** that Exel Transportation Services, Inc.'s claim for the payment of administrative expenses is DENIED.

IT IS SO ORDERED.

BOTMAN INTERNATIONAL, B.V. v. INTERNATIONAL PRODUCE IMPORTS, INC., ET AL.
NO. 99 CV 5088.

Filed July 27, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 14659).

PACA – PACA Trust *res*, preservation of – Terms of payment, pre-delivery modification of – Responsibly connected – Liability, secondary, of others.

PACA reparation claim where the agreed time due for payment for agricultural commodities lengthened from 21 to 60 days as the buyer's financial condition worsened. Only those sales which were agreed to be paid within 30 days could come within the PACA trust. After notice to buyer that the proceeds of the goods were to be held in a PACA trust under 7 USC 499b, buyers failed to properly maintain the trust *res*. Seller elected to proceed alternately against individuals under 7 USC § e(c)(2) and hold the responsibly connected individuals secondarily liable for failure to act in a fiduciary manner with the trust assets for the beneficiaries (sellers). Buyer was a 100% owned by responsibly connected individual who was found to be active involvement of business operations.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDGES: R. Barclay Surrick, J.

OPINION
MEMORANDUM AND ORDER

Presently before the Court is Plaintiff's Renewed Motion for Partial Summary Judgment. (Doc. No. 53.) For the reasons that follow, Plaintiff's Motion will be granted in part and denied in part.

1. Factual Background

The following facts are based on documents submitted by the parties. Where the parties dispute certain facts, we construe the record in the light most favorable to the defendants.

Over the course of nearly two years, Plaintiff Botman International, B.V. ("Botman International"), a corporation engaged as a supplier of perishable agricultural commodities with its principal place of business

in the Netherlands, sold and shipped over 460 individual shipments of produce to Defendant International Produce Imports, Inc. ("IPI"). Initially, IPI was a Pennsylvania corporation with its sole shareholders consisting of Defendants Dirk J. Keijer ("Mr. Keijer") and Clare A. Keijer ("Ms. Keijer"), individuals who are husband and wife. However, in early May, 1999, Ms. Keijer resigned as an officer and director and transferred her shares to Mr. Keijer. Thereafter, Ms. Keijer worked as general counsel to IPI which, on July 1, 1999, was re-incorporated in Delaware for the purpose of facilitating a possible bankruptcy filing. (Tr. of Oct. 29, 1999 hearing, at 75-76.)

IPI initially developed a business relationship with Botman International in the fall of 1997, when Mr. Keijer met Adri Botman, president of Botman International, at a produce convention. Shortly after that meeting it was decided that IPI and Botman International would undertake a limited number of produce transactions to determine whether it was worthwhile to continue. After a number of trades were completed Mr. Botman traveled to the Keijers' home in Oxford, Pennsylvania in January, 1998, to discuss whether to continue their trading relationship. At this meeting Mr. Botman gave Mr. Keijer a document entitled "Conditions of Sale Governing Export Transactions" which they discussed in detail, including provisions stating that goods would be paid for within twenty-one days of the date of the invoice relating to the delivery of those goods.[1] Mr. Keijer agreed that IPI would adhere to the terms contained therein.

From January, 1998 until August, 1999, IPI repeatedly purchased produce from Botman International. Each of these purchases is reflected by an invoice prepared by Botman International detailing the date of purchase, the type and quantity of produce being purchased, and the unit price of the produce. In addition, the invoices contain figures apparently stating the amount of freight and packing costs and include language relating to the manner in which the produce was shipped. Examination of the invoices reveals that produce shipped to IPI was destined for a

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[1] Clause 11 of the Conditions of Sale states: "Payment of the goods delivered shall be made within 3 weeks of the date of the invoice relating to the delivery, unless agreement has been reached in writing on a departure from this rule." (Def.s' Ex. A.).

variety of locations, with many of these locations being several hours distant from the Philadelphia area.[2]

When each shipment arrived at its destination, it was trucked to a warehouse and inspected. After inspection, adjustments to the invoices were made through negotiations between IPI and Botman International to account for any irregularities in the shipped produce. The produce was then stored at a warehouse until sold by IPI to another party. Virtually all of IPI's business revolved around purchasing produce from Botman International and re-selling that produce in the Philadelphia area, with IPI's largest single account being Giant Foods.[3] In 1999, approximately ninety percent of IPI's supply of produce came from Botman International. (Tr. of Oct. 25, 1999 hearing, at 30.) Thus, at all times relevant to this case, Botman International was a component of Giant Foods's produce supply chain.

As IPI continued to do business with Botman International, IPI began to incur substantial debt. In April, 1999, IPI's debt to Botman International had increased to such a level that Botman International requested financial information from IPI in order to re-evaluate its creditworthiness. In response, IPI delivered to Botman International a Profit and Loss Statement covering the period January, 1999, through March, 1999, informing Botman International of IPI's exact financial condition.

In May, 1999, IPI's financial situation took a turn for the worse when another firm displaced IPI as a produce dealer for Giant Foods. Prior to May, 1999, when IPI received a shipment of produce from Botman International, that shipment would be warehoused by Colace, one of Giant Foods' main produce suppliers. Although Colace sold the same type of produce to Giant Foods, it was not, strictly speaking, IPI's competitor at the time that IPI was trading with Botman International

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[2] Sometimes produce was shipped to the following locations: New York City, New York; Newark, New Jersey; Washington, D.C.; and Philadelphia, Pennsylvania.

[3] Giant Foods accounted for approximately twenty percent of IPI's sales. (Tr. of Oct. 25, 1999 hearing, at 27-28.)

because IPI dealt only with produce imports from Holland whereas Colace dealt in more locally grown produce. This changed, however, in May, 1999, when Botman International began selling produce to Colace. Because Giant Foods was now able to buy Holland produce from Colace, IPI lost the Giant Foods account. This had a devastating impact on IPI's already shaky finances and led Mr. Keijer to travel to Holland on or about May 10, 1999, to discuss the matter with Mr. Botman.

When the Keijers flew to Holland to meet with Mr. Botman in May, 1999, IPI was approximately $ 1.6 million in arrears and approximately sixty to ninety days overdue in its payments to Botman International. Although there is some dispute over exactly what information was communicated to Mr. Botman at this meeting, Defendants contend that Mr. Botman was informed that for IPI to remain viable, it was imperative that it be able to maintain the Giant Foods account. At this meeting, according to Defendants, it was proposed by Botman International that IPI would receive a twenty-five cent per carton commission for logistical support. Also, according to Defendants, there was an agreement by Mr. Botman and Botman International to extend IPI's payment schedule to sixty days. In support of their contention that Botman International agreed to extend IPI's payment schedule to sixty days, Defendants cite to a May 12, 1999, Memorandum signed by Mr. Keijer and Mr. Botman stating, in pertinent part, "For its part, Botman has expressed its concern that an aging analysis of IPI's account shows that some of IPI's invoices are outstanding for more than 60 days. Botman International and IPI agree that it [sic] their mutual goal to find solutions to IPI's financial concerns so as to enable it to bring its account within the 60 day range which is acceptable to Botman." (Apr. 10, 2000, Aff. of Dirk Keijer, Ex. C.) The Memorandum also states that "IPI agrees to provide Botman with monthly and cumulative profit and loss statements" and that the parties discussed various measures proposed by Botman to facilitate IPI's financial recovery. According to the Memorandum, one of the measures discussed was an "incentive bonus." However, it is clear from the Memorandum that no agreement as to any bonus had been reached at that time. Rather, the document itself states that "the specific amount, timing, duration and method of payment [had]

yet to be discussed." [4] *Id*.

After the May, 1999 meeting, IPI continued to purchase numerous lots of produce from Botman International until August 30, 1999. During this time, IPI's debt to Botman International remained substantial. To protect itself, on September 9, 1999, Botman International sent IPI Notices of Intent to Preserve Trust Benefits covering invoices between July 20, 1999, up to and including August 25, 1999 and covering a total of $ 433,079.54 in unpaid invoices.[5] Ultimately, by September 29, 1999, IPI owed Botman International a then-undisputed balance of $ 1,464,233.75 for produce that it had purchased.

As IPI's debt was mounting higher and higher, IPI's principals sought to limit whatever potential liability they might incur for the unpaid produce under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § § 499a, et seq. For this reason, Ms. Keijer resigned her position as an officer of IPI and transferred all of her shares of IPI to her husband. After resigning as an officer of IPI, Ms. Keijer undertook the representation of IPI as its general counsel. In another effort to limit PACA liability, IPI sought to have the payment schedule extended to sixty days during the May 12, 1999, meeting with Mr. Botman. Because PACA regulations provide that "the maximum time for payment for a

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[4] One of the most intensely disputed facts in this case is whether this document represents an agreement between IPI and Botman International. Defendants contend that it does; Botman International contends that it does not. In Judge Buckwalter's November 4, 1999, Memorandum regarding Botman's Motion for Preliminary Injunction, Judge Buckwalter found that the document clearly was not an agreement and that Botman refused any effort by IPI to characterize it as such. (Doc. No. 10.) We agree with Judge Buckwalter's conclusion in this respect.

[5] Under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e(c)(3), an unpaid produce supplier loses the benefits of the PACA trust "unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored."

shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities," 7 C.F.R. § 46.46(e)(2), had Botman International been agreeable to extending the payment schedule to sixty days, this would have prevented the creation of the PACA trust.

Broadly speaking, this case concerns IPI's alleged failure to pay Botman International for various shipments of produce that IPI ordered and received from Botman totaling $ 1,4 64,233.75. However, it is clear from the submissions of the parties that this case more closely revolves around the alleged failure of Defendants to maintain a statutorily mandated trust pursuant to PACA. With respect to these particular allegations, Botman International claims that between July 20, 1999 and August 25, 1999, Botman International sold produce to IPI totaling $ 433,079.54 and that Botman International took appropriate measures under PACA to preserve its trust benefits as to this amount.

Botman International initiated this action by filing suit in this court on October 15, 1999. On that same day, Botman International requested that the court issue a preliminary injunction to enforce the statutory trust under PACA and to establish a constructive trust until Defendants paid $ 1,464,233.75 plus interest, costs, and attorneys' fees to Botman International. On October 25, 27, and 29, 1999, Judge Buckwalter held a hearing on the issuance of a preliminary injunction and, after making several findings of fact, entered a Preliminary Injunction on November 4, 1999. After the preliminary injunction was issued Botman International amended its complaint on November 18, 1999 to assert additional causes of action against Defendants. Defendants answered the complaint on December 8, 1999. The initial pleadings in this matter were then followed by a litany of motions to dismiss and for summary judgment, as well as two motions by Defendants to amend their answer to the complaint. Judge Buckwalter denied the motions to dismiss and for summary judgment on June 28, 2000 and permitted Defendants to amend their answer. Defendants' Amended Answer to Amended Complaint with Affirmative Defenses and Counterclaims consists of 1,510 paragraphs contained within its extraordinarily bulky 552 pages. The Amended Answer also contains sixteen affirmative defenses and six counterclaims. Much of Defendants' Amended Answer consists of an exceptionally detailed pleading of the facts underlying their six

counterclaims wherein Defendants describe documents that were simultaneously filed as exhibits. On June 27, 2001, Botman International filed the Instant Motion.

II. Legal Standard

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56 "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment . . . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." FED. R. CIV. P. 56(c). The moving party has the initial burden of demonstrating the absence of genuine issues of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Following such a showing by the moving party, the nonmoving party must make a sufficient showing to establish the existence of an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. Discussion

Judge Buckwalter made numerous findings of fact and conclusions of law with respect to this matter in his Memorandum accompanying the Order of Preliminary Injunction entered on November 4, 1999.
The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is

customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999).

In light of the preliminary nature of the earlier proceedings in this matter, we will exercise our independent judgment with respect to Judge Buckwalter's earlier findings of fact and conclusions of law.

A. Defendants' Counterclaims Against Botman International

Defendants have raised six counterclaims that Botman International argues are without merit and should be dismissed. Because Defendants have raised issues in their Counterclaims that are relevant to our analysis of Botman International's claims, we will address Defendants' Counterclaims before considering the merits of Plaintiff's claims.[6]

1. Counterclaims Alleging that Botman International's Invoices Contained Overcharges

Defendants' First through Fifth Counterclaims essentially allege that Botman International sold various shipments of produce to IPI at inflated amounts for which Defendants now seek to recover. In their First Counterclaim, Defendants allege that Botman International, in

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[6] Defendants have also raised sixteen affirmative defenses in their Amended Answer. Plaintiff argues that these affirmative defenses "are essentially the same issues argued before the Court during the three days of hearings on the preliminary injunction, and/or already decided by Judge Buckwalter in motion practice" and that they should be "summarily dismissed." (Renewed Motion, at 17.) Plaintiff does not, however, offer any argument directed to any particular affirmative defense. To the extent that Defendants have raised these affirmative defenses in their response to Botman's Renewed Motion for Partial Summary Judgment, we will address them.

breach of its fiduciary and contractual obligations, illegally overcharged IPI for transportation services and that it was also enriched through the receipt of transportation rebates or other promotional payments from its transportation providers. Defendants also allege that these overcharges and rebates were used to obtain further profits "through manipulation of currency and exchange rates between Dutch Guilders . . . and U.S. Dollars." (Amended Answer P 1481.) Defendants demand that Plaintiff disgorge any illegal profits and that the illegal profits be held in a constructive trust for IPI's benefit.

In their Second Counterclaim, Defendants raise substantially the same allegations as in their First Counterclaim, i.e., that Botman International made false, misleading, and fraudulent statements that formed the basis of at least eighty-five, if not all, of Plaintiff's invoices, and request that "any and all overcharges found to be involved in Plaintiff's affirmative claims for unpaid shipments must be reduced by the sum of the actual and true charges, which Defendants believe to total more than $ 510,000.00 . . . ." (Answer P 1487.)

In their Third Counterclaim Defendants allege that Botman International's agents made materially false and misleading statements as to transportation charges in a scheme to defraud IPI of an amount estimated to exceed $ 2,000,000.00.

Defendants' Fourth Counterclaim alleges no additional facts, but merely states a claim for unjust enrichment based upon the alleged illegal profits.

Defendants' Fifth Counterclaim alleges a claim under the Rackateer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 et seq. Like Defendants' first four Counterclaims, Defendants' RICO claim is rooted in the allegation that Botman International was transmitting fraudulent invoices and statements to IPI by wire and mail "for the purpose of obtaining illegal and secret profits for IPI." (Amended Answer P 1500.)

Whether Defendants' allegation that Botman International overcharged IPI for certain produce shipments has merit necessarily hinges upon the language in Botman International's invoices relating to freight charges. This language seemingly indicates that many of the shipments from Botman International to IPI were negotiated on a cost

plus freight basis. Such an agreement, Defendants contend, is reflected in certain invoices containing phrases such as "Shipment is landed, customs cleared" or "Shipment is C/F."

The first step in determining whether Botman International overcharged IPI for produce shipments is to determine the meaning of the terminology used in the invoices. In interpreting the meaning of these terms, we note that the transactions between IPI and Botman International concerned the sale of perishable produce in the course of foreign commerce and therefore the transactions are governed by the terms of PACA. We will assume that the terminology used in the invoices has a meaning consistent with similar language used in PACA and its regulations.

We note that the parties do not appear to disagree as to the meaning of the phrases at issue. The phrases "Shipment is landed, customs cleared" or "Shipment is C/F" have meanings that concern the manner in which a particular shipment of produce is to be shipped to the purchaser. IPI argues that "'C/F' means that the seller is to pay for cargo and freight and, if PACA governs, is the same as 'C.a.f.', 'cost and freight.'" (Def.s' response, at 4.) PACA regulations specify that the term "C.a.f." means "cost and freight" and "shall be deemed to be the same as f.o.b. sales, except that the selling price shall include the correct freight charges to destination."[7] 7 C.F.R. § 46.43(v). Although Botman International does not contest Defendants' interpretation of the terms stated on the invoice, it argues that the terminology used in the invoices did not accurately reflect the contract between Botman International and IPI. Indeed, Botman International contends that "notwithstanding anyhing [sic] to the contrary on the Botman invoices, all shipments to IPI were on a 'delivered' basis." (Pl.'s Reply, at 3.)

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[7] Regulations provide that "f.o.b." means "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." 7 C.F.R. § 46.43(i). In an f.o.b. sale, the buyer is liable for paying freight charges. Tom Lange Co., Inc. v. ANIC, Inc., U.S. Dept. of Agric., PACA Docket R-93-81, slip op. (Sept. 22, 1993) (attached to Defendants' response as Exhibit A).

Looking to PACA regulations, "'Delivered' or 'delivered sale' means that the produce is to be delivered by the seller on board car, or truck, or on dock if delivered by boat, at the market at which the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. 7 C.F.R. § 46.43(p). The seller assumes the risk of loss and damage in transit not caused by the buyer." *Id*. Having sold the produce on a "delivered" basis, Botman International argues that "it doesn't matter to the buyer whether the shipping charges are listed as $ 50.00 or $ 50,000.00, because the price of the goods including such charges was set before shipping, and the shipping charges are paid by the seller." (Pl.'s Reply Memo., at 4.) In response, Defendants argue that even if Botman International did ship all produce to IPI on a "delivered" basis, Botman International's claim must be reduced by any transportation costs to market paid by IPI for all of the shipments in an amount to be determined at trial.

After careful examination of the invoices in question, we find that they clearly demonstrate that the listed shipping costs were irrelevant to the amount paid by IPI for produce it purchased from Botman International.[8] Indeed, in many instances it is impossible to attribute any meaning at all to the listed freight charges. Instead it is apparent that when IPI negotiated to purchase produce from Botman International, the shipping price was implicitly included in the per unit cost and the listed freight charge was irrelevant. For example, on or about July 20, 1999, IPI ordered 2,240 units of tomatoes from Botman International at a price of $ 7.00 per unit. The total dollar amount of tomatoes purchased was

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[8] In a sworn statement before the District Court of Alkmaar in the Netherlands, Adri Botman characterized the transportation and packing costs as "fictitious amounts," stating, "Once the unit prices and the quantities had been agreed upon, the prices for freight and packing were entered by hand before such an invoice was printed. These prices do not correspond to the transportation and packaging costs actually charged to IPI. The reasons why we do not enter the actual amounts here is that we do not want to let our competitors know what our actual transportation costs are. As a matter of fact, these transportation costs are aggressively negotiated by us and they constitute a part of our profit margin. The amounts listed for freight and packing on the invoices have no influence whatsoever on the import duties which Botman must pay." (Def.'s Opp., Ex. 10.)

$ 15,680.00. For this shipment of tomatoes, Botman International invoiced IPI for $ 15,680.00 and indicated that the "shipment is landed, customs cleared[,] duties paid." However, Botman International's invoice also indicates "freight included" for $ 16,000.00 and "packing included" for $ 2,240.00. Thus the sum of freight and packing charges listed on the invoice is alone $ 2,560.00 more than the actual invoiced amount. This example is not anomalous and it is significant for two reasons. First, it shows that when IPI ordered produce it did so on a unit price basis that was agreed to beforehand. There were no unknown charges levied against IPI. When IPI ordered tomatoes for $ 7.00 per unit, it received tomatoes at $ 7.00 per unit. Second, the example demonstrates the flaw in Defendants' argument that it only recently discovered that it was being charged for inflated shipping costs. In the above example the sum of the listed shipping charges totaled $ 18,240.00 whereas IPI was only invoiced for $ 15,680.00 - the cost of the produce alone. In other words, the listed shipping charges sometimes exceed the amount that Botman International actually charged IPI by very substantial amounts. Certainly it cannot be said that IPI only recently became aware that the listed shipping charges were inaccurate. That the shipping charges were inconsistent with the billed amount is clear from even a casual examination of the invoices. It is clear that IPI was not paying inflated shipping charges when the listed shipping charges were not a component of the total price paid by IPI.[9]

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[9] Defendants' argument that Plaintiff was under a fiduciary duty to obtain the lowest possible freight, transportation, and port clearing charges and to include only the actual and true charges for such services in its pricing and invoices to IPI is unavailing. In support of this argument, Defendants have *cited Tom Lange Co., Inc. v. ANIC, Inc.*, U.S. Dept. of Agric., PACA Docket R-93-81, slip op. (Sept. 22, 1993) (attached to Defendants' response as Exhibit A), a case argued by Defendants' present counsel. In ANIC, a purchaser of perishable agricultural produce argued that the seller of the produce had improperly inflated freight charges so as to make improper profits in violation of PACA. In response, the seller of the produce argued that it was not required by PACA to disclose what it was billed by the trucking companies that it utilized to ship the produce to the buyer. The Secretary of Agriculture disagreed. The Secretary held that because the subject sales were f.o.b., the buyer is responsible for the freight. In such a case, a seller acts in a fiduciary capacity if the seller initially finds a trucker, pays the

(continued...)

Defendants also argue that if Botman International had shipped all of the produce on "delivered" terms, as Botman International itself suggests, the claim must be reduced by transportation costs to market paid by IPI. Once again we have undertaken a careful review of the invoices in question and have discovered that not all of the invoices state the destination to which the shipments were delivered and that many of the invoices indicate that shipments were made to locations far from Philadelphia.[10]

Significantly, Defendants have not submitted receipts or other records that show that IPI ever paid for shipping costs for goods it received from Botman International. In other words, the record wholly lacks any evidence relating to transportation costs actually paid by IPI.

Defendants have failed to provide any evidence from which we could conclude that the location of these shipments was not previously agreed upon by the parties. As defined in the PACA regulations, a "delivered sale" is shipped by the seller to the buyer's market, "or at such other market as is agreed upon." 7 C.F.R. § 46.43(p) (emphasis added). Defendants have not suggested, and the voluminous record in this case also does not disclose, any instance in which IPI rejected a shipment of produce for failure to ship to the agreed-upon market. The mere fact that the produce may have been delivered to New York City or some other location besides Philadelphia does not lead to the conclusion that

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(...continued)
freight, and invoices the buyer. Because ANIC involved an f.o.b. sale, it is inapposite. In the instant case IPI was not separately billed for the shipping costs incurred by Botman International. By including the shipping cost as a component of the price of the produce that Botman International sold to IPI, Botman International made IPI fully aware of all costs inherent in the sale and IPI then had the opportunity to refuse to purchase the produce at the price offered. IPI cannot now come to court declaring that Botman International had a fiduciary duty to prevent IPI from making imprudent business decisions regarding its purchases of produce.

[10] The shipments were mostly sent to airports in New York City, Newark, and Philadelphia. However, at least one shipment was sent via air to Chicago, and numerous other shipments were sent via air to Washington, D.C.

Botman International's claims must be reduced by the cost of IPI's transportation costs to Philadelphia. Botman International cannot be held liable where there has been no showing that IPI paid any freight charges for the produce it received from Botman International and where there is no indication that the produce was delivered to a location different from that agreed upon by the parties. Accordingly, we are compelled to conclude that Botman International did not fraudulently overcharge Plaintiff for any shipments of produce. We will therefore grant Plaintiff's motion for summary judgment with respect to Defendants' First through Fifth Counterclaims.

2. Sixth Counterclaim: Breach of Contract

Defendants' Sixth Counterclaim alleges that Botman International and IPI entered into an oral agreement in which Botman was to compensate IPI for its loss of the Colace/Giant Foods account by paying IPI the sum of twenty-five cents per box/carton for all produce sold to Colace and/or Giant Foods by or for Botman International. Defendants further allege that this sum "would be paid to IPI by issuance of credit memo invoices by Botman International for 'logistical services' and credited to IPI's account with Botman for a period of five (5) years commencing on May 12, 1999." (Def.s' Answer P 1506.) Defendants contend that Botman International issued the required credits to IPI from May through August, 1999, but stopped the payments in September, 1999 despite the fact that Botman International continues to sell substantial amounts of produce to Colace/Giant Foods.

Botman International has moved for summary judgment with respect to this breach of contract claim arguing that there was no agreement to pay the twenty-five cent fee. First, Botman International disputes that IPI ever had a direct relationship with Giant Foods. Rather, Botman International contends that IPI bought produce from Botman International, sold the produce to a third party, and that third party then sold the produce to Giant Foods. Botman International also disputes Defendants' assertions that the loss of the Giant Foods account negatively affected IPI's profitability and that Botman International used confidential information it obtained from IPI to negotiate sales directly with the Colace firm for the Giant Foods account. While Botman

International does not dispute the fact that IPI is no longer a supplier of produce to Giant Foods, Botman International contends that this is due to the fact that Giant Foods decided to eliminate the middlemen and deal directly with Botman International. Finally, Botman International disputes that there was ever an agreement to compensate IPI for the loss of the Giant Foods account.

Botman International certainly has met its initial burden in demonstrating the absence of a genuine issue of material fact concerning the existence of any oral agreement on May 12, 1999, for Botman International to compensate IPI. Of particular significance is a document signed by both Mr. Keijer and Mr. Botman stating, "Botman has proposed a substantial 'incentive bonus' plan as a means of motivating IPI to continue its business relationship with Botman in a positive manner, however, the specific amount, timing, duration and method of payment have yet to be discussed." (Botman Certification, Doc. 55, Ex. 13.) This document was signed on the same day that Defendants allege that a different oral agreement was reached, yet this document expressly disclaims any agreement as to an "incentive bonus."[11]

Because Botman International has met its initial burden of demonstrating the absence of a genuine issue of material fact with respect to this claim, it is incumbent upon Defendants to come forward with a showing that a genuine issue of material fact exists. However, Defendants have failed to respond to Plaintiff's motion for summary judgment with respect to their Sixth Counterclaim. In failing to respond Defendants have quite obviously failed to meet their burden. Moreover, we deem Defendants' Sixth Counterclaim to be abandoned. *Estate of Henderson v. City of Philadelphia*, No. 98-3861, 1999 U.S. Dist. LEXIS 10367, at *48-49 (E.D. Pa. July 12, 1999) (granting the defendant's motion for summary judgment where the plaintiff abandoned its claim

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[11] In his November 4, 1999 Memorandum addressing Botman International's Motion for Preliminary Injunction, Judge Buckwalter found that the document signed on May 12, 1999, "is clearly not an agreement and Botman clearly refused any effort by IPI to so characterize it." (Doc No. 10 P 7.)

by failing to mention a claim as a basis for denying the defendant's motion for summary judgment); *Wright v. Montgomery County,* No. 96-CV-4597, 1998 U.S. Dist. LEXIS 20414, at *11-12 (E.D. Pa. Dec. 22, 1998) ("In the instant matter, Plaintiff failed to respond to Defendants' Motion for Summary Judgment concerning all of Plaintiff's State Law Tort Claims pleaded in Counts Two through Eight of the Complaint. The Plaintiff, however, responded to Defendant's Motion for Summary Judgment regarding his constitutional claim. By choosing to defend his constitutional claim, and not his state law claims, it is apparent that the Plaintiff has elected to abandon his state law tort claims.") Accordingly, we will grant summary judgment on Defendants' Sixth Counterclaim in favor of Botman International and against Defendants.

B. Plaintiff's Claims against IPI

1. Count I: Breach of Contract

In Count I of its Amended Complaint, Botman International alleges that from May 12, 1999 through August 30, 1999, IPI contracted to purchase perishable agricultural commodities on account and that IPI has failed to pay Botman International the balance of $ 1,464,233.75, thereby breaching its contract with Botman International. When this case was filed, Defendants did not dispute the fact that IPI owed $ 1,464,233.75 to Botman International for produce that IPI had purchased but never paid for. In fact, on or about September 29, 1999, Mr. Keijer faxed a letter to Botman International stating, "As agreed on September 28th, 1999, International Produce Imports, Inc. ("IPI") confirms that the undisputed balance of outstanding and unpaid invoices due and payable to Botman International B.V. ("Botman") is $ 1,464,233.75." (Certification of Adri Botman, Exhibit 4.) This fact was confirmed by Mr. Keijer at the October 25, 1999 hearing for the preliminary injunction. During the cross-examination of Mr. Keijer by Mr. Gentile the following exchange took place:

Q: Do you acknowledge that IPI, your company, owes Botman more than $ 1.4 million?

A: Yes, sir.

(Tr. of Oct. 25, 1999 hearing, at 18.)[12] Mr. Keijer now states, "I believed at that time that IPI owed Botman $ 1.4 million on account of the invoices in the Complaint. That was, however, prior to my discovery the following April of the facts which indicate to me that Botman had been defrauding IPI of many thousands of dollars in secret profits and freight overcharges. (Declaration of Dirk J. Keijer, at 5.) However, for the reasons stated above, there has been no showing that Botman International defrauded IPI or that the invoices inaccurately reflect the true value of goods purchased and received by IPI. It cannot be said that Defendants have only just now discovered the shipping charges listed on the invoices were false. That these charges were fictitious is apparent from a casual examination of the invoices that were in Mr. Keijer's possession. Accordingly, we will grant Plaintiff's motion for summary judgment with respect to its breach of contract claim against IPI.

2. Counts II, III and IV: Failure to Maintain Trust Under PACA, Breach of Fiduciary Duty, and Dissipation of Trust Assets

In Count II of its Amended Complaint, Botman International alleges that a statutory trust arose in favor of Botman International upon IPI's receipt of perishable agricultural commodities purchased from Botman International, and that IPI has failed to maintain this trust in violation of PACA and its regulations. Botman International further alleges that the statutory trust consists of all inventories of food or other products

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[12] During the cross-examination of Mr. Keijer by Mr. Gentile the following exchange took place:

Q: Do you acknowledge that IPI, your company, owes Botman more than $ 1.4 million?

A: Yes, sir.

(Tr. of Oct. 25, 1999 hearing, at 18.)

derived from the commodities and the proceeds from the sale of the commodities, amounting to $ 433,079.54. Botman International alleges that IPI failed to hold perishable agricultural commodities subject to the PACA trust in trust for the benefit of Botman International. This, according to Botman International, constituted a breach of trust. In Count III, Botman International alleges that IPI dissipated trust assets by improperly spending proceeds obtained from the resale of perishable agricultural commodities for purposes other than promptly paying Botman International as required by 7 U.S.C. § 499b. Similarly, in Count IV Botman International alleges that IPI failed to pay for perishable agricultural commodities that IPI received from Botman International in violation of PACA and its regulations.

PACA was enacted by Congress in 1930 for the purpose of regulating the interstate trade in perishable agricultural commodities such as fresh fruits and vegetables. George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 990 (2d Cir. 1974). In 1984, PACA was amended to provide for a statutory trust on the behalf of unpaid suppliers or sellers.

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. 7 U.S.C. § 499e (c)(2).

Federal regulations implementing the PACA state that the PACA trust is a "nonsegregated 'floating' trust." 7 C.F.R. § 46.46(b). *See also Consumers Produce Co. v. Volante Wholesale Produce*, 16 F.3d 1374, 1378 (3d Cir. 1994); *In re United Fruit & Produce Co. Inc.*, 242 B.R. 295, 301-02 (Bankr. W.D. Pa. 1999). "Commingling of trust assets is contemplated." 7 C.F.R. § 46.46(b). Thus, a seller need not trace specific trust assets in order to recover assets subject to the trust. *See In re W.L. Bradley Co.*, 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987). "The PACA trust provisions were modeled after the PSA [Packers and Stockyards Act, 7 U.S.C. § § 181-229] trust provisions and authority

developed under that statute is persuasive in the interpretation of the PACA trust." *Consumers Produce*, 16 F.3d at 1382 n.5 (citing *In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D. Tex. 1985)). PACA regulations provide that when a statutory trust arises under PACA, the dealer to whom the goods were sold is "required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b)." 7 C.F.R. § 46.46(d)(1).

Thus, even if there is no dissipation of trust assets there may still be a breach of trust if the trustee does not "maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." *Id.* It is clear from the record that Botman International is a PACA trust creditor. On September 9, 1999, Botman International sent IPI a Notice of Intent to Preserve Trust Benefits covering invoices between July 20, 1999 and August 25, 1999. The total of the invoices subject to the PACA trust is $ 433,079.54. Furthermore, Defendants admit that Botman International has not been paid for the shipments sent to IPI during July and August of 1999. (Def.s' Response, at 3.) Defendants argue that Botman International misrepresented freight charges on its invoices and is therefore barred from recovery because of "unclean hands."[13]

In order to prevail on an "unclean hands" defense, a defendant must show fraud, unconscionability, or bad faith on the part of the defendant. *S & R Corp. v. Jiffy Lube, Int'l*, 968 F.2d 371, 377 n.7 (3d Cir. 1992). Defendants have not adequately shown any of these elements. Although the freight charges listed on Botman International's invoices appear to be incorrect, there has been no showing by Defendants that they have relied upon these representations. Furthermore, Defendants have not

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[13] Defendants have, in fact, raised other arguments as to why there can be no PACA liability in this case, but these arguments are raised only with respect to the claims of dissipation against the individual defendants.

come forward with any invoices or receipts indicating that it was IPI, not Botman International, who paid for shipping of produce from Botman International to IPI. This, together with the fact that many of the invoices so clearly demonstrate that the indicated shipping charges were meaningless, convinces us that Defendants cannot show unclean hands in this case.

It is also clear that Defendants do not have sufficient liquid assets to pay Botman International $ 433,079.54. However, Defendants argue that there has been no dissipation of trust assets because the combination of IPI's cash and accounts receivable far exceeds the value of the PACA trust. Although Defendants have not attached any documents to their response to Botman International's Renewed Motion for Summary Judgment, certain documents do inform our opinion in this respect. For instance, in Defendants' Compliance With Temporary Restraining Order, it is indicated that as of October 11, 1999, IPI had outstanding accounts receivable of $ 581,774.[14]

Under 7 U.S.C. § 499e(c)(2), accounts receivable are part of the PACA trust and must be preserved for the benefit of all unpaid suppliers. There is evidence here that accounts receivable have been preserved for the benefit of Botman International. At any rate, there is certainly no showing that the accounts receivable are fictitious or otherwise uncollectible. In other words, Botman International has not shown that there has been a dissipation of trust assets by IPI. Because it has not been shown that the trust res is insufficient to pay the beneficiaries of the trust, we need not address whether the payment of business expenditures out of the floating trust constitutes a dissipation of trust assets. *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346 (S.D.N.Y. 1993) and its progeny are distinguishable in this respect. There the courts held that the use of proceeds from the sale of perishable agricultural produce for legitimate business expenditures is

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[14] We note this is consistent with Judge Buckwalter's finding that IPI's accounts receivable are substantially less than the amount owed to Botman International. The total amount of money owed to Botman International is much greater than the value of the PACA trust. This is because the PACA trust covers only shipments delivered to IPI between approximately July 20, 1999 and August 25, 1999.

a breach of trust. See *Id.* at 348. However, in neither Morris Okun or any other similar case was there a dispute over the value of the trust res.[15] Although Botman International is free to show that these accounts receivable are non-existent or illusory, at this time there is a material issue of fact as to whether IPI dissipated trust assets.

Therefore, we will deny Plaintiff's Renewed Motion for Summary Judgment on Count III, Dissipation of Trust Assets.

Regardless of whether IPI dissipated trust assets, it is clear that IPI has breached a duty owed to Botman International with respect to the manner in which it has kept the PACA trust. PACA regulations require that trust assets be "freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." 7 C.F.R. § 46.46(d)(1). Defendants concede that IPI's liquid assets are insufficient to satisfy IPI's obligations to Botman International subject to the PACA trust. In failing to make assets "freely available to satisfy [its] outstanding obligations" to Botman International, IPI has breached its duty as trustee. Because there is no issue of material fact as to whether IPI has maintained trust assets in a manner such that the assets are available to satisfy its debts to Botman International, we conclude that IPI has breached the PACA trust and its corresponding fiduciary duty to Botman International. Accordingly, summary judgment will be entered in favor of Botman International and against IPI with respect to Counts II (Failure to Maintain Trust Under PACA) and IV (Breach of Fiduciary Duty) of Plaintiff's Amended Complaint.

C. Plaintiff's Claims Against the Individual Defendants

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[15] Because it has not been shown that the trust res is insufficient to pay the beneficiaries of the trust, we need not address whether the payment of business expenditures out of the floating trust constitutes a dissipation of trust assets. *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346 (S.D.N.Y. 1993) and its progeny are distinguishable in this respect. There the courts held that the use of proceeds from the sale of perishable agricultural produce for legitimate business expenditures is a breach of trust. See *Id.* at 348. However, in neither Morris Okun or any other similar case was there a dispute over the value of the trust res.

Botman International argues that the Keijers are responsibly connected persons to IPI and, as such, are liable to PACA trust creditors for any breach of trust or dissipation of trust assets that has occurred.[16] In response, Defendants argue that there has been no dissipation of PACA trust assets and that there is no basis for holding the individual defendants personally liable. In particular, Defendants argue that the payment of officers salaries and supplies are not properly considered a dissipation of PACA trust assets and that IPI's cash and accounts receivable exceed any amount that may arguably be subject to a PACA trust. Moreover, since the IPI's assets exceed the trust amount, Defendants argue, there is a material issue of fact as to whether there has been any dissipation of assets and therefore judgment should not be entered against the individual defendants.

PACA itself does not specify that a "responsibly connected" person will have personal liability for corporate debts. See 7 U.S.C. § 499a(b)(9). Under the statute, the only significance that attaches to being a "responsibly connected" person is that such a person is subject to certain restrictions regarding future employment with a PACA licensee. See 7 U.S.C. § 499h(b). Nevertheless, a growing number of courts have imposed personal liability on persons who are actively involved in the day-to-day operations of the corporation.[17] See, e.g., *Shepard v. K.B.*

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[16] 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." 7 U.S.C. § 499a(b)(9). Notably, the statute does not declare that "responsibly connected" persons may be held secondarily liable for breach of fiduciary duty.

[17] Although most of the cases that hold individuals to be secondarily liable purport to do so because the person was actively involved in the operation of the corporation,

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Fruit & Vegetable, Inc., 868 F. Supp. 703, 705-06 (E.D. Pa. 1994). These courts have generally concluded that "the crucial factor in imposing such liability is the existence of fiduciary duties under the Act and a breach of those duties when the PACA trust is not preserved." Bartholomew M. Botta, Personal Liability for Corporate Debts: The Reach of the Perishable Agricultural Commodities Act Continues to Expand, 2 Drake J. Agric. L. 339, 345 (1997). When considering whether to impose personal liability on an individual, courts have generally held that "PACA liability attaches first to the licensed seller of perishable agricultural commodities. If the seller's assets are insufficient to satisfy the liability, others may be found secondarily liable if they had some role in causing the corporate trustee to commit the breach of trust." *Shepard*, 868 F. Supp. at 706. One is not secondarily liable under PACA simply because the person is an officer or shareholder of a corporation. *Id*. Rather, the court must first consider whether the person was actively involved in the corporation and if such involvement is sufficient to establish legal responsibility. *Id*. If a sufficient basis for legal responsibility exists, it then must be determined whether the person breached a fiduciary duty owed to the PACA creditor. *Id*. "Being a statutory trust, PACA incorporates common law breach of trust principles." *Id*.

1. Plaintiff's Claims Against Mr. Keijer for Breach of Fiduciary Duty/Conversion and Dissipation of Trust Assets

It is undisputed that Mr. Keijer was actively involved in the operation of IPI throughout the history of IPI's dealings with Botman International. (Def.s' Amended Answer P 6, Dec. of Dirk J. Keijer P 12.) At all times while the PACA trust has been in existence, Mr. Keijer has been an

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(...continued)
we note that in each case the person held secondarily liable would also be considered a "responsibly connected" person. However, the converse is not true. A person who would be considered "responsibly connected" under the statute may not be held secondarily liable if they did not exercise day-to-day control over the corporation. *See Shepard*, 868 F. Supp. at 706; *Mid-Valley Produce Corp. v. 4-XXX Produce Corp*., 819 F. Supp. 209 212-13.

officer of IPI and holder of 100 percent of the outstanding stock of IPI. There has never been any suggestion that he is merely a nominal officer. Indeed, by Mr. Keijer's own admissions, he was solely responsible for IPI's activities during the time period in which the PACA violations occurred. (Declaration of Dirk Keijer P 17.) These facts are sufficient to establish that Mr. Keijer had "active involvement" in the operation of the business such that he may be held secondarily liable if IPI breached its fiduciary duty owed to Botman International under PACA. See *Shepard*, 868 F. Supp. at 706.

In determining whether Mr. Keijer may be held liable for dissipation of PACA trust assets, we note that there is a material question of fact as to whether IPI has dissipated any trust assets. Therefore, we must also necessarily reach the same conclusion with respect to Mr. Keijer, for his liability for dissipation of trust assets is dependent upon a finding that IPI is liable for dissipation of trust assets. Accordingly, we will deny Plaintiff's Renewed Motion for Summary Judgment on Count X (Dissipation of Trust Assets) with respect to Mr. Keijer.

However, a PACA trustee has a duty to preserve trust assets in a manner in which the assets are freely available to satisfy the trustees' obligations. 7 C.F.R. § 46.46(d)(1). Thus, a breach of fiduciary duty may occur even without dissipation of trust assets if the trust assets are not preserved in a manner such that they are freely available to satisfy IPI's obligations to Botman International. It has already been established that IPI has breached the statutory trust and its corresponding fiduciary duty to Botman International by failing to preserve the PACA trust assets in a manner such that they are freely available to satisfy IPI's debts to Botman International. Because Mr. Keijer was admittedly responsible for all of IPI's activities at all relevant times, Mr. Keijer is secondarily liable for that breach of trust. *See Mid-Valley Produce Corp. v. 4-XXX Produce Corp.*, 819 F. Supp. 209, 212. Accordingly, we will grant summary judgment in favor of Botman International and against Mr. Keijer with respect to Counts IX (Breach of Fiduciary Duty - Constructive Trust) and XI (Breach of Fiduciary Duty - PACA) of Plaintiff's Amended Complaint.

2. Plaintiff's Claims Against Ms. Keijer for Breach of Fiduciary Duty/Conversion Dissipation of Trust Assets

Botman International argues that Ms. Keijer is a responsibly connected person in this matter and that she, like Mr. Keijer, may be held secondarily liable for a breach of fiduciary duty and dissipation of trust assets. In support of this argument, Botman International argues that in order to avoid personal liability under PACA, Ms. Keijer began taking steps in May, 1999, to dissociate herself from IPI by resigning as an officer and transferring her stock in the corporation to Mr. Keijer. After dissociating herself from IPI, Plaintiff contends that Ms. Keijer "caused IPI to be re-incorporated in Delaware, in anticipation of taking it into bankruptcy" (Pl.'s Reply, at 24) and prepared "the 'so called' agreement to change the terms of payment to '60 days,' which would take the transactions outside of the PACA, . . . flew to Hoofddorp to have it executed by Mr. Botman . . ., and began putting a PACA disclaimer on IPI invoices." (Pl.'s Reply, at 25.) In support of its argument that Ms. Keijer should be held secondarily liable, Botman International also sets forth Judge Buckwalter's finding that "until May 5, 1999, Clare C. Keijer was a shareholder and officer of IPI. Thereafter, she remained as general counsel to IPI and had sufficient managerial functions with respect to financial matters as to be in a position of control, together with Dirk Keijer, over the corporate entity, IPI, now through her legal services, a Delaware Corporation." (Memo. of November 4, 1999, Findings of Fact P 4.)

We find that a genuine issue of fact exists as to whether Ms. Keijer was actively involved in the operation of IPI subsequent to May 5, 1999. It is uncontested that Ms. Keijer was acting as IPI's general counsel, for which she received a salary, even though she was not an officer or shareholder at any time in which the PACA trust was in existence. (Pl.'s Reply, at 24.) We are not persuaded that it is appropriate at this stage to infer that because Ms. Keijer was involved insome business decisions she was actively involved in the decisions leading to IPI's failure to perform its PACA obligations. The record reflects that Ms. Keijer would, on occasion, assist in IPI's bookkeeping, that she was knowledgeable about IPI's operations, and that she performed legal services for IPI. However, it does not necessarily follow from these facts that Ms. Keijer was involved in the day-to-day control over IPI's affairs such that she can be held legally responsible for any PACA trust

violations that may have occurred.

We also note that Botman International has failed to set forth any cases demonstrating that persons not formally associated with a dealer may be held personally liable for the acts of the corporation. We are not aware of any case in which a person has been held secondarily liable who was not either a shareholder or officer of the corporation.[18] *Cf. Skone & Connors Produce v. Panattoni,* No. 91-36358, 1994 U.S. App. LEXIS 27368 (9th Cir. Sept. 14, 1994) (finding personal liability for a husband and wife who were the sole shareholders of a PACA dealer); Morris Okun 814 F. Supp. 346 (holding shareholder and officer personally liable); *Mid-Valley Produce*, 819 F. Supp. 209 (holding president of corporation personally liable); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997) (holding that individual shareholders, officers, or directors of a corporation may be held personally liable under PACA); *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995) (finding liability on the part of a person who was sole shareholder, director, and president of the corporation).

For the foregoing reasons, we will deny Plaintiff's Renewed Motion for Partial Summary Judgment with respect to all claims against Ms. Keijer.

An appropriate Order follows.

ORDER

AND NOW, this 27th day of July, 2004, upon consideration of Plaintiff's Renewed Motion for Partial Summary Judgment (Doc. No. 53), Defendants' response (Doc. No. 57), Plaintiff's Reply Memorandum of Law in Support of Motion for Partial Summary Judgment (Doc. No. 64), and all documents contained in the record, it is ORDERED that:

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[18] Although we have not discovered any case in which a person who is neither shareholder nor officer has been held secondarily liable for breach of fiduciary duty, we do not presently hold that such formal contacts are necessary to secondary liability. Our decision to deny summary judgment as to claims against Ms. Keijer is sufficiently grounded in the fact that there has not been an adequate showing of her active involvement, regardless of whether formal contacts are necessary or not.

1. Summary Judgment is GRANTED in favor of Plaintiff and against Defendants on Defendants' First through Sixth Counterclaims;

2. Summary Judgment is GRANTED in favor of Plaintiff and against IPI on Counts I (Breach of Contract), II (Failure to Maintain Trust Under PACA), and IV (Breach of Fiduciary Duty);

3. Summary Judgment against IPI on Count III (Dissipation of Trust Assets) is DENIED;

4. Summary Judgment is GRANTED in favor of Plaintiff and against Dirk J. Keijer on Counts IX (Breach of Fiduciary Duty - Constructive Trust) and XI (Breach of Fiduciary Duty - PACA);

5. Summary Judgment against Dirk J. Keijer on Count X (Dissipation of Trust Assets) is DENIED; and

6. Summary Judgment against Clare A. Keijer is DENIED on all Counts.

IT IS SO ORDERED.
BY THE COURT:
R. Barclay Surrick, J.

MERNA K. JACOBSON v. USDA.
No. 03-1157.
Filed August 5, 2004.

(Cite as: 2004 U.S. App. 202).

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle and Roberts, Circuit Judges.

OPINION

ORDER

Upon consideration of petitioner's petition for rehearing filed July 16, 2004, it is **ORDERED** that the petition be denied.

Per Curia

THE POTATO KING, INC., VIKING PRODUCE, INC., WHOLESALE PRODUCE SUPPLY CO., W.A. WHITE BROKERAGE CO., KELLOGG COMPANY FOOD BROKERS and OKRAY FAMILY FARMS, INC., v. BENSON'S WHOLESALE FRUIT, INC., DAVID A. ROALKVAM, RHONDA ROALKVAM, ROYAL BANCSHARES, INC. and ROYAL BANK.
No. 03-C-552-C .
Filed August 27, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 17523).

PACA – Trust *res* preservation – Responsibly connected – Secondary liability for trust assets.

PACA seller notified buyer of intent to preserve PACA trust assets under 7 USC § 499e(c)(4). The sole owners of the seller entity failed to maintain the trust *res* and assets were distributed to creditors and employee salaries. Seller may bring action under a reparation order to be enforced by the Secretary under 7 USC § 499f or g, or alternately, through a court action under 7 USC § 499e(c)(5) wherein individuals may be held secondarily liable for breach of the PACA fiduciary trust.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUDGES: BARBARA B. CRABB, District Judge.

OPINION AND ORDER

In this civil action for declaratory, injunctive and monetary relief, plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co., Kellogg Company Food Brokers and Okray Family Farms, Inc. are suing defendants Benson's Wholesale Fruit, Inc., David Roalkvam, Rhonda Rolkvam, Royal Bancshares, Inc. and Royal Bank for breach of contract and violation of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a et seq. Plaintiffs argue that they incurred damages when defendants failed to maintain and use trust funds as required under the Act. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is plaintiffs' motion for partial summary judgment against defendant Benson's Wholesale Fruit, Inc. for failure to pay promptly and maintain trust assets and breach of contract and against defendants David and Rhonda Roalkvam for breach of fiduciary duty. Plaintiffs seek $ 185,760.54 from defendants. Defendants have not submitted any response to plaintiffs' motion for summary judgment against them. On February 4, 2004, I entered a final default judgment against defendant Benson's Wholesale Fruit, Inc., ordering defendant to pay plaintiffs $ 153,101.54 plus pre-judgment and post-judgment interest and costs and disbursements of this action, totaling $ 164,641.95. The default judgment did not include the amount owed to plaintiff Okray Family Farms, Inc. Because I have entered final judgment against defendant Benson's Wholesale Fruit, Inc., I will deny plaintiffs' motion for partial summary judgment with respect to defendant Bensons' as moot as it applies to plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co. and Kellogg Company Food Brokers. However, I will grant the motion as it applies to plaintiff Okray Family Farms, Inc. In addition, plaintiffs argue that because defendants David and Rhonda Roalkvam are officers and shareholders of defendant Benson's Wholesale Fruit, Inc., they are liable to plaintiffs for breach of trust under the Act. Because the Act permits recovery against both the corporation and its controlling officers and because plaintiffs have

shown they are entitled to judgment as a matter of law, I will grant plaintiffs' motion for summary judgment against defendants David and Rhonda Roalkvam. From the plaintiffs' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff The Potato King, Inc. is a Wisconsin corporation with its principal place of business in La Crosse, Wisconsin. Plaintiff Viking Produce, Inc. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Plaintiff W.A. White Brokerage Co., is a Minnesota corporation with its principal place of business in Maiden Rock, Wisconsin. Plaintiff Wholesale Produce Supply Co. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Plaintiff Kellogg Company Food Brokers is a Minnesota corporation with its principal place of business in Mound, Minnesota. Plaintiff Okray Family Farms, Inc. is a Wisconsin corporation with its principal place of business in Plover, Wisconsin. All plaintiffs are engaged in the business of buying and selling wholesale quantities of perishable agricultural commodities in interstate commerce. Defendant Benson's Wholesale Fruit, Inc. distributes wholesale fresh produce and is a Wisconsin corporation with its principal place of business in Elroy, Wisconsin. Defendants David A. Roalkvam and Rhonda Roalkvam are officers of defendant Benson's. Defendants David and Rhonda Roalkvam purchased Benson's in 1991 and each owns 50% of the company's outstanding stock. In addition, they own the building where defendant Benson's is located and leased it to defendant Benson's until May 2003. Defendant Benson's paid the lease payments to David and Rhonda Roalkvam, who deposited those payments into their personal checking account.

B. Plaintiffs' Relationship with Defendants.

Plaintiffs The Potato King, Viking Produce, W.A. White, Wholesale Produce and Kellogg Company entered into contracts with defendant Benson's under which plaintiffs agreed to sell produce and Benson's agreed to purchase that produce. Although plaintiffs sold Benson's $

185,760.54 in produce, defendant Benson's failed to pay the contracts. Defendant Benson's owes the following amounts to plaintiffs: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

C. Violations under the Perishable Agricultural Commodities Act of 1930.

When plaintiffs sold produce to defendant Benson's, plaintiffs became beneficiaries of a trust pursuant to the Perishable Agricultural Commodities Act. The trust assets consist of all defendant Benson's produce or produce-related assets, including all funds commingled with funds from other sources and all assets procured by such funds in the possession or control of Benson's since the creation of the trust. Benson's failed to maintain sufficient trust assets to fully satisfy all qualified trust claims under the Act, such as plaintiffs' unpaid claims asserted in this action. Therefore, defendant Benson's breached its fiduciary duty to maintain sufficient trust assets to pay all trust claims under the Act. Benson's is in possession, custody and control of the trust assets for the benefit of plaintiffs and other similarly situated trust beneficiaries.

Defendants David and Rhonda Roalkvam are the only people in a position to control the trust assets of Benson's. Defendants David and Rhonda Roalkvam failed to maintain the trust fund, as required under the Act and they permitted assets subject to the trust fund to be transferred to third parties such as defendant Royal Bank and used for payroll, insurance and other bills. There was never a period when all of Benson's produce debt was paid in full.

Plaintiffs gave written notices of their intent to preserve trust benefits to Benson's in accordance with the Act's amendments of 1995 by including the statutory trust language, as set forth in 7 U.S.C. § 499e(c)(4), on each of their invoices and by sending those invoices to Benson's. Plaintiffs are "creditors," "suppliers" and "sellers" of produce under the Act. Defendants have no reason to dispute the validity of plaintiffs' claims under the Act and are aware of no facts that void plaintiffs' trust rights under the Act.

OPINION

On February 4, 2004, I entered a default judgment against defendant Benson's, ordering it to pay plaintiffs $ 153,101.54, plus pre-judgment interest in the amount of $ 7,618.07 plus $ 469.00 in costs, for a total award of $ 164,641.95, plus post-judgment interest. Defendant Benson's owed this amount pursuant to the agreements that it had with plaintiffs The Potato King, W.A. White, Wholesale Produce, The Kellogg Company and Viking Produce. The amount owed to plaintiff Okray Family Farms, Inc. was not included in the default judgment. Now plaintiffs, including plaintiff Okray Family Farms, Inc., move for partial summary judgment against defendant Benson's and defendants David and Rhonda Roalkvam. The undisputed facts that support plaintiffs' motion for partial summary judgment show that defendant Benson's owes plaintiffs a total of $ 185,760.54. The discrepancy in the amounts owed to plaintiffs under the default judgment and the motion for partial summary judgment is the result of adding the amount defendant Benson's owes to plaintiff Okray Family Farms, Inc., $ 32,659.00, to the total award sought ($ 153,101.51 plus $ 32,659.00 equals $ 185,760.54). In addition, I understand that plaintiffs are moving for partial summary judgment against defendants David and Rhonda Roalkvam to secure a secondary source of payment for its unpaid claims under the Perishable Agricultural Commodities Act.

7 U.S.C. § 499e(c)(2) provides in pertinent part that all "perishable agricultural commodities received by a . . . dealer . . . and any receivables or proceeds from the sale of such commodities . . . shall be held by such . . . dealer . . . in trust for the benefit of all unpaid suppliers or sellers of such commodities . . . until full payment of the sums owing in connection with such transactions has been received." Thus, when a dealer receives perishable agricultural commodities from a seller, a trust is created in favor of that unpaid seller. 7 U.S.C. § 499e(c)(2). This trust remains in effect until the seller receives full payment for the perishable agricultural commodities. *Id.* The Act defines "dealer" as "any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity in interstate or foreign commerce . . ." 7 U.S.C. § 499a(b)(6).

Defendants Benson's Wholesale Fruit, Inc. and David and Rhonda

Roalkvam do not oppose plaintiffs' motion for partial summary judgment. However, because I entered a default judgment against defendant Benson's Wholesale Fruit, Inc. on February 4, 2004, I will deny plaintiffs' motion against defendant Benson's as moot to the extent that the motion applies to plaintiffs The Potato King, W.A. White, Wholesale Produce, The Kellogg Company and Viking Produce. Because plaintiff Okray Family Farms, Inc. was not included in the default judgment and because it is undisputed that defendant Benson's owes this plaintiff $ 32,659.00, I will grant plaintiffs' motion for partial summary judgment against defendant Benson's Wholesale Fruit, Inc. only as it applies to the amount owed to plaintiff Okray Family Farms, Inc.

As to plaintiffs' motion against defendants David and Rhonda Roalkvam, it is undisputed that defendant Benson's is a distributor of wholesale fresh produce and that defendants David and Rhonda Roalkvam own defendant Benson's entirely. Furthermore, it is undisputed that defendants David and Rhonda Roalkvam failed to maintain the trust fund, as required under the Act, by permitting assets subject to the trust fund to be transferred to third parties such as defendant Royal Bank and used for payroll, insurance and other bills. Plaintiffs are beneficiaries of the trust assets and have rights under the Act to those assets. Trust rights under the Act "may be enforced either through a reparation order issued by the Secretary of Agriculture and subsequent judicial enforcement, 7 U.S.C. § 499f & g, or through a court action for breach of fiduciary trust, 7 U.S.C. § 499e(c)(5)." Patterson Frozen Foods v. Crown Foods International, 307 F.3d 666, 669 (7th Cir. 2002). "The latter remedy permits recovery against both the corporation and its controlling officers." *Id.*

Because it is undisputed that defendants David and Rhonda Roalkvam are controlling officers of defendant Benson's, which breached its fiduciary duty to maintain sufficient trust assets to pay all trust claims under the Act, I will grant plaintiffs' motion for partial summary judgment against defendants David A. Roalkvam and Rhonda Roalkvam. Defendants David and Rhonda Roalkvam are liable to plaintiffs' unpaid claims under the Act, totaling $ 185,760.54 and owed to the plaintiffs as follows: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff

W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

ORDER

IT IS **ORDERED** that

1. The motion for partial summary judgment by plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co. and Kellogg Company Food Brokers against defendant Benson's Wholesale Fruit, Inc. is **DENIED** as moot;

2. The motion for partial summary judgment by plaintiff Okray Family Farms, Inc. against defendant Benson's Wholesale Fruit, Inc. is **GRANTED**;

3. The motion for partial summary judgment by plaintiffs The Potato King, Inc., Viking Produce, Inc., Wholesale Produce Supply Co., W.A. White Brokerage Co., Kellogg Company Food Brokers and Okray Family Farms, Inc. against defendants David A. Roalkvam and Rhonda Roalkvam is **GRANTED** for breaching their fiduciary duty under the Perishable Agricultural Commodities Act of 1930;

4. Defendants David and Rhonda Roalkvam are liable to plaintiffs' unpaid claims under the Act, totaling $ 185,760.54 and owed to the plaintiffs as follows: 1) $ 17,895.47 to plaintiff The Potato King; 2) $ 8,843.79 to plaintiff Viking Produce; 3) $ 78,042.85 to plaintiff W.A. White; 4) $ 41,086.80 to plaintiff Wholesale Produce; 5) $ 7,232.63 to plaintiff Kellogg Company; and 6) $ 32,659.00 to plaintiff Okray Family Farms.

Entered this 27th day of August, 2004.

TRAY-WRAP, INC. v. USDA.
No. 02 Civ. 6898 (RCC).
Filed October 18, 2004.

(Cite: as 2004 U.S. Dist. LEXIS 20895).

PACA – Bribery – Inspection services, withheld – Arbitrary & capricious, when not – Breach of contract, when not – Negligence in failure to provide inspections, when not.

Court granted summary judgement against Tray-Wrap (a business seeking USDA inspection services under PACA). Court dismissed Tray-Wrap's negligence claim filed under Federal Tort Claims Act (FTCA) because it had failed to exhaust its administrative remedies. Court dismissed Tray-Wrap's contract claim against USDA for its alleged failure to deliver inspection services holding that Tray-Wrap failed to allege the details and existence of a contract for those services. Court dismissed Tray-Wrap's claim of denial of Constitutional due process for USDA's failure to grant Tray-Wrap an entitlement (inspections) since due process claims do not usually extend to claims of entitlement except where the government has little or no discretion to award the entitlement.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION
MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, U.S.D.J.

Plaintiff Tray-Wrap, Inc. ("Plaintiff" or "Tray-Wrap") brings this action against Defendant Ann M. Veneman, Secretary of Agriculture, United States Department of Agriculture ("USDA"), for negligence, breach of contract, due process violations, and Administrative Procedure Act ("APA") violations. Plaintiff seeks the restoration of inspection and grading services provided by the Agricultural Marketing Service ("AMS")[1] and monetary damages. Defendant moves for dismissal, or alternatively, for summary judgment.

I. Background:

Tray-Wrap, a company located at Hunts Point in the Bronx, New York, buys produce wholesale, repackages it, and sells it. After buying produce, Tray-Wrap typically applies to AMS for inspection services.

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[1] AMS is part of the USDA and provides inspections of produce upon request.

AMS inspections are voluntary and a company must apply for them, either orally or in writing. At the conclusion of an inspection, the AMS inspector issues a certificate stating whether the produce meets a specified grade. This determination is based on the presence of quality defects in a sample taken of the produce.

On October 27, 1999, a federal grand jury indicted eight AMS inspectors at Hunts Point and twelve owners or employees of companies operating there. These individuals were indicted for participating in an alleged racketeering and bribery scheme. Tray-Wrap manager Anthony Spinale ("Spinale") was one of the indicted individuals. The nine-count indictment against Spinale alleged that he bribed AMS inspectors in connection with inspections for Tray-Wrap and G&T Terminal Packaging Co. ("G&T"), another company with which he was affiliated. AMS responded by immediately suspending its inspectors who were indicted. AMS also conditionally withdrew inspection services from companies (including Tray-Wrap) whose owners or employees were indicted. AMS orally notified these companies of its decision within days. AMS subsequently sent letters to these companies setting forth the basis of its decision and inviting them to submit additional information. One of the affected companies, Cooseman Specialties, Inc. ("Cooseman"), filed suit against AMS and sought to enjoin it from withdrawing inspection services. AMS and Cooseman resolved the action by agreeing that, inter alia, inspection services would be restored if Cooseman represented that none of its indicted employees would participate in AMS inspections during the pendency of their criminal cases. Thereafter, AMS developed a similar template agreement for the other affected companies. The agreement required a company to represent that its indicted employees would have no involvement in AMS inspections during the pendency of their criminal cases. In addition, the companies had to waive their right to file any claims against USDA arising out of the circumstances that led to the agreement. Nine of the twelve affected companies entered into this template agreement and all had inspection services restored.

Of the three companies that did not enter into the template agreement, two (Tray-Wrap and G&T) were affiliated with Spinale. On March 13, 2000, Tray-Wrap, G&T, and a third company (collectively, "Tray-Wrap I Plaintiffs") filed suit against AMS claiming that AMS's

withdrawal of inspection services violated its due process rights and 7 C.F.R. § 50.11(a) ("Tray-Wrap I"). Tray-Wrap I Plaintiffs sought, inter alia, a temporary restraining order and preliminary injunction to stay the withdrawal of inspection services.

The Honorable Denny Chin, on April 12, 2000, denied Tray-Wrap I Plaintiffs' request for a temporary restraining order and preliminary injunction. In doing so, Judge Chin stated:

> The government's proposal for settlement is more than reasonable. Inspection services would be reinstated upon entering into the settlement agreement. Mr. Spinale can remain involved in the operation of the company. He would simply be prohibited from participating in inspections . . . . The government's actions are not arbitrary and capricious. They are not unreasonable.

Transcript of April 12, 2000 Hearing, at 9-10 (Lawler Decl. Ex. Q.)

On January 26, 2001, Spinale pled guilty to one count of bribing an AMS inspector. The remaining eight counts against Spinale involving Tray-Wrap were dismissed pursuant to a plea agreement. Spinale admitted, however, that "on the other dates in the Indictment, I paid Mr. Cashin $ 100 per inspection to influence the outcome of the report." Transcript of January 26, 2001 Hearing, at 10-11 (Lawler Decl. Ex. T.) Subsequently, on April 30, 2001, the remaining claims in Tray-Wrap I were dismissed with prejudice by stipulation.

On October 25, 2001, Spinale submitted a request for an AMS inspection on behalf of Tray-Wrap. AMS denied this request pursuant to its conditional withdrawal of inspection services. AMS subsequently advised Tray-Wrap that it needed to submit a letter stating that Spinale was no longer an employee. Tray-Wrap sent such a letter to AMS on November 14, 2001. AMS then sent a revised agreement to Tray-Wrap that would restore inspection services. The revised agreement provided, inter alia, that:

> Tray-Wrap acknowledges that Anthony Spinale is no longer employed by Tray-Wrap. Tray-Wrap agrees that if it ever rehires Anthony Spinale that it will immediately notify USDA that

> Anthony Spinale is one of its employees. Tray-Wrap, further agrees that a designated representative of Tray-Wrap shall be authorized to accept any inspection report from any official of the USDA on the warehouse floor, located on the first floor.

Agreement for Restoration of Inspection Services at Tray-Wrap, Inc. (Faraci Aff. Ex. B.)

In addition, the revised agreement provided that Tray-Wrap would waive its right to sue USDA on account of the circumstances giving rise to the agreement. Tray-Wrap refused to sign the agreement and AMS has therefore not restored inspection services to it.

While Spinale has not been employed by Tray-Wrap since late 2001, he continues to participate in AMS inspections at Hunts Point for other companies with which he is affiliated. Tray-Wrap filed the instant suit (Tray-Wrap II) on August 22, 2002.

II. Defendant's Motions to Dismiss:

Defendant seeks to dismiss the Complaint on three grounds: (A) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1); (B) failure to state a claim pursuant to Rule 12(b)(6); and (C) res judicata.

A. Plaintiff's Negligence Claim:

Plaintiff claims that it is entitled to monetary damages under the Federal Tort Claims Act ("FTCA") for AMS's negligence in refusing to provide it with inspection services. Defendant contends that this claim should be dismissed pursuant to Rule 12(b)(1) because Plaintiff failed to comply with certain procedural requirements of the FTCA.

The doctrine of sovereign immunity provides that the United States may only be sued with its consent. *See United States v. Mitchell*, 463 U.S. 206, 212, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983). Congress waived the United States' sovereign immunity for certain claims by enacting the FTCA. See 28 U.S.C. § § 1346(b), 2671-80. This waiver is subject to numerous conditions, each of which must be satisfied before a court may exercise its jurisdiction. One such condition is that a plaintiff filing suit under the FTCA must first file an administrative

claim with the appropriate federal agency. See *Id.* § 2675(a) (providing that a plaintiff filing suit under the FTCA must "have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."); see also 7 C.F.R. § 1.51 (noting that FTCA claims brought against the USDA must first be presented to the USDA). The administrative claim must "provide enough information to permit the agency to conduct an investigation and to estimate the claim's worth." *Romulus v. United States*, 160 F.3d 131, 132 (2d Cir. 1998).
Failure to comply with this requirement deprives a court of subject matter jurisdiction and requires dismissal. *See Adeleke v. United States*, 355 F.3d 144, 153 (2d Cir. 2004) (dismissing FTCA claim for lack of subject matter jurisdiction because "it is undisputed that [plaintiff] did not file any administrative claim with respect to his seized personal property."). Plaintiffs bear the burden of proving compliance with this requirement. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999). It is undisputed that Tray-Wrap has never filed an administrative claim with the USDA. Accordingly, this court lacks subject matter jurisdiction to hear Plaintiff's FTCA claim and it is dismissed.[2]

B. Plaintiff's Breach of Contract Claim:

Plaintiff also claims that AMS's actions in refusing to restore inspection services breached its contract with Plaintiff. Defendant contends that this claim should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

To state a claim for breach of contract under New York law, a plaintiff must allege: (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff; (3) breach of contract by the defendant; and (4) damages. *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996). While these elements need not be separately pleaded, failure to allege them will result in dismissal. *See, e.g., Sony Fin. Servs., LLC v. Multi Video Group, Ltd.*, 2003 U.S. Dist. LEXIS 10058, No. 03

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[2] It is thus unnecessary to consider Defendant's additional contention that Plaintiff's FTCA claim should be dismissed on the grounds that AMS's alleged negligence is not comparable to any common law tort liability in New York state.

Civ. 1730 (LAK), 2003 WL 21396690, at *2 (S.D.N.Y. June 17, 2003) (dismissing counterclaim for breach of contract because movant failed to allege terms of contract, nature of breach, or that defendant actually performed under contract); *Sel-Lab Marketing, Inc. v. Dial Corp.*, 2002 U.S. Dist. LEXIS 15932, No. 01 CIV. 9250 (SHS), 2002 WL 1974056, at *4-6 (S.D.N.Y. Aug. 27, 2002) (dismissing breach of contract claim because plaintiff failed to allege facts that could establish the existence of a valid contract).

Plaintiff cursorily notes in its Complaint that it had a "contractual right to inspection services." (Compl. P13.) Plaintiff does not allege how this contract was formed or what its terms were. Such conclusory allegations cannot establish the existence of a valid contract.[3] Likewise, Plaintiff does not plead that it performed its obligations under this supposed contract. Accordingly, Plaintiff's breach of contract claim is dismissed.

C. Plaintiff's Due Process Claim:

Plaintiff also claims that AMS's summary refusal to restore inspection services violated Plaintiff's due process rights as guaranteed by the Fifth Amendment. Defendant argues that this claim should be dismissed pursuant to Rule 12(b)(6).

The Due Process Clause of the Fifth Amendment extends its procedural guarantees only to "deprivation of a protected interest in life, liberty, or property." *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 581 (2d Cir. 1989). To have a constitutionally protected interest in property, "a person clearly must have more than an abstract need . . . for it . . . . He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Plaintiff is claiming a constitutionally protected

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[3] Plaintiff may be alleging that the Agricultural Marketing Act of 1946 ("AMA") and the regulations promulgated thereunder establish a contractual right to inspection services. If so, this argument is far off the mark. A statute is presumed not to create a contractual obligation, absent a clear intent by the government. See Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co., 470 U.S. 451, 465-66, 84 L. Ed. 2d 432, 105 S. Ct. 1441 (1985). Neither the AMA nor the regulations promulgated thereunder reflect such an intent.

interest in receiving inspection services that have been conditionally withdrawn.

Plaintiffs generally do not have legitimate claims of entitlement to government benefits (such as AMS inspection services) that are awarded in the government's discretion. *See, e.g., Sanitation and Recycling Indus. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997) ("The Commission is vested with broad discretion to grant or deny a license application, which forecloses plaintiffs from showing an entitlement to one."); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) ("Where a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit.").

To have a legitimate claim of entitlement to such benefits, the government must have very little authority or discretion to deny them, such that conferral of the benefit is essentially assured. *See Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996) (stating that "where the complained-of conduct concerns matters that are within an official's discretion, entitlement to that benefit arises only when the discretion is so restricted as to virtually assure conferral of the benefit."); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) ("Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest.").

AMS withdrew inspection services from Plaintiff pursuant to 7 C.F.R. § 50.11. This regulation provides that "The grading or inspection services withdrawn, after appropriate corrective action is taken, will be restored immediately, or as soon thereafter as a grader or inspector can be made available." 7 C.F.R. § 50.11. Because the USDA regulations are silent as to what constitutes "corrective action," AMS has discretion in determining whether this requirement has been fulfilled. Even assuming, however, that "corrective action" is established, a party must still apply to AMS for inspection services. In considering such applications, AMS has the discretion to deny them. See 7 C.F.R. § 51.9 (providing that an application for inspection services may be rejected by the inspector in charge if, inter alia, "it appears that to perform the inspection and certification service would not be to the best interest of the Government."); *Id.* § 51.46 (listing various reasons for which an

application for inspection services may be denied). Applicants are thus not assured of receiving inspection services from AMS-especially after they have been conditionally withheld. Accordingly, Plaintiff does not have a constitutionally protected property interest at stake and its due process claim is dismissed pursuant to Rule 12(b)(6).

III. Defendant's Motion for Summary Judgment:

Defendant moves for summary judgment on Plaintiff's APA claims. While its Complaint is far from clear, Plaintiff seems to allege that AMS's refusal to restore inspection services should be set aside pursuant to the APA, 5 U.S.C. § 706(2)(A), because: (1) AMS acted contrary to its own regulations ("first APA claim"); and (2) AMS's refusal was arbitrary, capricious, or an abuse of discretion ("second APA claim"). Defendant claims that it is entitled to summary judgment because AMS's refusal to restore inspection services was conducted in accordance with law and was not arbitrary, capricious, or an abuse of discretion.

Summary judgment is appropriate where there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "Genuine" facts are those facts that provide a basis for a "rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). There is no genuine issue of material fact concerning AMS's denial of inspection services that would preclude entry of summary judgment.

A. Plaintiff's First APA Claim:

According to 5 U.S.C. § 706(2)(A), an agency's actions may be set aside if the agency did not act "in accordance with law." Courts must, however, give "substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994).

AMS conditionally withheld inspection services from Plaintiff in October 1999 pursuant to 7 C.F.R. § 50.11. According to this regulation, once inspection services are conditionally withheld, they will be restored after corrective action has been taken--a determination left to AMS's discretion. AMS acted in accordance with this regulation in

refusing to restore inspection services to Plaintiff. AMS determined that corrective action would be established if Plaintiff signed a template agreement. Because Plaintiff has refused to sign this agreement, it has not had inspection services restored. Plaintiff complains of never receiving a hearing on this issue. However, no USDA regulation requires that a hearing must be held to determine whether corrective action has been established and inspection services should be restored. Since AMS acted in accordance with its regulations, Defendant is entitled to judgment as a matter of law on Plaintiff's first APA claim.

B. Plaintiff's Second APA Claim:

An agency's actions may also be set aside if they were "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The court must conduct its review "based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985). The scope of this review is "narrow and deferential." *Henley v. Food and Drug Admin.*, 77 F.3d 616, 620 (2d Cir. 1996). In conducting this review, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

The record reveals that AMS's decision not to restore inspection services unless Plaintiff signed a template agreement was not arbitrary, capricious, or an abuse of discretion. AMS made the decision to conditionally withdraw inspection services to ensure that "the bribery or other illegal or corrupt practices [at Hunt's Point] had been eliminated." (Skelton Decl. P14.) To that end, AMS drafted a template agreement that would restore inspection services to Plaintiff and other companies if they made certain representations. Judge Chin found in Tray-Wrap I that this proposed agreement was "more than reasonable" and did not rise to the level of arbitrary activity needed to set aside an agency's determination. Transcript of April 21, 2000 Hearing, at 9 (Lawler Decl. Ex. Q.) AMS learned in November 2001 that Spinale was no longer affiliated with Tray-Wrap. In response, AMS offered to restore inspection services if Tray-Wrap signed an agreement that was less restrictive than the one Judge Chin found to be reasonable. This latest proposal required Plaintiff, inter alia, to acknowledge that Spinale was

no longer employed by Plaintiff (which supposedly was the case) and to contact AMS if that fact changed.

Plaintiff emphasizes that charges against Spinale involving Tray-Wrap were dropped. Spinale also admitted, however, that he committed all of the offenses alleged in the indictment (including those involving Tray-Wrap). See Transcript of January 26, 2001 Hearing, at 10-11 (Lawler Decl. Ex. T.) Moreover, since pleading guilty to bribery, Spinale has had a continued presence at Hunt's Point and has frequently participated in inspection services for other companies. Plaintiff also complains about the proposal's waiver clause. This clause does not waive Plaintiff's right to ever sue USDA. It merely prevents Plaintiff from re-litigating AMS's withdrawal of inspection services for perhaps the third time.

Accordingly, AMS's decision not to restore inspection services to Plaintiff unless it signed a template agreement was not arbitrary, capricious, or an abuse of discretion. Rather, this decision was a reasonable means of ensuring that corruption at Hunts Point was eliminated. Therefore, Defendant is entitled to judgment as a matter of law on Plaintiff's second APA claim.

IV. Conclusion:

Defendant's motion to dismiss Plaintiff's negligence, breach of contract, and due process claims is granted. Defendant's motion for summary judgment on Plaintiff's remaining APA claims is granted. It is thus unnecessary to consider Defendant's motion to dismiss for res judicata.

SO ORDERED

TRAY-WRAP, INC., v. PACIFIC TOMATO GROWERS. LTD.
02 Civ. 1615 (DC).
Filed November 1, 2004.

(Cite as: 2004 U.S. Dist. LEXIS 22389).

PACA – Reparation – Stipulation agreement, reversal.

Parties entered into a settlement agreement which dismissed reparation claim under PACA. Court denied Pacific's motion to set aside the agreement pursuant to FRCP 60(b)3 [Fraud in procuring settlement agreement] on the grounds that the opposing party Tray-Wrap, Inc. failed to disclose its legal tactics of pursuing matters after the settlement agreement in bringing suit in a state court on the same claims.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION
MEMORANDUM DECISION

CHIN, D.J. USDJ

This case was filed on March 1, 2002, pursuant to the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a et seq., to appeal a decision and order of the United States Department of Agriculture (the "DOA"). Appellant Tray-Wrap, Inc. ("Tray-Wrap") sought to set aside the DOA's decision, which found Tray-Wrap liable to appellee Pacific Tomato Growers, Ltd. ("Pacific") for $ 38,000.00, as the balance due for eight shipments of tomatoes delivered to Tray-Wrap, with interest and costs.

Although Tray-Wrap was appealing a DOA decision, the parties were entitled to a trial de novo. 7 U.S.C.§ 499g(c). The trial was scheduled for December 6, 2002, but on the eve of trial, the parties advised the Court that they had settled. Accordingly, the Court issued a 30-day order on December 5, 2002, discontinuing the action with prejudice but allowing the parties to restore the action within 30 days if settlement were not consummated within that time. In a letter dated January 2, 2003, the parties requested an extension of time to restore the action. That application was granted and the time was extended to February 7, 2003.

The Court did not hear from the parties within the extended time period, but they submitted a stipulation of dismissal on March 20, 2003, which the Court so ordered on March 26, 2003 and the Clerk docketed on April 1, 2003.

In relevant part, the stipulation provided:

> It is hereby stipulated and agreed . . . the above entitled action be, and the same hereby is dismissed; i.e., [Tray-Wrap] withdraws its appeal herein, and . . . [Pacific] will notify the P.A.C.A. Branch of the U.S. Department of Agriculture, Agricultural Marketing Service in Washington, D.C. in writing that it is dismissing its complaint . . . and it is further stipulated and agreed that [Tray-Wrap] shall be refunded its bond posted with this Court.

Tray-Wrap subsequently sued Pacific in New York Supreme Court for malicious prosecution in this matter. That complaint was filed on November 14, 2003.

On March 25, 2004, Pacific moved to set aside the April 1, 2003 order of dismissal pursuant to Fed. R. Civ. P. 60(b). The motion is hereby denied.

DISCUSSION

Pacific seeks relief from the April 1, 2003 order under Rule 60(b)(3) and (6) . Rule 60(b) provides in relevant part that:

> the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

I address the request for relief under the two subsections separately.

A. Rule 60(b)(3)

The Second Circuit has held that "a Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits" of a case. *Fleming v. New York Univ*., 865 F.2d 478, 484 (2d Cir. 1989).

In the instant case, there is no indication, much less clear and convincing evidence, of fraud. Pacific does not provide specific incidences of misrepresentation by Tray-Wrap and there is no indication that misrepresentations were made to Pacific before it signed the stipulation.

Both parties in this case were represented by counsel who were fully capable of negotiating the terms of the document. Pacific argues that Tray-Wrap omitted material information by failing to disclose that it planned to sue Pacific in state court. Pacific has not shown, however, any duty on the part of Tray-Wrap -- its adversary in a lawsuit -- to disclose its legal strategy. Pacific could have required a general release or it could have insisted on a provision in the stipulation prohibiting future litigation.

Pacific signed the stipulation without objection, but now apparently believes it was injured by the settlement. This is not a basis for vacating an order under Rule 60(b). "When a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect." *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994).

In its motion papers, Pacific includes conclusory statements alleging that Tray-Wrap defrauded the court. Although Rule 60(b) does not limit the power of the Court to decide a claim of fraud upon the court, Pacific has provided no evidence to substantiate the claim. Fraud upon the court "is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). Pacific has presented no evidence of such fraud here.

The Rule 60(b)(3) motion is denied.

B. Rule 60(b)(6)

Relief may be granted under Rule 60(b)(6) when "extraordinary circumstances" justify relief or "where the judgment may work an extreme and undue hardship." In re *Emergency Beacon Corp*., 666 F.2d 754, 759 (2d Cir. 1981) (citations omitted). It is well-settled that "relief cannot be had under clause (6) if it would have been available under the earlier clauses." 11 Charles A. Wright, et al., Federal Practice & Procedure § 2864 at 362 (2d ed. 1995). See also, e.g., Emergency Beacon, 666 F.2d at 758 ("Relief under clause (6) is not available unless the asserted grounds for relief are not recognized in clauses (1)-(5)").
Pacific argues in its motion and reply papers that it was defrauded by Tray-Wrap, arguments appropriately categorized under clause (3) of Rule 60(b), discussed above. These arguments cannot be a basis for relief under Rule 60(b)(6). Nor has Pacific demonstrated any

extraordinary circumstances or undue hardship in any other respect. With no alternative basis for relief under Rule 60(b)(6), that prong of the motion is denied as well.

CONCLUSION

For the above reasons, Pacific's motion is denied. Tray-Wrap's request for costs and sanctions under Fed. R. Civ. P. 11, made as part of its opposition to the Rule 60(b) motion rather than separately as required by Rule 11(c)(1)(A), is also denied.

SO ORDERED

In re: FLEMING COMPANIES, INC., CAVENDISH FARMS, ET AL., v. FLEMING COMPANIES, INC., ET AL.
No. 03-1049-SLR.
Filed November 8, 2004.

(Cite as: 316 B.R. 809).

PACA – Trust, PACA – Canned agricultural commodities – Qualified products – Fresh, canned is not.

Sellers of wholesale food products to a now bankrupt retailer seek to have their canned food products (which were originally fresh fruits and/or vegetables) specially protected by the trust created under PACA [7 USC § 499 e(c)(2)]. The court denied sellers claim that "canned goods" are included in the definition of "fresh" [7 CFR § 46.2(u)]. Lacking specific definition as guidance, the court rationalized that PACA was created to protect sellers of "fresh" agricultural commodities which were highly perishable and where the value of the commodities quickly declined. Canned commodities on the other hand are meant to be stored with little or no further deterioration and as such do not come under the protection of the Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUDGES: ROBINSON, Chief Judge.

MEMORANDUM OPINION

I. INTRODUCTION

On November 18, 2003, defendants filed a motion to withdraw the bankruptcy reference pursuant to 28 U.S.C. § 157(d). The motion was granted. Now before the court is defendants' motion for summary judgment against Dole Packaged Foods and Del Monte (D.I. 18), plaintiffs Dole Packaged Foods' and Del Monte's cross motion for summary judgment (D.I. 20), plaintiffs' motion for summary judgment directed to "battered and coated produce" (D.I. 27), and plaintiffs' motion for partial summary judgment on fees and interest charges. (D.I. 32)

II. BACKGROUND

Defendants are "food, grocery and general merchandise wholesaler[s] and distributor[s]" that bought and sold processed food products in interstate commerce. (D.I. 1 at 2) On April 1, 2003, defendants initiated bankruptcy proceedings under Chapter 11 of the United States Bankruptcy Code. *Id.* Since filing the bankruptcy petition, defendants have continued to operate their business as debtors-in-possession. *Id.*

Plaintiffs are ten independent corporations, each of which sold wholesale quantities of various food products to defendants. *Id.* On September 26, 2003, plaintiffs filed an adversary complaint in bankruptcy court alleging violations of the Perishable Agricultural Commodities Act ("PACA"). See 7 U.S.C. § 499a et. seq. (2004).

PACA was intended to protect suppliers of perishable agricultural products from the risk that a wholesale buyer of produce would be unable to pay for the goods. See generally *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669 (7th Cir. 2002); *Magic Restaurants, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.),* 205 F.3d 108, 112 (3d Cir. 2000). Unlike other creditors, an interest in the goods themselves is of little protection to such suppliers because the goods are marketable for a finite amount of time. To alleviate this risk, Congress provided three types of protections under PACA. First, the act prohibits "unfair conduct" by entities in the agricultural commodities business. See 7 U.S.C. § 499b (2004). Second, it requires any entity carrying on "the business of a commission merchant, dealer, or broker"

in the agricultural field to be licensed by the Secretary of Agriculture. 7 U.S.C. § 499c. Third, and of relevance to the dispute at bar, it created a "trust for the benefit of all unpaid suppliers or sellers" of agricultural commodities. 7 U.S.C. § 499e(c)(2). The trust is funded with "agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities." *Id.* The trust remains in place until all "the sums owing in connection with such transactions have been received by such unpaid suppliers." *Id.* Unpaid suppliers who qualify under PACA are given an interest in the buyer that is superior to any other lien or secured creditor. *See Magic Rest.*, 205 F.3d at 112.

In order to be protected by PACA, plaintiffs have to show: (1) the goods in question were perishable agricultural commodities; (2) the commodities were received by a commission merchant, dealer or broker; and (3) they provided written notice of their intent to enforce PACA. At issue in three of the motions is whether canned goods and frozen potatoes are perishable agricultural commodities. In the fourth motion, the issue is whether the interest and attorney fees associated with defendants' overdue payments can be taken out of the PACA trust.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine

issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995).

The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

IV. CROSS MOTIONS FOR SUMMARY JUDGMENT

Defendants argue that PACA does not cover the canned goods they purchased from plaintiffs Dole Packaged Food and Del Monte because canned goods do not constitute fresh produce, as defined under PACA. Plaintiffs argue that the definition of "fresh," as promulgated by the United States Department of Agriculture ("USDA"), encompasses the canned goods sold to defendants. This court agrees with defendants.

PACA's application is limited to "perishable agricultural commodit[ies]," defined as fresh fruits or vegetables "of every kind and character." 7 U.S.C. § 499a (2004). PACA was enacted to protect "producers of perishable agricultural goods [who] in large part [are] dependent upon the honesty and scrupulousness of the purchaser." *Magic Rest.*, 205 F.3d at 110. In 1984, PACA was amended to give unpaid suppliers an interest in the trust corpus of a bankrupt buyer that is superior to the interest of any other creditor. *Id.* at 112. Congress reported that this added protection was necessary because sales of perishable agricultural commodities "'must be made quickly or they are not made at all . . . . Under such conditions, it is often difficult to make credit checks, conditional sales agreements, and take other traditional safeguards.'" *Id.* at 111 (quoting H.R. Rep. No. 98- 543, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406).

Congress vested regulatory authority under PACA with the USDA.

See 7 U.S.C. § 499o. The USDA expanded upon Congress's definition of "perishable agricultural commodity" in its regulations, stating:

> Fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seeds, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

7 C.F.R. § 46.2(u) (2003).[1]

It is evident from the above language that the USDA has included within the scope of PACA's protection a broad range of processes characterized as not altering the essential nature of "fresh" fruits and vegetables. Indeed, the USDA recently amended its definition of "fresh" to include "battered" and "coated" fruits and vegetables. *See Fleming Companies, Inc. v. USDA*, 322 F. Supp.2d 744, 749 (E.D. Tex. 2004). Despite the wide net thrown out by the USDA in its regulation, however, the court declines to characterize canned goods as "fresh," for several reasons.

In the first instance, such a characterization flies in the face of

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[1] In 2004, the USDA amended its definition to include "coating" and "breading." 7 C.F.R. § 46.2(u) (2004).

PACA's legislative history. As noted above, Congress created the trust at issue in order to protect suppliers of "perishable" agricultural goods because sales of such goods must be made quickly, while the goods are still marketable. Common sense informs the notion that suppliers of canned goods are not forced to make such quick sales because the canning process renders their products nonperishable for an extended period of time, certainly well beyond the time it takes to negotiate a sale.

Such a characterization likewise is contrary to the ordinary meaning of the words chosen by Congress to define the statutory territory. More specifically, Congress used "fresh" to describe a "perishable agricultural commodity," the common definition of which explicitly excludes canned goods. See The American Heritage Dictionary 534 (2d ed. 1984) (defining "fresh" as "not preserved, as by canning, smoking or freezing"). The rationale of PACA and the common definition are in accord. There is no indication that Congress intended something other than the ordinary meaning. Therefore, PACA was not intended to include canned goods.

Furthermore, in similar legislation, Congress has specifically excluded canned goods from the ambit of "perishable" agricultural commodities. For instance, in 1936 Congress promulgated another act that dealt with perishable agriculture commodities, the Walsh-Healey Act. See Act of June 30, 1936, ch. 881, 49 Stat. 2036. The act was intended to use the power of federal contracts to raise employee wages. *Id*. The act, however, did not apply to contracts for "perishables." See 41 U.S.C. § 43 (2004); § 9, 49 Stat. at 2039. With respect to the Walsh-Healey Act, the USDA explicitly defined "perishable" as not including canned products. See 41 C.F.R. § 50-201.2 (b) (2004).[2] Without a reason to conclude that Congress or the USDA is using "perishable" to mean something different under PACA than under the Walsh-Healey Act, this court infers that "perishable" does not include canned goods.

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[2] The legislative history of the Walsh-Healey Act does not indicate the rationale behind the exception, nor does it indicate what Congress intended "perishable" to mean. The exception was in the original act that notably was enacted only six years after PACA. Four years after the Walsh-Healey Act, PACA was amended to add cherries in brine in the definition of "perishable agricultural commodity," but the rest of the definition remained the same. See June 29, 1940, ch. 456, § 2, 54 Stat. 696.

Finally, at least one other court has found that when fruits have undergone a preservation process, they no longer can be characterized as "fresh." *See In re L. Natural Foods Corp.*, 199 B.R. 882 (Bankr. E.D. Pa. 1996) (holding that dried apricots and prunes were not "fresh" because the drying process removed so much internal water that the nature of the item had changed).

In sum, despite the broad language employed by the USDA in its regulation, it does not specifically include "canning" among those processes characterized as not altering the essential nature of a "fresh" fruit or vegetable. Absent such specific direction from the USDA, there is no persuasive evidence that canned goods otherwise were intended to be or are included within the scope of PACA's protection. In sum, the court declines to ignore PACA's plain language and legislative history or to discard common sense in order to embrace plaintiffs' position.

V. MOTION FOR SUMMARY JUDGMENT ON BATTERED AND COATED CLAIMS

Plaintiffs' motion for summary judgment with respect to their battered and coated potato products is denied without prejudice to renew. At issue in this case is not only whether plaintiffs' products are protected under PACA, but also whether the USDA's inclusion of battered and coated potatoes is a valid administrative action. This court is not bound by the decision of the United States District Court for the Eastern District of Texas with respect to its determination that the USDA's amendment is valid.At this time, the parties have not briefed the court on the issue of administrative validity, and this court declines to consider whether plaintiffs' frozen potato products are included in the USDA's definition of "fresh" before it considers the validity of the amended definition. To enable the parties to file more complete motions for summary judgment on this issue, discovery is opened for ninety (90) days with respect to plaintiffs' battered and coated french fries. At the close of discovery, the parties are expected to file any necessary motions for summary judgment.

VI. MOTION FOR PARTIAL SUMMARY JUDGMENT ON

PREJUDGMENT INTEREST AND ATTORNEY FEES[3]

A trust created pursuant to PACA is available for the payment of all "sums owing in connection with such transactions." 7 U.S.C. § 499e (emphasis added). Plaintiffs claim attorney fees and prejudgment interest are sums owing in connection with the sales at issue. Defendants argue that PACA is narrower and only the amount owed for the commodities is covered by the trust fund.

1. Attorney Fees

Under the American Rule, a winning party is not automatically entitled to attorney fees. Attorney fees can be awarded if there is a statutory basis or evidence of Congressional intent to award fees. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). Section 499e makes no provision for attorney fees. Other sections of PACA, however, do allow for attorney fees. See, e.g., 7 U.S.C. § 499g(c) (providing fees to a party who successfully appeals from a reparation order for violation of § 499b). Clearly, Congress understood that the award of attorney fees in the trust provision would require express language in the statute. If Congress had intended the trust provision to include attorney fees, it would have included such a statement. *See Middle Mountain Land and Produce v. Sound Commodities, Inc.*, 307 F.3d 1220, 1225 (9th Cir. 2002); *Hereford Haven, Inc. v. Stevens*, 1999 U.S. Dist. LEXIS 3116, No. 98-CV-0575, 1999 WL 155707, at *4 (N.D. Tex. March 12, 1999); *Valley Chip Sales v. New Arts Tater Chip Co.*, 1996 U.S. Dist. LEXIS 18232, No. 96-2351, 1996 WL 707028, at *6 (D. Kan. Oct. 10, 1996); *In re W.L. Bradley Co.*, 78 B.R. 92, 95 (Bankr. E.D. Penn. 1987).

In addition to a statutory basis, attorney fees can be awarded if there

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[3] Defendants filed a motion to strike plaintiffs' reply memorandum of law in support of plaintiffs' motion for summary judgment. Defendants argued that plaintiffs' reply contained "new arguments, new authorities, and new evidence." (D.I. 44 at 2) Defendants, however, fail to direct the court's attention to any arguments, authorities or evidence in the reply memorandum that are not included in the plaintiffs' original brief. Nor do the defendants provide evidence regarding which material in the reply brief "should have been included in a full and fair opening brief." Local Rule 7.1.3 (c)(2). From what the court has discerned, everything in plaintiffs' reply memorandum is either in the original brief or in response to defendants' arguments in opposition of plaintiffs' motion. Therefore, defendants' motion is denied.

is a contractual basis for them. *See Middle Mountain Land and Produce*, 307 F.3d at 1225 (citing *Alyeska Pipeline Serv. Co.*, 421 U.S. at 257-59). In this case, some of the plaintiffs included provisions for attorney fees in their invoices sent to defendants. Defendants argue that the attorney fees provisions included in the invoices were not binding provisions of a contract because they materially altered the agreement. Defendants further argue that different laws apply to each of the plaintiffs because they are each "residents" of different states.

This court did not find any statutory difference between the states at issue because each has adopted U.C.C. § 2-207 verbatim.[4] See generally Cal. Com. Code § 2207 (West 2002), Fla. Stat. ch. 672.207 (2004), Tex. Bus. & Com. Code Ann. § 2-207 (Vernon 1994), Pa. Stat. Ann. tit. 13 § 2207 (West 1984). Pursuant to U.C.C. § 2-207, the attorney fees included in plaintiffs' invoices are considered "sums owing in connection with [the] transaction." *See Country Best v. Christopher Ranch, LLC,* 361 F.3d 629 (11th Cir. 2004) (per curiam); *Weis-Buy Servs. v. Paglia*, 307 F. Supp. 2d 682 (W.D. Penn. 2004); *E. Armata, Inc. v. Platinum Funding Corp.*, 887 F. Supp. 590 (S.D.N.Y. 1995). Despite defendants' own indication that the consideration of whether a change materially alters a contract is one that depends on the unique facts of every case, they have not asserted any facts that would indicate that the attorney fees provisions at issue materially changed their contracts with plaintiffs. (D.I. 38 at 13, citing *Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co.*, 2000 U.S. App. LEXIS 1520, No. 99-4042, 2000 WL 147392, at *9 fn.10 (10th Cir. Feb. 4, 2000)

Plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz included clauses in their invoices requiring defendants to pay attorney fees associated with collecting overdue

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[4] Plaintiff Cavendish is a Canadian corporation that shipped fruits and vegetables to various locations throughout the United States. (D.I. 41 at 6) Heinz is a Pennsylvania corporation. (Id.) Dole Fresh Fruit and Dole Fresh Vegetable and are both California corporations. (Id.) Defendant Fleming is a Texas corporation. (Id.) Although the contracts at issue could be controlled by laws of other states, defendants do not argue that the contracts are governed by any state laws other than those cited.

payments. (D.I. 41 at Ex. A, B, C, D, E) These plaintiffs are entitled to collect attorney fees because the fees are directly associated with the transactions at issue. The other plaintiffs, however, are not entitled to attorney fees because there is no contractual or statutory basis for such an award.

2. Prejudgment Interest

Prejudgment interest can be awarded to a party at the court's discretion. When implementing PACA, Congress intended to protect agricultural commodity dealers when buyers failed to pay for purchased goods. The act gives an unpaid supplier an interest that is superior to all other creditors, which illustrates Congress's intent to provide suppliers with the utmost protection with respect to monies owed. This superior interest is broad, as it encompasses all "sums owing in connection with [the] transaction." 7 U.S.C. § 499e(c); *see also Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 138 (3d Cir. 2000). Allowing a buyer to make a late payment without paying the appropriate interest, and accumulating the interest for itself, is antithetical to the purpose of PACA. *See generally Middle Mountain Land and Produce,* 307 F.3d at 1224; *Valley Chip Sales, Inc.*, 1996 U.S. Dist. LEXIS 18232, No. 96-2351, 1996 WL 707028, at *6; *E. Armata, Inc.*, 887 F. Supp. at 595; *In re W.L. Bradley Co.*, 78 B.R. 92, 94.

Plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz included a provision for interest on late payments in their invoices. Once included in the agreement, the interest is explicitly connected to the sales transaction. If successful, these plaintiffs are entitled to prejudgment interest at the rate cited in the sales contract. The other plaintiffs are also legally entitled to prejudgment interest at a rate to be determined, if necessary, upon the conclusion of the case.

VII. CONCLUSION

For the stated reasons, defendants' motion for summary judgment against plaintiffs Del Monte Foods and Dole Packaged Foods is granted. Plaintiffs' Del Monte Foods and Dole Packaged Foods motion for summary judgment is denied.

Plaintiffs' motion for summary judgment with respect to battered and

coated produce is denied without prejudice to renew. Discovery on the issue is opened for ninety days and any new or renewed motions for summary judgment are due two weeks after that.

Plaintiffs' motion for summary judgment with respect to their right to attorney fees and costs is granted in part and denied in part. Plaintiffs' motion with respect to attorney fees is granted as to plaintiffs Cavendish Farms, DiMare Fresh, Dole Fresh Fruit, Dole Fresh Vegetables and Heinz. Plaintiffs' motion for summary judgment with respect to attorney fees is denied as to plaintiffs Dimare Fresh, Dimare-Tampa, and Dole Distribution- Hawaii. Plaintiffs' motion with respect to prejudgment interest is granted as to all plaintiffs. Defendants' motion to strike plaintiffs' reply memorandum of law in support of plaintiffs' motion for summary judgment is denied. An order consistent with this memorandum opinion shall issue.

B.T. PRODUCE CO., INC., v. ROBERT A. JOHNSON SALES, INC.
No. 03 Civ. 5634 (VM).
Filed December 14, 2004.

(Cite as: 354 F. Supp. 2d 284).

PACA – Reparation – Bribery – Reparation order, presumptive validity of facts recited therein.

B.T. Produce (wholesaler) appealed a reparation order which found that wholesaler's agent (Taubenfeld) was involved in a scheme or pattern to bribe USDA inspectors such that R.A.J.S. was induced by mistake to accept a lower market price based upon false inspection reports. The court found that the unsupported and inherently contradictory affidavits of the convicted USDA inspectors regarding the dates of the bribery acts did not overcome the presumptive validity of the Reparation Order under 7 USC 499g(c). The plea agreement of B.T.'s agent directly contradicted the dates of illegal activity described in the affidavit of the USDA inspector who were convicted of accepting bribes.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF

NEW YORK

JUDGES: Victor Marrero, U.S.D.J.

DECISION AND ORDER

Petitioner B.T. Produce Co, Inc. ("BTP") has appealed a June 30, 2003 reparation order (hereinafter, "Reparation Order") rendered by a Judicial Officer of the United States Department of Agriculture ("USDA") in favor of respondent Robert A. Johnson Sales, Inc. ("RAJS"), awarding RAJS $ 34,171.75 plus interest and costs. Under Section 499g(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a et seq., such an appeal is reviewed de novo by a federal district court, "except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated." 7 U.S.C. § 499g(c). BTP's appeal was filed with this Court on July 30, 2003.

RAJS has now moved for summary judgment on the appeal pursuant to Fed. R. Civ. P. 56.[1] The Court grants RAJS's motion, concluding that BTP has failed to produce any evidence that reasonably calls into question the validity of the Reparation Order.

I. BACKGROUND

A. BTP'S INVOLVEMENT IN CORRUPTION AT HUNTS POINT PRODUCE MARKET

The reparations proceeding that is the subject of the instant motion is one of many that arose out of corrupt practices at the Hunts Point Wholesale Produce Market in the Bronx, New York. *See Koam Produce, Inc. v. DiMare Homestead, Inc.*, 213 F. Supp. 2d 314 (S.D.N.Y. 2002) (hereinafter, "Koam I") (affirming PACA reparation award arising out of corrupt practices at Hunts Point); *Koam Produce, Inc. v. DiMare Homestead, Inc.* 222 F. Supp. 2d 399 (S.D.N.Y. 2002) (hereinafter, "Koam II") (awarding attorney's fees to prevailing party in

[1] The parties have also moved for the Court to take judicial notice of several documents relevant to this appeal. For reasons discussed infra, the Court grants these motions.

reparation proceeding under PACA), aff'd, 329 F.3d 123 (hereinafter, "Koam III") (affirming Koam I and Koam II). As uncovered by federal investigators and as discussed in Koam I, 213 F. Supp. 2d at 317-18, produce wholesalers operating out of the Hunts Point Market would regularly pay small bribes to USDA inspectors and supervisors, who in exchange for the bribes would artificially downgrade produce in official inspections requested by the wholesalers. The wholesalers would then be able to use the fraudulent inspections as leverage with produce suppliers to negotiate a reduction in the price paid by the wholesalers to the suppliers, who were not present during the inspections and who had no reasonable means of calling the inspections' results into question. This conduct occurred from at least the beginning of 1996, when the federal government began an investigation it called "Operation Forbidden Fruit," through October 27, 1999, when twenty-one people, including eight USDA inspectors and thirteen owners and employees of produce wholesalers were arrested for their roles in the bribery scheme. See *Id.*; United States Department of Agriculture, Report and Analysis of the Hunts Point Bribery Incident (hereinafter, "USDA Report"), attached as Ex. C to RAJS's Request for Court to Take Judicial Notice of Matters in Support of RAJS's Motion for Summary Judgment, dated Aug. 31, 2004 (hereinafter, "RAJS Request for Judicial Notice").[2]
Though this point is disputed by BTP in its pleadings and two brief affidavits submitted on its behalf, numerous documents indicate that an employee and part-owner of BTP, William Taubenfeld ("Taubenfeld"), had paid bribes and received benefits under the illicit arrangement from at least 1996 until he was arrested and indicted on October 27, 1999.[3]

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[2] The Court grants RAJS's request to take judicial notice of the USDA Report, which was made without opposition from BTP. Courts have frequently taken judicial notice of official government reports as being "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b). *See, e.g., Texas & Pac. Ry. Co. v. Pottorff,* 291 U.S. 245, 254 n. 4, 78 L. Ed. 777, 54 S. Ct. 416 (1933), amended on other grounds, 291 U.S. 649, 54 S. Ct. 525 (1934) (taking judicial notice of official reports put forth by the Comptroller of the Currency); *Kaggen v. I.R.S.*, 71 F.3d 1018, 1021 (2d Cir. 1995).

[3] The Court also grants RAJS's and BTP's requests to take judicial notice of various documents from a criminal case brought by the United States against Taubenfeld. See

(continued...)

Although Taubenfeld's indictment only charged him with thirteen bribes of USDA inspectors between March and August of 1999, see Indictment, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Oct. 27, 1999), attached as Ex. A to Plaintiff-Appellant's Request for the Court to Take Judicial Notice, dated Sept. 30, 2004 (hereinafter, "BTP Request for Judicial Notice"), his Plea Agreement permitted him to plead guilty to only one count of bribery in exchange for a promise from the Government that he would not "be further prosecuted criminally . . . for his participation, from in or about 1996 through in or about October 27, 1999, in making cash payments to United States Department of Agriculture produce inspectors in connection with inspections of fresh fruit and vegetables at B.T. Produce Co., Inc." Plea Agreement at 2, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Feb. 2, 2000) (hereinafter, "Taubenfeld Plea Agreement"), attached as Ex. A to RAJS Request for Judicial Notice (emphasis added).[4] Furthermore, in Taubenfeld's sentencing hearing, neither Taubenfeld nor his attorney objected when Judge Cote of this Court described Taubenfeld's illegal conduct as occurring between January 1996 and October 1999, and asked if there were any remaining factual issues in dispute related to the Government's case against Taubenfeld. See Transcript at 3-4, *United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. May 11, 2000) (hereinafter, "Taubenfeld Sentencing Hearing"), attached as Ex. B to RAJS Request

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(...continued)
United States v. Taubenfeld, 99 Cr. 1094 (DLC) (S.D.N.Y. filed Oct. 27, 1999). The parties did not object to each others' requests, and the documents the parties are seeking to introduce -- Taubenfeld's indictment, his plea agreement with the Government, and the transcript of his sentencing hearing, are subject to judicial notice pursuant to Fed. R. Evid. 201(b). See, e.g., Jacques v. R.R. Retirement Bd., 736 F.2d 34, 40 (2d Cir. 1984) (taking judicial notice of complaint in inferior court within same jurisdiction in related case); Allen v. City of Yonkers, 803 F. Supp. 679, 697 n.22 (S.D.N.Y. 1992) (taking judicial notice of prior action in this District involving some of the same parties).

[4] The Plea Agreement was also part of the official USDA record that served as the basis for the Reparation Order. See Certified Copy of PACA Docket No. R-01-033 at 5.

for Judicial Notice.[5] BTP nonetheless insists that there is no evidence that Taubenfeld bribed any USDA inspectors on its behalf before the fall of 1998, at the earliest. (See BTP's Memorandum of Law in Opposition to Motion for Summary Judgment (hereinafter, "BTP Mem. of Law") at 3-4.) In support of its assertions, BTP puts forth two declarations by USDA inspectors who pled guilty to taking bribes and preparing fraudulent inspections as part of the corrupt practices at the Hunts Point Market, and who claim that Taubenfeld had not begun bribing them or other inspectors until the later half of 1998, at the earliest. (See Declaration of Michael Tsamis, dated Sept. 25, 2004 (herinafter, "Tsamis Decl."), attached to Plaintiff-Appellant's Counter-Statement of Contested Material Facts (hereinafter, "BTP Rule 56.1 Statement"), P3 ("I did, occasionally receive $ 50.00 payments from Billy Taubenfeld in 1999, but I have no recollection of receiving such payments from anyone at BT Produce prior to late 1998."); Declaration of Glenn Jones, dated Sept. 24, 2004 (hereinafter, "Jones Decl."), attached to BTP Rule 56.1 Statement, P4 ("I was personally aware when Billy Taubenfeld, a salesman at B.T. Produce . . ., first began making payments to inspectors when they were present at that wholesaler to perform inspections on produce shipments. Such payments did not begin until the later half of 1998.").)

B. THE DISPUTE BETWEEN THE PARTIES

In 1996 and 1997, RAJS, a California supplier of grapes, sold several shipments of grapes to BTP at the Hunts Point Market that had been inspected by USDA inspectors and found below grade. On the basis of these inspections, RAJS had agreed to reduce the prices it would otherwise have charged BTP for the shipped grapes. Upon learning of the corrupt practices at the Hunts Point Market during that period of

[5] Judge Cote's description of Taubenfeld's involvement in the fraudulent scheme appears to be based at least in part on the Presentence Investigation Report that the Probation Department prepared to aid in Judge Cote's sentencing of Taubenfeld. *See Presentence Investigation Report, United States v. Taubenfeld*, 99 Cr. 1094 (S.D.N.Y. Apr. 28, 2000) (hereinafter, "Taubenfeld PSR"). In that Report, to which Taubenfeld had no substantive objections, see *Id.* at 25, Taubenfeld is described as having bribed a cooperating witness "for many years," *Id.* at 9, and as having paid corrupt inspectors regular bribes from at least January 1996 through the date of his arrest in 1999, see *Id.* at 12.

time, RAJS filed a PACA reparation claim against BTP on March 24, 2000, seeking reimbursement for the amount by which ten separate shipments of grapes to BTP during 1996 and 1997 were devalued as a result of allegedly fraudulent inspections.[6] BTP filed counterclaims related to the ten shipments, alleging that it was fraudulently induced to overpay for the shipments by more than $ 100,000.

The resulting Reparation Order denied RAJS's claims as to five of the shipments and BTP's counterclaims in their entirety, but granted reparations against BTP for the five other devalued shipments. The Reparation Order first acknowledged that there was no explicit evidence on the record that any of the inspections of the ten challenged shipments were fraudulent. It further noted that five of the ten challenged shipments were inspected by UDSA employees who were not implicated in the bribery scheme. The Reparation Order thus denied RAJS's reparation claims related to those five shipments, concluding that RAJS could not demonstrate that the inspections were tainted by bribes. See Reparation Order at 13. The other five inspections, however, were undertaken by USDA inspectors who were charged and convicted of accepting bribes from wholesalers. The Reparation Order determined that these inspections were procured by Taubenfeld acting as an agent for BTP, and that Taubenfeld's actions could thus be charged to BTP. See *Id.* at 21. Because the inspections were procured by an individual who had admitted to committing bribes during the period at issue, and conducted by USDA inspectors who had been found to have accepted bribes during that same period, the Reparations Order concluded that the allowances or downward price adjustments that RAJS had agreed to accept as a result of the five corrupt inspections could be set aside on the grounds of misrepresentation or unilateral mistake. See *Id.* at 24. It denied BTP's counterclaims on the grounds that they were time-barred under PACA's nine-month statute of limitations and were not supported by evidence that the parties had reached an accord and satisfaction on

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[6] RAJS's PACA claims were not time-barred, despite a nine-month statute of limitations normally applying to such claims, see 7 U.S.C. § 499f(a)(1), because Congress explicitly extended the deadline for filing PACA reparation claims "involving the allegation of a false inspection certificate prepared by a grader of the Department of Agriculture at the Hunts Point Terminal Market" until January 1, 2001. Grain Standards and Warehouse Improvement Act of 2000, Pub. L. No. 106-472, § 309, 114 Stat. 2058, 2075.

the shipments that served as the basis for its counterclaims. *Id*. at 18-19. Since BTP had no evidence independent of the allegedly fraudulent inspection certificates to support its claims that RAJS's produce was damaged at the time it was accepted, the Reparations Order required BTP to pay damages to RAJS reflecting the amount by which the produce was devalued as a result of the inspections. For three of the shipments, designated as Shipments 3, 7, and 8 in the Reparation Order, damages were calculated as the difference between the contract price BTP had originally agreed to pay RAJS and the amount it ultimately paid after RAJS agreed to make adjustments as a result of the inspections. Those damages totaled $ 18,120.00. The other two shipments, designated as Shipments 9 and 10 in the Reparations Order, were sold on what was known as an "open" basis, with the prices of the shipments to be negotiated upon their arrival at the Hunts Point Market. *Id*. at 14-15. Based on published prices at the market for various grades of grapes on the days Shipments 9 and 10 arrived at the Hunts Point Market, the Reparations Order concluded that RAJS received $16,051.75 less than it would have had the inspections not downgraded the grapes. It thus ordered BTP to pay RAJS this amount in damages as well, for a total of $ 34,171.75 in damages, plus interest in the amount of 10 percent per annum from January 1, 1998 until paid, plus $ 300.00 in costs.

This appeal followed.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment when the materials offered in support of an in opposition to the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court ascertains which facts are material by considering the substantive law of the action, for only those "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Normally, a moving party who bears the ultimate burden of proof at

trial must "support" its motion for summary judgment by "informing the district court of the basis for its motion," and by identifying portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In this case, however, BTP, the nonmoving party, bears an initial burden of production at trial to call into question the prima facie validity of the Reparation Order. This burden of production is placed on BTP by 7 U.S.C. § 499g(c), which states that reparation orders must be treated as "prima-facie evidence of the facts therein stated." *See Frito Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1032 (D.C. Cir. 1988); *Frankie Boy Produce Corp. v. Sun Pacific Enterprises*, 2000 U.S. Dist. LEXIS 9961, No. 99 Civ. 10158 (DLC), 2000 WL 991507 at *1 (S.D.N.Y. July 19, 2000).

Frito Lay establishes that BTP must make an affirmative showing that there is a genuine issue for trial in order to defeat RAJS's motion for summary judgment. As in Frito Lay, the appellee, RAJS, faces the burden of proving its right to recover under PACA. Also as in *Frito Lay*, the appellee (RAJS) discharged its initial burden as moving party under *Celotex* "when, armed with the prima facie value of the Secretary's decision, [RAJS] alerted the Court to the absence of evidence to support appellant's case." *Frito Lay*, 863 F.2d at 1033.[7] As the appellant was required to do in *Frito Lay*, BTP must in this case "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (quoting *Celotex*, 477 U.S. at 324) (internal quotation marks omitted).

B. BTP HAS FAILED TO MEET ITS BURDEN OF PRODUCTION

The Court concludes that BTP has failed to introduce any evidence that legitimately calls into question the Reparation Order's prima facie validity. For BTP to succeed in establishing that there is a "genuine issue for trial," *Id.*, it must demonstrate that there is some means of distinguishing RAJS's claims from those of the produce supplier in

[7] Other than the documents related to Taubenfeld and Operation Forbidden Fruit judicially noticed infra, RAJS is has introduced no evidence other than the Reparation Order in support of its Motion for Summary Judgment.

Koam. In that case, a produce supplier who agreed to accept downward price adjustments from wholesalers at the Hunts Point Market as a result of negative USDA inspections filed a PACA reparation claim against the wholesaler, seeking damages associated with those downward adjustments. The inspections were conducted by USDA inspectors who admitted to taking bribes during that period of time, and were requested by an employee of the wholesaler who had admitted to paying bribes during that time. The PACA reparation order in that case found no evidence that the specific inspections giving rise to the downward adjustments were fraudulent, but nonetheless ordered the wholesaler to pay reparations. The District Court affirmed the reparation order over the objection of the wholesaler, who argued that the supplier needed to offer evidence that each of the challenged inspections were actually fraudulent.

The Court of Appeals rejected that argument, concluding that the wholesaler's price adjustment agreements could be voided under the doctrine of unilateral mistake even without evidence that the specific inspections were fraudulent. Under the doctrine:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . ., and
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Koam III, 329 F.3d at 127 (quoting Restatement (Second) of Contracts § 153).

The Circuit Court found that the supplier's lack of knowledge concerning the wholesaler's and inspectors' involvement in a bribery scheme at the time the adjustments were made led the supplier to be mistaken concerning the validity of the [USDA inspections: "It is clear that, when the parties agreed to the price adjustments, DiMare [the supplier] was mistaken as to both whether Koam [the wholesaler] had

paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted bribes." *Id.* It was equally clear to the Circuit Court that the mistakes were material and adverse to the supplier, that the supplier did not bear the risk of mistake, and that the mistake was the fault of the wholesaler's failure to disclose its own involvement in bribery activities. *Id.* at 127-28. The Circuit Court also held that the adjustments were voidable on the grounds that it would be unconscionable to enforce the agreements, "which resulted from the work of inspectors who had accepted bribes." *Id.* at 128.

The Reparation Order in this case was based on the same legal doctrine adopted by the Circuit Court in Koam III, as well as on the doctrine of misrepresentation. See Reparation Order at 19-24. As approved of by the Circuit Court in Koam III, the Reparation Order granted relief under these doctrines where a downward price adjustment was requested by an employee of a produce wholesaler, Taubenfeld, who was convicted of bribing public officials, based on an inspection conducted by an inspector who was convicted of taking bribes. BTP does not take issue with the Reparation Order's legal analysis, but instead argues that this case can be distinguished from Koam on the grounds that its employee, Taubenfeld, did not begin to engage in illegal activity until after the inspections at issue in this case were already completed.[8] The only evidence that it has introduced in this Court in support of this argument, however, are two declarations by USDA inspectors who pled guilty to accepting bribes from produce wholesalers. These declarations, as described above, briefly assert that Taubenfeld did not begin bribing USDA inspectors until late 1998. They are accompanied by conclusory allegations in BTP's brief that Taubenfeld did not begin making illegal payments until 1998, at the earliest. See BTP Mem. of Law at 2 ("There was no evidence introduced in the USDA proceeding that Billy Taubenfeld (or anyone else at BT) made any illegal payments to any inspector prior to the earliest criminal

[8] BTP does not dispute that the inspectors whose reports prompted RAJS to accept downward price adjustments were accepting bribes at the time of the inspections.

charge relating to March 24, 1999.");[9] *Id.* at 4 ("The Secretary would be likewise justified in voiding agreements between the Fall of 1998, when it can now be established that Taubenfeld began his illegal payments, and October 27, 1999 when he was arrested and ceased his connection with BT.")

The Court concludes that the unsupported declarations of the two inspectors are insufficient in several respects to call into question the Reparation Order. First, the supplier in Koam was allowed to void downward price adjustments on the grounds that it would be unconscionable to enforce adjustments "which resulted from the work of inspectors who had accepted bribes" where the company benefitting from the adjustments had engaged in, and profited from, illegal bribery, *Koam III*, 329 F.3d at 128, as well as on the basis of the produce wholesaler's failure to inform the supplier of the ongoing corrupt activities at the market. It would be similarly unconscionable to enforce RAJS's adjustments in this case. BTP does not dispute that the inspections of Shipments 3, 7, 8, 9 & 10 "resulted from the work of inspectors who had accepted bribes" in exchange for downgrading produce at the time they inspected RAJS's shipments, nor does it deny awareness of the corrupt practices pervading the Hunts' Point Market at the time the adjustments were made, or dispute that it benefited financially from corruption at the market. Furthermore, if RAJS had known of the widespread corruption at the market, it may have decided to discount the USDA inspections or seek independent inspections, rather than simply accept price adjustments on the basis of the inspections themselves. BTP deprived RAJS of those options when it failed to tell RAJS that the inspections it had ordered were inherently suspect. See Restatement (Second) of Contracts § 153.

Second, the declarations lack sufficient foundation to call into question the validity of Taubenfeld's own admission that he began bribing USDA inspectors beginning in 1996, at the latest. As discussed above, Taubenfeld acknowledged bribing inspectors from 1996 until

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[9] This allegation is directly contradicted by evidence that the Plea Agreement, in which Taubenfeld admitted his bribery of USDA inspectors from "in or about 1996 through in or about October 27, 1999," was part of the official USDA record at the time the Reparation Order was issued. See Certified Copy of PACA Docket No. R-01-033 at 5.

1999 on numerous occasions. See Taubenfeld Plea Agreement at 2 (Taubenfeld admitting "his participation, from in or about 1996 through in or about October 27, 1999, in making cash payments to United States Department of Agriculture produce inspectors in connection with inspections of fresh fruit and vegetables at B.T. Produce Co., Inc."); Taubenfeld Sentencing Hearing (reiterating Taubenfeld's admission that he began bribing USDA officials in 1996); Taubenfeld PSR (same). Neither of the declarants, who do not profess to know Taubenfeld personally or to have spoken with him about when he began bribing officials, would be in a position to know better than Taubenfeld himself when Taubenfeld began paying bribes at the Hunts Point Market. None of BTP's pleadings attempts to explain why the convicted inspectors' speculative declarations should be credited where they are directly contradicted by Taubenfeld's admissions concerning matters uniquely within his own knowledge.[10] See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") (emphasis added); *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004) (concluding that a party may not create a genuine issue for trial "merely by the presentation of assertions that are conclusory") Third, the Court finds these declarations inherently contradictory and implausible. While the Court may not assess credibility on summary judgment, *see Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996), "when evidence is so contradictory and fanciful that it cannot be believed by a reasonable person, it may be disregarded." *Jeffreys v. Rossi*, 275 F. Supp. 2d 463, 476-77 (S.D.N.Y. 2003). BTP has introduced no statements and made no arguments calling into question the validity of its own agent Taubenfeld's admissions, which may be charged to BTP, even though it had every opportunity to do so during the USDA reparations proceeding and this appeal. Not only are

[10] Declarant Glenn Jones alleges that "in my position as both inspector and supervisor in the Hunts Point Market, I had first hand personal knowledge of all of the people in that market who did, and those who did not make payments to USDA inspectors." (Jones Decl. P3.) But Jones, even if he was a self-styled leader of a corrupt enterprise, was in no position to know whether or when Taubenfeld may have paid bribes to USDA inspectors who, in turn, failed to report those bribes to him.

the declarations directly contradicted by its agent's admissions; at least one of the declarations is contradicted as well by the declarant's own statements during the criminal proceedings brought against him. While Michael Tsamis states in his declaration that none of his inspections were influenced by bribes (see Tsamis Decl. P4 ("Nor were any of may inspections written up with any notations other than what resulted from my personally examining the produce and then following the training and procedures given me by the USDA Inspection Service")), he admitted during his plea hearing that he "accepted $ 150 for performing three inspections . . . to downgrade the commodities that the applicant was getting and give adjustments in the price." Transcript at 38, *United States v. Tsamis*, 99 Cr. 1085 (LAK) (S.D.N.Y. Feb. 9, 2000).[11] Permitting BTP to manufacture an issue for trial on the basis of conflicts between its own agent, Taubenfeld, and these declarants "would be a terrible waste of judicial resources and a fraud on the court." Jeffreys, 275 F. Supp. 2d at 477.

BTP's other objections to RAJS's summary judgment motion lack merit. First, BTP asserts that the Court should adopt the approach of the District Court in *Six L's Packing Co., Inc. v. Post & Taback, Inc.*, 132 F. Supp. 2d 306 (S.D.N.Y. 2002), attached as Ex. 3 to BTP's Request for Judicial Notice, in which the court approved a proposed settlement recommended by a Special Master for distribution of a limited PACA trust fund.[12] (See BTP Mem. of Law at 5.) In that case, the District Court was faced with multiple claimants to the limited assets of an insolvent wholesaler, many of whom were mere nonpayment creditors. The court also lacked the benefit of factual findings contained in USDA reparation orders because produce suppliers who alleged fraudulent downgrading were forced to file claims directly in District Court in order to have any opportunity to recover against the insolvent

[11] Declarant Jones stated in his plea allocution that he "received cash payments to downgrade produce," *Id.* at 34, but unlike Tsamis, he does not purport in his declaration to have avoided being influenced by bribes when inspecting produce.

[12] The Court takes judicial notice of the Special Master's Report and the Order approving the recommendations contained in the Report as accurately reflecting the District Court's disposition of the case.

wholesaler. In addition, the parties had extremely limited opportunity to engage in discovery concerning the extent to which the wholesaler had engaged in bribery. See Revised Special Master's Report and Recommendation at 2-5 & 10, *Six L's Packing Co., Inc. v. Post & Taback, Inc.*, Nos. 01 Civ. 0573, 01 Civ. 0934 (JSR) (Consolidated) (S.D.N.Y. Nov. 20, 2001), attached as Ex. 2 to BTP Request for Judicial Notice. None of these conditions obtain here: RAJS has brought a claim for damages directly against a solvent defendant; the Court has the benefit of the Reparation Report as a prima facie source of factual findings; and BTP had ample opportunity, both during the USDA reparation proceedings and in the de novo proceeding before the Court, to discover evidence that, despite Taubenfeld's admissions, BTP's business practices were not tainted by bribery before late 1998. Therefore, the approach taken by the District Court in the Six L's case does not apply here.

Next, BTP reasserts its counterclaims against RAJS, arguing that it overpaid by over $ 46,000 for Shipments 1, 2, 4, 5, and 6, as designated by the Reparation Order, which were performed by USDA inspectors who had never been accused of bribery. BTP bears the burden of proof on these claims, *see Koam III*, 329 F.3d at 128, but offers no evidence in support of its argument. Even if its claims were not barred by the PACA statute of limitations,[13] BTP cannot under *Celotex* resist summary judgment where it has no evidence of overpayment that could create a genuine issue for trial. BTP is incorrect when it argues that it may rely solely on "the evidence submitted before the Secretary" without introducing or pointing to any record evidence in support of its counterclaims before this Court, either in its brief or in its Local Rule 56.1 Statement. Under PACA, the record before the Court on appeal consisted only of the Reparation Order and the pleadings filed before the

[13] BTP acknowledges that its counterclaims would otherwise be time-barred under PACA, but argues that it may nonetheless assert them under N.Y.C.P.L.R. § 203(d), which permits counterclaims to be asserted late if the "counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends." The Court expresses serious reservations concerning the availability of this state procedural rule under PACA, which designated a strict time limitation for filing PACA reparation claims with a limited exception for those had been harmed by bribery at Hunts Point Market, but does not reach this question, given BTP's failure to introduce any evidence in support of its counterclaims.

USDA Secretary. See 7 U.S.C. § 499g(c); *Frito Lay*, 863 F.2d at 1036. BTP has had ample opportunity to conduct discovery in this Court, or to seek to introduce discovery that may have been conducted during the reparation proceeding into evidence here. Since it has not done so, the Court concludes that RAJS is entitled to judgment as a matter of law on BTP's counterclaims.

BTP's arguments that a trial is necessary to determine whether damages were properly calculated for Shipments 9 and 10, which were sold on an "open" price. But, as with its counterclaims, BTP introduces absolutely no evidence suggesting that those shipments were properly priced, or that the damage calculations employed by the Reparation Order are incorrect. This wholly unsupported argument may be disregarded by the Court on summary judgment.

III. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the Motion for Summary Judgment of respondent Robert A. Johnson Sales, Inc. ("RAJS") against petitioner B.T. Produce Co., Inc. ("BTP"), pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, is hereby granted; it is further

ORDERED that judgment be entered in favor of RAJS in the amount of $ 34,171.75, plus interest thereon at the rate of 10 percent per annum from January 1, 1998, plus $ 300, plus additional costs, expenses, and attorney's fees pursuant to 7 U.S.C. § 499g(c); and it is finally

ORDERED that RAJS submit its application for costs, expenses and attorney's fees to the Court by January 7, 2005, that BTP submit its response to RAJS's application by January 21, 2005, and that RAJS submit any reply to BTP's response by January 28, 2005.

The Clerk of Court is directed to close this case, subject to its being reopened in the event that the application for costs and fees authorized above is filed.

SO ORDERED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021
and
MICHAEL H. HIRSCH
PACA Docket No. APP-03-0005
and
BARRY J. HIRSCH
PACA Docket No. APP-03-0006.
Filed December 3, 2004.

PACA – Responsibly connected – Bribery – False inspection reports – Target price – Willful – Flagrant – Repeated – Aggravating circumstances – Mitigating circumstances – Sanctions.

Ruben Rudolph, Christopher Young-Morales and Charles Kendall for Complainant.
Marc C. H. Mandell and Charles Hultrstrand, for Respondents.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

DECISION

In this decision I find that in PACA Docket No. D-02-0021, Respondent Kleiman & Hochberg, Inc.[1] willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on 12 occasions. However, because I find these violations were only committed in order to expedite inspections and not to gain an advantage over shippers or others in any of the specific transactions relied upon by Complainant, I am imposing a civil

[1]In PACA Docket No. D-02-0021, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and Kleiman & Hochberg is the Respondent. In PACA Docket No. APP-03-0005, Michael H. Hirsch is the Petitioner, and in PACA Docket No. APP-03-0006 Barry J. Hirsch is the Petitioner.

penalty of $180,000 for the violations in lieu of a ninety day license suspension, and I am not revoking Respondent's PACA license. I also find that both Michael H. Hirsch, in PACA Docket No. APP-03-005, and Barry J. Hirsch, in PACA Docket No. APP-03-0006, are responsibly connected to Respondent.

Procedural History

On July 16, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondents with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 16, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Meanwhile, on February 12, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Respondent. On March 17, 2003, Michael and Barry Hirsch each filed appeals of those determinations. On April 4, 2003, former Chief Judge James W. Hunt consolidated the disciplinary case against Respondent and the Petitions of the Hirsches for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 16, 2003. I conducted a hearing in New York City from March 1 through 4, and from March 15 through 18, 2004. Christopher Young-Morales and Charles Kendall of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and David Gendelman represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around

the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 50[2]. To avoid a prison term, Cashin agreed to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 51, CX 19. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the days events, principally which inspections he received bribes for and for how much. Tr. 51-2, 55-6. He turned over the money he received as bribes during each of these meetings.[3] These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing.

[2]"Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-UU). The exhibits for the responsibly connected cases are marked RCMH and RCBH for Michael and Barry Hirsch respectively.

[3]While it is undisputed that Cashin turned over the bribes paid for the 12 inspections at issue here, there is some dispute as to whether he turned over other bribes paid by Respondent.

CX 10. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is no evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that he received bribes on numerous occasions over a number of years from John Thomas, a 31.6 % shareholder and vice-president of Respondent. CX 1, Tr. 41-48, 243. Cashin specifically accounted for 12 inspections where he received bribes from Thomas during the pendency of the Forbidden Fruit investigation. These 12 inspections are cited in the Complaint. Cashin testified that in each of these 12 inspections, he "helped" Respondent by altering one or more aspects of the inspection certificate, but that he had no recollection as to what he did in any specific inspection to "help" Respondent. Tr. 44-5. He testified that he would have "helped" Respondent by overstating the defects, overstating the number of produce containers he inspected, and misstating the temperature of the produce. Tr. 46-50. However, he could not state what he did in any particular instance. Tr. 49.

At the conclusion of Operation Forbidden Fruit, Cashin resigned his position. Tr. 30. John Thomas, Respondent's part owner and vice-president, was indicted on October 21, 1999, for Bribery of a Public Official, a crime for which he eventually pled guilty on October 17, 2001. However, there are significant differences between the initial indictment and the superseding information to which he pled. Initially, Thomas was charged with seven counts of Bribery, based on the payments he made to Cashin in connection with 12 inspections. CX 8A. The indictment alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to influence the outcome of inspections* of fresh fruits and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York." (emphasis added). The superseding information to which Thomas pled guilty to one count of bribery alleged that Thomas "made

cash payments to a United States Department of Agriculture produce inspector *in order to obtain expedited inspections*." (emphasis added). CX 8. As I discuss below, while I hold Respondent responsible under the Act for the crimes committed by Thomas, the motivation for the crimes, and the impact of the crimes on the shippers and growers involved, are factors I am considering in terms of the appropriate remedy against Respondent.

Thomas freely admitted to paying bribes for the inspections in question. Tr. 509-12, 529. Thomas has been with Respondent for approximately 30 years, and basically runs the night shift. Tr. 509. He testified that in the 1980's he had been visited by USDA inspector Danny Arcery. Tr. 510. This visit was in response to complaints he had made about late produce inspections. Tr. 509-10. He testified that Arcery told him that in order to avoid late inspections, he had to "tip" the inspector $25 to get him "to come quicker rather than purposely later," Tr. 510, 529-32, and that if these instructions were not complied with the produce would be allowed to rot before an inspector would show up. Id., at 511. He testified that while he paid bribes to inspectors and their supervisors, he never asked for "help" and no "help" was ever offered. Tr. 513. He further testified that he never asked for nor received a falsified inspection report, and that the only reason he was paying the inspectors and their supervisors was "to get a quicker inspection as opposed to being purposely delayed." Tr. 518. He further testified that while he was somewhat involved in the sales of the produce, he did not deal with the shipper in settling accounts and had no role in going back to the shipper and adjusting prices. His partners, Barry and Michael Hirsch, handled prices with the shippers. Tr. 535. He also testified that all the bribes came out of his own pocket, and not from company funds and that no one else at Respondent knew he was making these payments. Tr. 519.

I heard a great deal of testimony, presented mostly by Respondent, concerning the significance of the 12 inspection reports that were issued for the inspections where bribes were paid to Cashin, which were the subject of the initial indictment, and which form the basis of Complainant's case. Through the testimony of Barry and Michael

Hirsch, as well as the testimony of many of the shippers who supplied the produce that was inspected, Respondents presented the circumstances behind each of these transactions.

Michael Hirsch testified that Respondent is primarily in the business of buying and selling produce, purchasing from shippers, growers and brokers. Respondent employs up to ninety people, and is a 24-hour a day operation, with the Hirsch brothers principally running the daytime portions of the business. Tr. 573-82. Most contact with suppliers occurs during the daytime. Tr. 576-7. Buying and selling of produce involves a constant give and take, trying to balance the needs of customers with the produce available. Tr. 576-9. Handling of distressed produce, including produce that is rejected by other houses or by wholesale customers, is a part of their business. Tr. 582-3. Frequently, a shipper will call stating that it is bringing in some distressed and/or rejected merchandise with the request that Respondent do the best it can in selling the produce. *Id.* In many cases, an inspection is called in even before an order arrives, if they know they will need an inspection. Michael Hirsch estimated that 5% of the loads they receive are inspected. Tr. 583-4.

The most common arrangement between Respondent and its shippers, particularly with merchandise that they know in advance has some problems is "price-after-sale" or "pas." Under these circumstances, there is no price fixed upon delivery of the product, although shipping documents frequently have "price ideas" on them. Tr. 578-80. Rather, Respondent records the price it received for each box of produce, factoring in any boxes lost due to repacking or dumping. This account of sale document may also reflect expenses, such as the fee[4] paid the USDA for the inspection. When the entire load is sold or otherwise disposed of, the average net sales price is calculated, at which point Respondent agrees upon a final price for the load with the shipper. Other pricing arrangements are also made, such as consignment, where Respondent would get an agreed upon percentage of whatever the final sale price was. Also, invoices will generally indicate which party pays

[4] The legal inspection fee, as opposed to any bribes.

the freight.

There are also a few more nebulous factors that are used to reach a final price between Respondent and its shippers. Thus, Lawrence Kroman of I. Kunik Company, who has worked with Respondent for approximately 18 years, explained that " . . . the settlement price depends on basically . . . my assessment or our assessment of what that price on that particular file needs to be. Some files the prices are close to what I want, sometimes the prices are more than I want, sometimes the prices are less than what I want. It's based on our relationship, I guess, and our long term goals together, I'd call it." Tr. 962. Other witnesses similarly testified that the final price paid by Respondent for a shipment of produce would be affected by such relationship factors, which frequently affect the final price paid. Tr. 624, 639.

With respect to the individual loads that are the subject of the 12 inspections at issue for which bribes were admittedly paid, Complainant provided undisputed evidence that Thomas bribed Cashin in connection with each of the inspections. However, the only evidence supporting Cashin's claim that in each of these 12 inspections he falsified the inspection reports to "help" Respondent is Cashin's uncorroborated word. Indeed, Cashin was unable to point to a specific instance regarding any of these inspection certificates where he falsified the information. Tr. 49. He only stated that he falsified each report. Even in his daily briefings with the FBI, there is not one single instance where Cashin told the agents of any specific falsification he made in any inspection certificate. In response, Respondent's witnesses testified that in each of the inspections at issue, the inspection report accurately depicted the produce described. Not only was this testified to in great detail by Respondent's principals Michael and Barry Hirsch, but the shippers and suppliers involved in these transactions also testified that the inspection certificates were generally consistent with their perception of the produce, and that since the produce was priced after sale, the inspection certificate was of little moment to the transaction in any event. Tr. 962-3.

For example, one of the cited inspection certificates, for which

Cashin was paid, involved a shipment of cantaloupes from I. Kunik Co. This certificate, dated 4/15/99 and signed by Cashin, RX D, p. 5 (also CX 11, p. 4) indicates that 10% of the produce has sunken areas, and a like proportion suffered from some decay. The sunken area is an indentation caused by age and dehydration. Tr. 804. Barry Hirsch testified that all business with Kunik is done as pas, which was confirmed by Lawrence Kroman, vice president of Kunik. Tr. 797, 961. Although the manifest for the load, RX D, p. 2, listed a price that would appear to be inconsistent with a pas, Kroman confirmed that the $14.25 per box on the manifest was "what I am shooting for as a return on the product" and that it was indeed a pas. Tr. 974. The report of sale sheet, RX D, p. 4, indicates that after the 1064 boxes were fully disposed of, and factoring in the cost of dumping some boxes and the cost of the inspection, the average box was sold by Respondent for $12.10. Respondent paid Kunik $11.75 per box for the entire load, making a "profit" of only 35 cents per box, not even enough to cover its costs when labor is factored in. Kroman admitted that no company in the business "could remain viable at 35 cents a carton," Tr. 978, and went on to explain, much as Barry Hirsch did, that in the course of a relationship lasting decades, sometimes Kroman would ask Hirsch to "work a little close," Tr. 979, and sometimes the margin would be bigger than would be justified by the particular load in question. There was no indication that the inspection certificate was not reflective of the condition of the produce, and the inspection certificate appeared not to be a factor in the settling of the price of the load.

Barry Hirsch was asked, regarding a different load, "Why would you even bother getting an inspection? " He replied, "When the work came in and it was really bad, every once in a while we'd call to get inspected, just in case the shipper needed the inspection for one of his growers or the shipper called me and asked me to get them inspected, we would get them inspected." Tr. 789. With respect to the Kunik load of cantaloupes that are the subject of RX D, the inspection certificate was never even sent to Kunik, Tr. 808, nor was it discussed with Kroman. Tr. 988-9.

In another shipment, Fisher Bros. Sales, Inc., pertinently contracted

with Respondent to sell 479 cartons of South African Bonheur grapes. RX F. This, too, was pas, as were all transactions between Respondent and Fisher. The grapes were not in the best condition, as Mr. Galo, who was Fisher's Director of Sales at the time, testified that "they'd probably been in the warehouse for a good four or five weeks," and that they were probably cleaning out the cooler at the warehouse. Tr. 1005. Fisher had a target price for the grapes and, when Respondent was able to sell the grapes for a higher price, Fisher received its full target price. Galo testified that the USDA inspection performed by Cashin played no part in Fisher's dealings with Respondent. Tr. 1026.

Similar scenarios were testified to regarding the other transactions that were the subject of the inspection certificates. With respect to each inspection certificate, either Michael or Barry Hirsch, and in most cases a representative of the shipper as well, testified that the inspection certificate accurately reflected the condition of the produce, that the certificate had no impact on the financial aspects of the transaction because the shipper knew in advance that the produce had some problems, and the final settlement of the load was based on the sales price of the produce more than anything else.

Cashin was also questioned as to his role regarding three other inspections that he stated he conducted, at Respondent's location, but for which he told the FBI investigators he did not receive any illegal payment. These inspections were conducted at Respondent's facility on 4/15/99, and are mentioned in the 302 forms at CX 10, page 4. Cashin testified that he conducted these inspections for "J Scott"—who Cashin said was a buyer who kept an office at Respondent's location. Tr. 148-9. Cashin testified he was never paid bribes for these three inspections. John Thomas, during the course of his testimony, stated that the three inspections Cashin claimed he conducted on 4/15/99 for Scott were in fact conducted for Respondent, and that he paid him a $50 bribe for each inspection. Tr. 516. Subsequently, Helene Traeger, Respondent's assistant office manager, testified that Scott had left Respondent's facilities after an argument in July 1998 and never returned. Tr. 736-8, 740-2. Barry Hirsch, too, confirmed that Scott would not have called for these three inspections, since Scott no longer worked there at the

time of the inspections, and that these suppliers were not people Scott worked with even when he was there. Tr. 870-3. Indeed, James Scott himself testified that he left Respondent in mid-July of 1998 and that he had never called for any inspections when he was working at Respondent's facility. Tr. 1047-52.

Carolyn Shelby, a marketing specialist, testified as to her role in the investigation. She basically reviewed a large number of documents, although she discovered that many sales records were lost in a fire at Respondent's facility. Tr. 287. She documented the license records of Respondent, and particularly looked at reparation complaints filed against Respondent. She testified that she did not know what were the outcomes of the reparation complaints against Respondent, nor did she know if the inspections affected the price of the produce at all. Tr. 324-6.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Koller testified that by Thomas's paying of bribes to Cashin, Respondent had committed willful, repeated and flagrant violations of PACA. Tr. 350-1. He testified that bribery destroyed the integrity of the inspection process, and constituted a failure by Respondent to perform duties described in Section 2(4) of the Act. He recommended that the license of Respondent be revoked, contending that, due to the seriousness of the violations, civil penalties were not adequate. On cross-examination, Koller admitted that it was generally desirable for inspections to be conducted as close to arrival time of the produce as possible. Tr. 368. He based his sanction recommendation on the commission of bribery, finally concluding that bribing a produce inspector is an unfair practice under the Act, and one for which license revocation was the appropriate sanction. Tr. 349-50.

With respect to whether Michael and Barry Hirsch were responsibly connected to Respondent, Thomas and the Hirsches consistently testified that Thomas acted on his own in paying bribes, and that neither of the brothers was aware that anything illegal was going on until Thomas was arrested. However, there was no dispute that Michael Hirsch was the

president and a director of Respondent, as well as a 31.6 % stockholder, and that during the period that is the subject of this case he played a major role in the day to day management of the company, that he worked there from 7:30 a.m. to 6 p.m. every day, that he played a significant role in determining the prices that would be paid for produce, and that his role in the company's operations was far from ministerial or nominal. Similarly, it was undisputed that Barry Hirsch served as treasurer, director and a 31.6 % stockholder, and that he, too, had significant day to day management roles with Respondent, including buying and selling of produce, overseeing warehouse operations, and generally running the daytime operations of the business with his brother. CX 1.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in 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.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender." 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues . . .giv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . 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."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(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.

Findings of Fact

1. Kleiman & Hochberg, Inc. (Respondent) is a New York Corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 30.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 50. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 50, CX 19.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about

that day's activities. Tr. 51-52; CX 10.

5. Beginning at least in the late 1980's, and continuing through August 1999, John Thomas paid bribes to William Cashin and other USDA inspectors. Tr. 509-512. The purpose of these bribes was to expedite inspections. *Id.*

6. John Thomas paid Cashin a $50 bribe to conduct each of the 12 inspections referred to in the Complaint.

7. The information reported in each of the inspection certificates referred to in the Complaint appears to be accurate.

8. There is no credible evidence in this record indicating that the bribes paid to Cashin for the 12 inspections referred to in the Complaint were used to gain a bargaining or economic advantage over any of the suppliers of the produce involved in these 12 transactions.

9. During the period in which he paid bribes to Cashin, John Thomas was vice president, a director and a 31.6 % shareholder of Respondent. CX 1.

10. During the period described in paragraph 9, Michael Hirsch was president, a director and a 31.6 % shareholder of Respondent. CX 1.

11. During the period described in paragraph 9, Barry Hirsch was treasurer, a director and a 31.6 % shareholder of Respondent. CX 1.

12. Both Michael and Barry Hirsch were actively involved in the day-to-day management of Respondent's business. There is no evidence that they knew or should have known that Thomas was paying bribes.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by John Thomas constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 12 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 90 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of $180,000.

5. Michael H. Hirsch is responsibly connected to Respondent.
6. Barry J. Hirsch is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, John Thomas, paid bribes to William Cashin in each of the 12 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that the preponderance of the evidence shows that these bribes were not paid to gain any advantage over produce shippers and sellers, but were paid in order to obtain inspections in a timely manner. Therefore, I am not granting Complainant's request to revoke Respondent's PACA license, but I am instead requiring that Respondent pay a civil penalty of $180,000 in lieu of a 90-day suspension of their license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Michael or Barry Hirsch by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Michael and Barry Hirsch are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 12 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. John Thomas, an officer and major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 12 occasions.

Both Thomas and Cashin freely acknowledged that Thomas did indeed make $50 payments to Cashin on the 12 occasions alleged in the Complaint. In fact there was no dispute that these 12 occasions were representative of a long-standing practice that went back at least until the 1980's. In fact, Thomas even testified that he paid Cashin an additional

$150 for three inspections that were not included in the Complaint even though they occurred on the same day as two other inspections that were included in the Complaint.

It is likewise undisputed that Thomas was vice-president of Respondent at the time the violations alleged in the Complaint were committed, and that he was a 31.6 % shareholder of Respondent.

B. Respondent is liable for the violative acts of Thomas that were committed within the scope of his employment or office.

Section 16 (U.S.C. §499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. Thomas testified that he paid the bribes in order to insure that inspections he ordered were not delayed. Thomas stated that the money used to pay the bribes came out of his own pocket, and there was no paper trial indicating otherwise. He also stated, and the Hirsch brothers confirmed, that he acted without their knowledge or approval. However, the purpose behind the bribes, even as expressed by Thomas, was to benefit Respondent, as the alleged threat of delayed inspections would harm Respondent as an entity. Even though Thomas, as a nearly one-third owner of Respondent, would obviously share in any benefit that Respondent received, it is evident that the bribes paid, whatever their motivation, were designed to benefit Respondent in the conduct of its business.

Thus, in *Post & Tauback, Inc.*, 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the PACA licensee's agents and employees." *Id.,* at 820. As long as Thomas was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if Michael and Barry Hirsch were unaware of Thomas' actions,

the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In *Post & Taback, Inc.*, the Judicial Officer unequivocally held that "as a matter of law,

. . . violations by [an employee] . . .are . . . violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the . . . bribery
. . . and would not have condoned [it]." *Id.,* at 821. I agree with Complainant's contention that if a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company's officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. See Complainant's Initial Brief at 29. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction." Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in *Post & Taback:*

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

in the entire inspection system.
Id., at 825.

Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, have recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. *In Sid Goodman and Co., Inc.*, 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. *See e.g., JSG Trading Corp.*, 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

While Thomas testified that the motivation for his payments to Cashin was to receive timely inspections, and while he essentially testified that Cashin was part of an extortion or shakedown ring among USDA inspectors, it is apparent that rather than complaining to other government officials, including the FBI, he opted to make the requested payments. There is no evidence, even from Thomas' own testimony, that he viewed the payments as anything more than an efficient means to get his work done. With the long standing nature of these payments, going back upwards of ten years based on Thomas' own testimony, Complainant easily meets its burden of showing that the illegal payments, or bribes, were willful, flagrant and repeated.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." *PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (2001). Here, Thomas, and therefore Respondent, knew that the payments made to Cashin in the 12

inspections involved in this case, as well as the countless illegal payments over at least the previous decade, were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were "flagrant." In *Post & Taback, supra,* the Judicial Officer found, citing the dictionary definition of "flagrant" as covering conduct "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned," that "payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry." *Id*., at 829-30. While there are some significant distinctions between the purposes of the bribes in this case versus those in *Post and Taback*, and other pertinent decisions, which I will discuss below in the context of sanctions, the long-standing practice of Respondent bribing Cashin and other inspectors easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Not only did Thomas admit making illegal payments to Cashin in at least the 12 instances cited by Complainant, he also alleged that he made three other payments to Cashin for inspections that Cashin did not report to the FBI, and admitted that he had made payments for inspections at least since his alleged meeting with Danny Arcery in the late 1980's. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of $180,000.

Although Respondent has committed at least 12 serious violations of the PACA by making illegal payments to Cashin, the sanction of license revocation, as urged by Complainant, is not appropriate under the facts of this case. I base my sanctions decision on a number of factors, including that the preponderance of the evidence establishes that the illegal payments to Cashin in these specific 12 instances were not used to gain a competitive advantage over any shipper or grower and that there is no credible evidence that Thomas made these payments for any reason other than to receive expedited inspections. Looking at the cases cited that support PACA license revocation, I must conclude that these violations, while serious, warrant a lesser sanction than those cases where bribes were paid in order to take economic advantage of the suppliers of the produce involved.

A. The initial indictment of John Thomas cannot be used to demonstrate that he committed the violations alleged, since he pled to a superseding information, which is dispositive.

Complainant has contended, at some length, that even though John Thomas eventually pled to an information charging him with making illegal payments to a USDA produce inspector in order to receive expedited inspections, I should look at the original indictment in order to determine the acts he really committed. Not surprisingly, Respondent has vigorously contested this approach.

Complainant contended in its opening brief at pages 12-14, 21-22, that the "indictment . . . supports the weight of the evidence, to the effect that Mr. Thomas paid the bribes to Mr. Cashin in order to affect the outcome of produce inspections." While, as I discuss below, I disagree that the weight of the evidence indicates that Thomas was making the payments to influence the outcome of produce inspections, I further disagree with Complainant's contention that the indictment can be considered as evidence that the crimes/violations alleged were committed. While the indictment played a significant role in triggering the PACA Branch's investigation of Respondent, as it should have, I believe it would be inappropriate for me to consider it as an indication that its allegations are correct, particularly where, as here, it has been

superseded by an information to which Thomas pled guilty. Indeed, it appears that the government voluntarily dismissed the initial indictment as part of accepting Thomas' guilty plea on the information in open court.

The limited cases cited by Complainant on the issue provide no help to their position. The cases of *Bousley v. U.S.*, 523 U.S. 614 (1998) and *Peveler v. U.S.*, 269 F. 3d 693 (C.A. 6, 2001), merely hold that when a person elects to vacate a guilty plea which was entered into as a result of plea bargaining, they must make a showing of actual innocence not only for the charges to which they pled, but to the initial charges which the government dropped in order to reach a bargain. The necessary predicate to the application of the holding of these two cases is the existence of an action to vacate a guilty plea. In Thomas' case, he has strongly insisted that his plea was appropriate, and reflected the criminal acts that he actually committed. *Bousley* and *Peveler* are inapposite. With respect to Thomas' motivation for bribing Cashin, I give the initial indictment no weight at all.

B. The preponderance of the evidence establishes that the motivation for the bribes paid by Respondent to Cashin was to prevent delays in inspections, that the 12 inspections that were the subject of the Complaint were not falsified by Cashin, and that Respondent did not use the 12 inspections at issue here to gain any business or commercial advantages vis-à-vis the shippers or growers involved.

The only evidence concerning the motivation for paying bribes to Cashin comes from the testimony of Cashin and Thomas. Unsurprisingly, their testimony conflicts in a number of areas. Thomas stated that he began making payments to USDA produce inspectors for the sole purpose of getting timely inspections beginning when he was told by Arcery that failure to make these payments would result in seriously delayed inspections. He testified that he never asked for "help" on any inspection and knew of no inspection certificates that reflected false information. Although he was indicted for paying bribes to influence the outcome of produce inspections, the only crime of which he stands convicted related to this case is for paying bribes to

expedite inspections. In fact, Thomas essentially testified, and counsel argued, that he was really the victim of an organized extortion scheme involving a large number of USDA inspectors, including supervisors and management. Given the number of inspectors indicted and convicted as a result of Operation Forbidden Fruit, and the alleged involvement of supervisors and management, it is not difficult to see how an individual could reach this conclusion.

While Thomas, and thus Respondent, maintained that they never paid bribes to influence inspections, Cashin testified that in each of the 12 inspections he made alterations to the inspection certificate, to "help" Respondent. Unfortunately, Cashin's recollection was such that he could not recall a single specific instance of any alteration he made to any certificate. He testified that he might have changed various items reported on the certificate, including temperature, count, and condition of the produce. While it may be understandable that Cashin would not specifically remember what he wrote on an inspection form nearly five years after the fact, his version of events is further tainted by the absolute lack of mention, in any of the 302 forms compiled by the FBI, of any actions he had taken with regard to the inspections other than actually conducting the inspections and accepting his illegal payment. It is incomprehensible to me how the investigation team, which included members of USDA's OIG, would not have recorded any accounts offered by Cashin of alterations made in the inspection certificates if there was evidence that such alterations were made. Further, Cashin was equipped with both video and audio recording equipment at various times, yet nothing was introduced into evidence which showed that Cashin "helped" Respondent in any way.

Cashin's recollection and/or credibility was greatly reduced by his account of the inspections he said he made for "J Scott." As discussed, *supra*, Cashin claimed that three inspections, for which he told the investigators he had not received illegal payments, were performed for "J Scott." Subsequent testimony from a number of witnesses, including James Scott himself, demonstrated that Scott had not worked at Respondent's produce house since approximately nine months before these three inspections took place, and that he had nothing to do with

these inspections. Thomas testified that he had in fact paid Cashin for these three inspections, and Respondent suggested that Cashin simply pocketed the money himself. This does not demonstrate, as suggested by Respondent, that Cashin's testimony was false in its entirety, but it strongly impacts his credibility. When the most affirmative and emphatic statements offered about the circumstances of inspections on a particular date are so glaringly incorrect, it certainly casts doubt on the statements made by Cashin concerning his alteration of the certificates.

Additionally, Respondent devoted a significant portion of its case to showing that the inspection certificates were in fact reflective of the produce inspected by Cashin. Extensive testimony by Michael and Barry Hirsch, as well as the testimony of Lawrence Kroman of I.J. Kunik, Dino Gallo, former Director of Sales for Fisher, and Peter Silverstein, President of Northeast Trading, Inc., corroborated this assertion of Respondent. Many of the transactions involved in the 12 inspections were of shipments known to be having "problems." Thus, for example, the Bonheur grapes that were the subject of Cashin's April 29, 1999 inspection (RX F, p. 3) were received by Respondent four to five weeks after the close of the season for Bonheur's, and were effectively the result of cleaning out Fisher's storage cooler. That the grapes were in less than ideal condition is consistent with their age. Similarly, the shipment of grape tomatoes received from NET and inspected by Cashin on May 28, 1999 (RX H, p. 9) had been rejected by the Stew Leonard's chain store. That 13% of the grape tomatoes were reported as defective by Cashin is not surprising; presumably that was the reason for the rejection. As a result, significant repacking had to be done by Respondent. *Id*., at 6. Further, NET had significant problems with the grower of these tomatoes, and believed that Cashin's inspection results were correct. Tr. 1106-7.

While Respondent did not have testimony from each and every supplier and grower whose produce was inspected by Cashin in these 12 instances, Complainant has offered no testimony, other than Cashin's generic statements that he "helped" Respondent on each inspection, that would allow me to find that, in any of the 12 instances, the produce was not in fact as Cashin described it in the inspection certificate. At the

very least, the preponderance of the credible evidence supports the finding that the inspection certificates were generally accurate as to the condition of the produce inspected.

The preponderance of the evidence also supports a finding that Respondent's illegal payments were not used as a means of dealing unfairly with the suppliers of the produce, a factor which I find is important in imposing the appropriate sanction for these violations. Respondent's witnesses uniformly testified that the inspection certificates had no bearing on the prices paid by Respondent for the produce, and that the ultimate price paid was based on the amount actually received by Respondent from its sales of the produce. Most of the contracts from the inspections at issue were based on price after sale, with a few others on consignment. There was no prearranged price, although there were price suggestions or goals on some of the shipping documents. Following the establishment of the selling price of the produce, which included factoring in produce that had been dumped or repacked, as well as the costs of inspections and, occasionally, freight and other charges, the final price was agreed to. Even here, there was no set formula for establishing prices, as Respondent and its suppliers testified that prices were often finalized based on long-term relationships, on what price was needed to get a return for a particular customer, and many other nebulous factors.

While Respondent's witnesses testified repeatedly that the purpose of the bribes paid by Thomas was to receive expedited inspections and that Respondent did not use the bribes to gain any advantage over the suppliers of the produce, Complainant provided little evidence to contradict this assertion. Thus, Complainant's sanctions witness testified that the bribes "tended to benefit Respondent . . . by Respondent making a bribery payment to a produce inspector to obtain false information for an inspection certificate . . . Respondent would be in a position to use the information that was reported on that inspection that is false to contact the shipper. And by presenting that certificate to the shipper to negotiate or obtain that kind of price adjustments or resolving disputes with the transaction." Tr. 345. But Complainant was unable to back this assertion up in the face of Respondent's evidence to

the contrary.

C. A civil penalty of $180,000 is the appropriate sanction.

At the close of the hearing, I asked both Complainant and Respondent to discuss appropriate sanctions. Tr. 1424-26. In particular, I asked the parties to discuss options available to me that were less onerous than the license revocation urged by Complainant and more onerous than the complete exoneration urged by Respondent. In their briefs, both parties chose to ignore my request and went for the all-or-nothing approach to sanctions. Neither party discussed other options available to me such as suspension of the license for a limited period and/or imposition of civil penalties, even though these options are explicitly available under the statute.

Even though Complainant has not met its burden of showing that the illegal payments made by Thomas were used to induce Cashin to alter inspection certificates, and even though Respondent has demonstrated to my satisfaction that it did not use these payments as part of a scheme to gain a financial advantage in produce transactions over their produce suppliers, this does not exonerate Respondent under the PACA. As discussed, *supra*, USDA case law strongly supports Complainant's contention that bribery of a USDA inspector constitutes a serious violation of the Act.

On the other hand, where the Judicial Officer has ultimately imposed the sanction of revocation, there has generally been a finding that the violator did commit the violation in order to gain a financial advantage, a circumstance not shown by the preponderance of the evidence in this case. Thus, several of the cases cited by Complainant to support revocation indicate that a significant factor leading to the imposition of the most severe sanction was that illegal payments were used to the economic advantage of the payor vis-à-vis the party with whom the payor was transacting business. Thus, in the recent decision of *Post & Taback, supra*, the Judicial Officer affirmed the administrative law judge's finding that payments were made "to influence the outcome of United States Department of Agriculture inspections of fresh fruits and

vegetables" and that the false information on the inspection certificates was used "to make false and misleading statements to produce sellers." These factual findings are considerably different than my findings in this case, as I have concluded that Complainant has neither shown that the inspection certificates were inaccurate nor that they were used to deceive or mislead the produce sellers. Similarly, in *Sid Goodman and Co., Inc., supra*, the payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. In *Tipco, Inc*., 50 Agric. Dec. 871 (1991), also cited by Complainant, the decision emphasized, among other things, that "members of the produce industry have an obligation to deal fairly with one another," *Id*., at 862, a significant factor in the Judicial Officer's decision to revoke a PACA license. Here, the testimony has been consistent that the Respondent did not deal unfairly with its suppliers, that the suppliers felt that the inspection certificates were accurate and that they had been dealt with fairly by Respondent, and that generally that Respondent has continued to maintain cordial business relationships with these suppliers at least through the date of these hearings.

In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances." *George A. Heimos Produce Company, Inc*., 62 Agric. Dec. 763, 797 (2003). Respondent committed willful, flagrant and repeated violations by paying bribes to USDA inspectors, which in itself constitutes an extremely serious violation of the PACA. Respondent did not pay these bribes to gain an economic or transactional advantage over its produce suppliers. Thus, rather than imposing the "death penalty" of license revocation, I believe that an appropriate sanction would be a 90-day suspension of Respondent's license. Under the alternative assessment provisions of the PACA, Respondent is assessed a penalty of $180,000, based on $2,000 per day for 90 days of continuous violation. In assessing this penalty, I am factoring in the size of Respondent's business, and the number of employees. Looking at

exhibits reflecting on Respondent's profitability, including the salaries paid to its principals, e.g., RCMH 6-8, I am satisfied that a penalty of this amount is an adequate sanction to deter future violations for Respondent and others, without seriously impeding Respondent's ability to continue in business. In *Heimos,* the Judicial Officer determined that, where a suspension was the appropriate sanction, "a civil penalty with an equivalent deterring effect is an appropriate sanction." *Id*., at 797.

III. Both Barry and Michael Hirsch are Responsibly Connected to Respondent.

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 90-day license suspension in lieu of the payment of the $180,000 civil penalty.

Barry and Michael Hirsch are each officers, directors and holders of over 31% of the stock in Respondent. Both are intimately involved in the day-to-day activities of the company. Their principal defense to the finding of the PACA Branch that they are not responsibly connected is reliance on the exception for a "person not actively involved in the activities resulting in a violation of this chapter." While there has been no showing that the Hirsches were involved in the violative activities—a fact generally conceded by Complainant—this does not provide the Hirsches any relief. The statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person "was only nominally a partner, officer, director or shareholder."

The record establishes to a certainty that each of the Hirsches was fully involved in Respondent's business. Indeed, in their Proposed Finding of Facts in the responsibly connected case, the Hirsches ask me to find that "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 1) and "Michael Hirsch was the President and 32% stockholder of

Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 2). These facts refute any possible contention that either of the Hirsches could show that they were not responsibly connected either by showing they were not "actively involved" or that their positions were only "nominal." Under the statutory definition, the fact that the Hirsches might not have been involved in the violative activities does not exonerate them unless they show that they were not actively involved or that their position was purely nominal. The Hirsches simply cannot meet the second part of the statutory test for escaping the responsibly connected label.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of $180,000 in lieu of a 90-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CHARLES E. ELLIOTT, JR.
PACA-APP Docket No. 04-0008.
Order Dismissing Case.
Filed July 6, 2004.

Clara Kim, for Respondent.
Joe Carl "Buzz" Jordan, for Petitioner.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

The parties Joint request to Dismiss Petition for Review is **GRANTED**.

Accordingly, this case is **DISMISSED**.

In re: JOHN COPE'S FOOD PRODUCTS, INC., PACA Docket No. D-02-0027 and
In re: VERNON A. FREY, PACA Docket No. APP-03-0015 and
In re: WARREN H. DEBNAM, PACA Docket No. APP-03-0017.
Order Dismissing Case as to Petitioner Walter H. Debnam.
File August 13, 2004.

Charles Kendall for Complainant.
Mark D. Evans for Respondents.
Decision and Order by Chief Administrative Law Judge, Marc R.Hillson.

Warren H. Debnam (Petitioner), and the Administrator, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (Respondent), jointly request that his Petition be withdrawn without prejudice.

In accordance with the terms of their Joint Motion, filed August 11,

2004, this case is DISMISSED without prejudice as to Warren H. Debnam.

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

In re: JOHN COPE'S FOOD PRODUCTS, INC., PACA Docket No. D-02-0027 and
In re: VERNON A. FREY, PACA Docket No. APP-03-0015 and
In re: WARREN H. DEBNAM, PACA Docket No. APP-03-0017
Order Dismissing Case as to Petitioner Vernon A. Frey.
File August 13, 2004.

Charles Kendall for Complainant.
Mark D. Evans for Respondents.
Decision and Order by Chief Administrative Law Judge, Marc R.Hillson.

Vernon A. Frey (Petitioner), and the Administrator, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (Respondent), jointly request that his Petition be withdrawn without prejudice. In accordance with the terms of their Joint Motion, filed August 11, 2004, this case is **DISMISSED** without prejudice as to Vernon A. Frey. Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

In re: JUAN MARTINEZ and ANTOLIN DEL COLLADO.
PACA - APP Docket No. -05-0001.
Order Dismissing Case.
Filed November 15, 2004.

Eric Paul, for Respondent.
Randall Norlund, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

Petitioners 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 October 5, 2004, be withdrawn.

Accordingly, this case is **DISMISSED**.

In re: ATLANTA EGG & PRODUCE CO., INC., CHARLES R. BRACKETT AND TOM D. OLIVER
PACA Docket No. D-03-0003, D-03-0004.
Three Rulings.
Filed December 4, 2004.

Andrew Stanton for Complanant.
William M. Droze for Respondent.
Ruling by Chief Administrative Law Judge, Marc. R. Hillson.

Three Rulings

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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: LOUIS PRODUCE CORPORATION, INC.
PACA Docket No. D-03-0020.
Decision and Order.
Filed July 31, 2004.

PACA-Default – Willful failure to pay despite motive.

David A. Richman, for Complainant.
Respondent, Pro se.
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 referred to as the "Act," instituted by a complaint filed on May 12, 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 2002 through June 2002, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 18 sellers, 251 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $337,694.77.

The complaint also asserts that on July 17, 2002, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq*.) in the United States Bankruptcy Court for the Eastern District of Louisiana (Case No. 02-15072). Respondent admitted in its bankruptcy schedules that the 18 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 admitted that

it has failed to make full payment promptly to the produce sellers listed in the complaint, but denies that its failure to pay as required by the Act was willful. Respondent's admissions in its answer are sufficient to justify the issuance of this 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 17, 2003 by certified U.S. mail, as evidenced by the posting date of the return receipt which was attached to the complaint. Respondent admitted in its answer that it 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 14, 2003, 120 days after service of the complaint. The affidavit of Gregory A. Breasher of the PACA Branch, Agricultural Marketing Service, attached to Complainant's Motion for Decision Without Hearing Based on Admissions, indicated that in December 2003, Mr. Breasher contacted five of the produce sellers listed in the complaint, and found that those five sellers were still owed **$217,506.00** 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 stated in its answer that it did not willfully make "misleading or false statements to defraud any supplier to profit." Louis Despaux, President of the Respondent corporation, explained that all of his suppliers knew the money problems he was having and still continued to sell to him. The Judicial Officer 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 applies here.

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 18 sellers in the total amount of $337,694.77 for 251 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.

Findings of Fact

1. Louis Produce Corporation, Inc. is a corporation organized and existing under the laws of the State of Louisiana. Its business address is 67-81 French Market Place, New Orleans, Louisiana 70116. Its mailing address is 7548 Patricia Street, Arabi, Louisiana 70032.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 971153 was issued to Respondent on March 28, 1997. This license terminated on March 28, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period January 2002 through June 2002, failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $337,694.77 for 251 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce.

4. On July 17, 2002, Respondent filed a voluntary petition pursuant to Chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Louisiana. In that matter, case number 02-15072, Respondent admitted in its bankruptcy schedules that the 18 sellers listed in paragraph III of the complaint hold unsecured claims in an amount greater than or equal to the amounts alleged in the complaint.

5. In its answer to the complaint, Respondent admited its failure to make full payment promptly.

6. 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

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 Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final September 9, 2004.-Editor.-]

In re: FIELDERS CHOICE PRODUCE, INVESTORS, LLC.
PACA Docket No. D-03-0022.
Decision Without Hearing by Reason of Default.
Filed July 27, 2004.

PACA - Default – Prompt payment, failure to make.

Jeffrey Armistead, for Complainant.
Steven J. Brown, 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 referred to as the "Act"), instituted by a complaint filed on May 20, 2003, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 2000 through January 2002, Fielders Choice Produce Investors, LLC, (hereinafter "Respondent") failed to make full payment promptly to eight sellers of the agreed purchase prices, or balances thereof, for 207 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce in the total amount of $244,114.33.

A copy of the complaint was mailed to Respondent by certified mail at its last known principal place of business on May 20, 2003, and was returned to the office of the Hearing Clerk. A copy of the complaint was served on Respondent by regular mail on June 11, 2003, and 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") the Respondent is deemed served with the complaint on the date of that mailing. 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 limited liability company organized and existing under the laws of the state of Arizona. Its business mailing address was 490 East Pima, Phoenix, Arizona 85004-2838.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 010664 was issued to Respondent on April 11, 2001. This license terminated on April 11,

2002, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period November 2000 through January 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 207 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 $244,114.33.

Conclusions

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

Order

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

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

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

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 17, 2004.-Editor]

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In re: QUEEN CITY MARKETING SERVICES, INC.
PACA Docket No. D-03-0029.
Decision Without Hearing by Reason of Default.
Filed July 27, 2004.

PACA - Default – Prompt payment, failure to make.

Clara Kim, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief 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 17, 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 May 2002 through January 2003, Respondent Queen City Marketing Services, Inc., (hereinafter "Respondent") failed to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of $249,109.58 for 56 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

On July 18, 2003, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was returned unclaimed by the U.S. Postal Service on August 12, 2003. On August 15, 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. 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 Ohio. Its business address is 700 West Pete Rose Way, Suite 344, Cincinnati, Ohio 45203. Its business mailing address is c/o Agent Richard A. Castellini, 1000 Tri-State Building, 432 Walnut Street, Cincinnati, Ohio 45202.

2. At all times material herein, Respondent was licensed or operating subject to license under the provisions of the PACA. PACA license number 19990008 was issued to Respondent on October 1, 1998. That license terminated on October 1, 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 May 2002 through January 2003, Respondent purchased, received and accepted in interstate commerce, from 11 sellers, 56 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 $249,109.58.

Conclusions

Respondent's failure to make full payment promptly with respect to the 56 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 became final September 27, 2004.-Editor]

In re: ALL WORLD FARMS, INC.
PACA Docket No. D-03-0027.
Decision Without Hearing by Reason of Default.
Filed August 20, 2004.

PACA - Default – Prompt payment, failure to make.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief 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, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period January 2001 through November 2002, All World Farms, Inc., (hereinafter "Respondent") failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, for 65 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce in the total amount of $354,079.10.

A copy of the complaint was mailed to Respondent by certified mail

at its last known principal place of business on June 24, 2003, and was returned to the office of the Hearing Clerk. A copy of the complaint was served on Respondent by regular mail on August 8, 2003, and 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"), the Respondent is deemed served with the complaint on the date of that mailing. 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 originally organized and existing under the laws of the State of Florida. Respondent's business address was 1291-A South Powerline Road, Pompano Beach, Florida 33069. On November 27, 2001, Respondent incorporated in the State of Pennsylvania. Respondent's business mailing address is 202 East Fairfield Avenue, Suite 282, New Castle, Pennsylvania 16105.

2. At all times material herein, Respondent was licensed under the provisions of the PACA or conducted business subject to license. License number 990091 was issued to Respondent on October 22, 1998. This license terminated on October 22, 2002, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period January 20001 through November 2002, Respondent purchased, received and accepted in interstate and foreign commerce, 65 lots of perishable agricultural commodities from 23 sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $354,079.10.

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 November 22, 2004.-Editor]

In re: BAYSIDE PRODUCE, INC.
PACA Docket No. D-04-0010.
Decision Without Hearing by Reason of Default.
Filed August 25, 2004.

PACA - Default – Prompt payment, failure to make.

David A. Richman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the "Act"), instituted by a Complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period November 23, 2002, through February 7, 2003, Respondent Bayside Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to 22 sellers of the agreed purchase prices, or balances thereof, in the total amount of $163,102.70 for 74 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 12, 2004 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").

A copy of the Complaint was also mailed to Respondent by certified mail at its last known principal place of business (street address) on April 26, 2004, and was returned by the Postal Service to the Department of Agriculture. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on May 21, 2004 pursuant to Section 1.147(c) of the Rules of Practice.

Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of California on August 6, 1997. Its business address was 1120 Growers St., Salinas, CA 93901. Its mailing address is P.O. Box 7265, Spreckels, California, 93962.

2. At all times material herein, Respondent was licensed under the PACA. License number 19981824 was issued to Respondent on August 26, 1998. This license terminated on August 26, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period November 23, 2002, through February 7, 2003, Respondent purchased, received, and accepted in interstate commerce, from 22 sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $163,102.70.

Conclusions

Respondent's failure to make full payment promptly with respect to the 109 transactions set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed

to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 28, 2004.-Editor]

In re: GARDEN FRESH PRODUCE, INC.
PACA Docket No. D-04-0007.
Decision Without Hearing by Reason of Default.
Filed August 25, 2004.

PACA - Default – Prompt payment, failure to make.

Charles Kendall, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the "Act"), instituted by a Complaint filed on January 27, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period January 14, 2002, through February 26, 2003, Respondent Garden Fresh Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to five (5) sellers of the agreed purchase prices, or balances thereof, in the total amount of $379,923.25 for 109 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at

its last known principal place of business on January 27, 2004, and was returned by the Postal Service to the Department of Agriculture on February 9, 2004. Upon inquiry by the office of the Hearing Clerk, the Postal Service indicated by letter received April 27, 2004 that Respondent had moved and left no forwarding address. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on April 28, 2004 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 *et seq*., hereinafter "Rules of Practice"). Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of Nevada on April 26, 2000. Its business address was 3940 E. Craig Rd. #103, North Las Vegas, Nevada 89030. Its mailing address is 43 E. Romie Lane, Salinas, California, 93901-3123.

2. At all times material herein, Respondent was licensed under the PACA. License number 20001495 was issued to Respondent on July 28, 2000. This license terminated on July 28, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph III of the Complaint, during the period January 14, 2002, through February26, 2003, Respondent purchased, received, and accepted in interstate commerce, from five (5) sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $379,923.25.

Conclusions

Respondent's failure to make full payment promptly with respect to the 109 transactions set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

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

Copies hereof shall be served upon parties.

[This Decision and Order became final December 17, 2004.-Editor]

In re: SEVEN SEAS TRADING CO., INC., d/b/a VALLEY VIEW FARMS.
PACA Docket No. D-03-0031.
Decision Without Hearing by Reason of Default.
Filed October 29, 2004.

PACA – Default – Prompt payment, failure to make.

Ann K. Parnes for Complainant.
Respondent - Pro se.
Decision and Order 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" or "PACA"), instituted by a complaint filed on September 5, 2003, by the Associate Deputy Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs of the Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1999 through February 2002, Respondent Seven Seas Trading Co., Inc., d/b/a Valley View Farms (hereinafter "Respondent") failed to make full payment promptly to 27 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,227,758.83 for 176 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business on December 18, 2003 by certified mail, and received on December 23, 2003. This complaint has not been answered. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a 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 New York. Respondent's last known business address is 119 Chrystie Street, New York, New York, 10002.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 760471 was issued to Respondent on October 1, 1975. This license terminated on March 19, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period November 1999 through February 2002, Respondent purchased, received and accepted in interstate and foreign commerce 176 lots of perishable agricultural commodities from 27

sellers, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,227,758.83.

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.

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Southern Produce Distributors, Inc. PACA Docket No. D-04-0006. 9/28/04.

Kroppf Fruit Company. PACA Docket No. D-03-0023. 11/8/04.

Washington Star, Inc. PACA Docket No. 03-0033. 11/15/04.