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AGRICULTURE DECISIONS

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COURT DECISION

BENJAMIN SUDANO, BRIAN SUDANO v. USDA.
Case No. 04-1872.
Filed May 13, 2005.

(Cite as: 131 Fed. Appx. 404).

PACA – Payment, failure to make, prompt – Responsibly connected – Ownership, greater than 10% – Actively involved.

Court held the JO correctly found that the Sudanos failed to prove that they were not "responsibly connected" once the 10% ownership threshold was reached.

United States Court of Appeals,
Fourth Circuit.

Before WILKINS, Chief Judge, WIDENER, Circuit Judge, and Robert E. PAYNE, United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

Benjamin Sudano and Brian Sudano seek review of a decision of the United States Department of Agriculture, finding that they were "responsibly connected"[1] to Lexington Produce Co. during the period the company was found to be in violation of the Perishable Agricultural Commodities Act, as amended, 7 U.S.C. §§ 499a-499s (the Act). On review, the Sudanos assert that they were not "responsibly connected" with Lexington Produce Co. between May 1999 and January 2000, the period during which Lexington Produce Co. violated 7 U.S.C. § 499b(4), § 2(4) of the Act, for failing to make "full payment promptly" of $915,115.25 of payments owed to multiple produce suppliers of perishable agricultural commodities.

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[1]"Responsibly connected" is defined as "affiliated or connected with a commission merchant, dealer, or broker as (A) 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." 7 U.S.C. § 499a(b)(9).

We have jurisdiction to entertain this petition because it is from a final order of the Secretary of Agriculture. *See*28 U.S.C. § 2342.

In a thorough and detailed opinion, the Secretary of Agriculture found that the Sudanos were "responsibly connected" with Lexington Produce Co. between May 1999 and January 2000. *In re Benjamin Sudano,* PACA-APP Docket No. 02-0001 (May 21, 2004). In accordance with that decision, we are of opinion and hold that Benjamin Sudano and Brian Sudano were "responsibly connected" with Lexington Produce Co. during the period in question.

We note that the Secretary held administrative hearings on four occasions in three cities, at which hearings oral testimony and documentary evidence were taken. During the period in question, May, 1999--January, 2000, Benjamin Sudano and Brian Sudano owned 100 percent of the outstanding stock of Lexington Produce Co., 50% each; Benjamin Sudano was the vice president and secretary of Lexington Produce Co., Brian Sudano was the president and treasurer; and both defendants also worked in the business upward of 10 to 13 hours every day of the week, including weekends. During the period May-November, 1999, the Sudanos, together with one John Alascio, controlled the business; and for the November, 1999--January, 2000 period, the Sudanos alone controlled the business.

Based on these facts and other findings of the Secretary, the Secretary correctly found that the defendants failed to prove under 7 U.S.C. § 499a(b)(9), by a preponderance of the evidence, that they were not "responsibly connected" with their company. Being of opinion the order of the Secretary under review is supported by substantial evidence and is free from reversible error, we accordingly deny the petition for review on the opinion of the Secretary of Agriculture. PACA-APP Docket No. 02-0001, filed May 21, 2004.

The petition for review is accordingly,

DENIED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: GLENN MEALMAN.
PACA Docket No. APP-03-0013.
Decision and Order.
Filed: February 8, 2005.

PACA – Director, role as corporate – Nominal involvement, when not – Disparate treatment, when not – Prosecutorial discretion, broad.

Andrew Stanton, for Complainant.
James P. Tierney, for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Petitioner Glenn Mealman was not responsibly connected to Furr's Supermarkets, Inc. I find that even though he was a director of Furr's for the period of time during which violations had been committed, his position as director was nominal.

Procedural History

On October 23, 2002, Petitioner was notified by letter from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, that an initial determination had been made that Petitioner was "responsibly connected" to Furr's Supermarkets, Inc., as that term is defined in 7 U.S.C. § 499a(b)9. The PACA Chief made that determination based on records showing him to be a member of the Board of Director of Furr's from November 1, 1997 through February 23, 2001. Following Petitioner's December 26, 2002, letter disputing his responsibly connected status, James Frazier, the Chief of the PACA Branch issued a final determination on April 3, 2003, that Petitioner was responsibly connected to Furr's. On October 29, 2003, Petitioner filed a petition for review of the PACA Chief's determination.

In the meantime, on September 12, 2002, USDA also filed a

complaint against Furr's alleging that it had committed "willful, flagrant and repeated" violations of 2(4) of the PACA (7 U.S.C. § 499b(4)). The basis for the complaint was Furr's failure to pay Quality Fruit a total of over $174,000 for the sale and delivery of perishable agricultural commodities between September 1998 and February 2001. On February 6, 2003, after Furr's filed an answer to the complaint but did not deny that it had failed to pay Quality Fruit, former Chief Judge James Hunt entered a Decision Without Hearing Based on Admissions against Furr's, pursuant to Rule 139 of the Rules of Procedure. At a telephone conference with former Judge Leslie Holt, counsel for Petitioner suggested that he should be allowed to present evidence on the underlying violations, since Furr's failure to contest these violations (they were in bankruptcy) should not deprive Petitioner from asserting that there was no underlying PACA violation—a necessary prerequisite to any responsibly connected liability. Judge Holt set a briefing schedule for the parties on this issue. The matter was subsequently assigned to me on April 7, 2004. At an April 15, 2004 telephone conference, I stated that I would follow the ruling I had recently made in another matter (*In re. Brackett & Oliver/Atlanta Egg & Produce Co., Inc*., copy attached)[*] where I held that due process considerations necessitated that a party charged with being responsibly connected to a company which had defaulted in a related disciplinary proceeding be allowed to show that the underlying violations did not occur.

Prior to the hearing, I also refused to sign a subpoena requested by Petitioner for records relating to three other individuals who were apparently affiliated with Furr's in various capacities but who were not the subject of an ongoing responsibly connected proceeding.

On June 8, 2004, I conducted a hearing in this case in Kansas City, Missouri. James P. Tierney represented Petitioner and Andrew Y. Stanton represented Respondent. [1] The parties subsequently filed

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[*] *See Brackett & Oliver, et al*. elsewhere in this volume – Editor

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[1] Petitioner testified on his own behalf and Respondent called two witnesses. I received into evidence Petitioner's Exhibits 1 through 9 (these exhibits are cited as

(continued...)

initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

Glenn Mealman worked for Fleming Companies, Inc. (Fleming) in a variety of capacities for 39 years, beginning with his graduation from college in 1957. Tr. 47. By the time he left the company in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. Tr. 47-48. Since he was only 63 when he retired, and his full retirement benefits did not kick in until he turned 65, he had a financial arrangement with Fleming to consult for and assist the company in various capacities. Tr. 49-50, 54-55, 65. Once he turned 65, he was paid by Fleming at an hourly rate to serve on the Furr's board. Tr. 68.

Fleming was a substantial investor in Furr's. Tr. 70-71. As such, Fleming was entitled to two seats on Furr's Board of Directors. Tr.21. In August 1998, Fleming asked Mealman to serve as a Director on Furr's board on Fleming's behalf. Tr. 21-22. All fees and expenses associated with this appointment were paid by Fleming. Tr. 34. Mealman had no ownership interest in Furr's, and no role in the day-to-day management of the company. Tr. 27. He had no check writing authority, had no role in the purchase of produce, and no role regarding payment of creditors. Tr. 26. As a director representing Fleming, Mealman attended Furr's board meetings. As a board member, he was required to serve on at least one committee, and so he served on the Real Estate Committee. Tr. 23. This committee met only once or twice during Mealman's tenure, and served essentially as a "rubber-stamp" to sites already approved by Furr's. Tr. 23-24. Mealman visited one site during his tenure. *Id.* Mealman also nominated an individual to be a board member, but only when he was requested to do so because he was told that someone on the selection committee should not be making a nomination. Tr. 32-33, PX1.

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[1](...continued)
"PEx") and rejected Petitioner's Exhibits 10-13. I also admitted Respondent's (REx) Exhibits 1 through 4. The official agency records that were the basis of the Agency's action are RC1 through 6.

Mealman remained on the Board even after Fleming ceased having an ownership interest in Furr's in June 2000. Tr. 36-37, 72. However, he attended no further meetings of the Furr's board prior to Furr's filing for bankruptcy in February 2001. Tr. 38-39. Mealman had no participatory role in either Furr's decision to file for bankruptcy, nor in any subsequent actions of Furr's. Tr. 41.

The PACA action against Furr's was primarily based on its failure to pay a single creditor—Quality Fruit. When Furr's was proceeding through bankruptcy, apparently Quality Fruit was the only creditor who failed to file a claim with the bankruptcy court. There is no evidence in this record as to why Quality Fruit did not pursue a claim against Furr's.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. 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.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, who in this case would be Furr's, 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.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Glenn Mealman, Petitioner in this matter, served as a member of the Board of Directors of Furr's Supermarkets, Inc. from 1998 until March, 2002.

2. Mealman occupied one of the two seats that his long-term employer, Fleming Companies, Inc., were entitled to fill as a result of their significant ownership interest in Furr's. Mealman had no ownership or employment interest in Furr's, and was never paid anything by Furr's. Between the time of his initial appointment to the Board, and Furr's termination of their ownership interest in June 2000, Fleming paid Mealman for his work on the Board, and also paid his expenses. Tr. 34. While Mealman did not resign from the Board at the time that Fleming's ownership interest terminated, he never attended another Board meeting. Tr. 38.

3. Mealman attended numerous board meetings between 1998 and 2000. As each board member had to serve on at least one committee, he served on the real estate committee. He viewed one potential site as part of his duties for this committee. Tr. 23-24. Also, at the request of another board member, he nominated a pre-selected individual to the board. Tr. 32, PX1.

4. Mealman attended meetings where sales trends and finances were discussed. Individual accounts payable or the failure to pay suppliers were never discussed at meetings attended by Mealman. PX1, PX3, RC5, Tr. 24-25.

5. Mealman was never involved in Furr's day-to-day business activities, had no check writing or document issuing authority, had no role in deciding what bills were to be paid, did not have particularized knowledge of Furr's financial difficulties, and had no knowledge of, nor relationship with, the company's creditors. Tr. 26-27.

6. Quality Fruits, a supplier to Furr's, was not paid in a timely fashion by Furr's, in violation of the PACA. As a result of this failure to pay Quality Fruits, a Decision Without Hearing Based on Admission was issued against Furr's on February 6, 2003. RX3, PX9, RC4.

7. Mealman did not know Furr's was considering bankruptcy until the company actually filed for bankruptcy. Tr. 41. He had no role in

the decision to file for bankruptcy, nor did he have any knowledge of individual accounts that were not paid.

Discussion

I reaffirm my earlier rulings that (1) Petitioner can challenge the underlying violation against Furr's which led to Respondent's charges that Petitioner is responsibly connected to a merchant which violated the PACA where such claim has not been litigated before the Agency, and (2) that Petitioner is not entitled to information or to present testimony concerning other individuals who were not pursued by Respondent. I also reject Petitioner's contention that Respondent cannot issue a responsibly connected determination until there has been a final decision in the related disciplinary proceeding. In my principal finding, I find that Petitioner was not responsibly connected to Furr's and that he was only nominally a director of that company. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original complaint. While the issue is largely moot in this case, since Petitioner did not produce any evidence indicating that Furr's did not fail to pay Quality Fruits as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, and has urged me in its opening brief, at pp. 13-15, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. The approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. Yet both the Act and the Rules of Procedure recognize the very close

relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require 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).

I find Respondent's reliance on *In re Danny L. Brand d/b/a Danny's Food Service,* 53 *Agric. Dec.* 1628, *aff'd* 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioner was not a party to the disciplinary proceeding relied upon in this case, nor did he have any opportunity to participate, and I have seen no evidence that he was in privity to Furr's in any event. Not allowing the Petitioner to challenge the existence of the underlying violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure and due process.

2. The USDA's decision not to proceed against other individuals as responsibly connected is immaterial to this case. Petitioner vigorously argues that I should have allowed him to subpoena documents and present evidence with respect to Respondent's treatment of other individuals who allegedly had connections with Furr's but who were not pursued, or whose pursuit was abandoned, by Respondent, as responsibly connected parties. Petitioner has couched its argument as one of constitutional disparate treatment, contending that the USDA applied different standards to Petitioner than to one David Morrow, a contemporary of Petitioner on the Furr's board. At the hearing, I allowed Petitioner's counsel to make a proffer on this issue, after I refused to allow him to question Josephine Jenkins of USDA on this subject.

The principal issue I have before me in this case, which I will discuss in more detail below, is whether Petitioner is responsibly connected to Furr's, assuming Furr's in fact violated the PACA. Whether the government could have sanctioned other individuals as responsibly connected is simply irrelevant to Petitioner's status. It would be most onerous, and inconsistent with the Act if, in order to

support a responsibly connected case against an individual, the government had to distinguish that individual from every other shareholder of over 10% of stock, board member, partner or officer. Even if Morrow was responsibly connected to Furr's and was not the subject of government sanction, that would not let Petitioner off the hook if he were otherwise liable. As Respondent has contended on this issue, the Chief of the PACA Branch is entitled to exercise prosecutorial discretion, which may not be challenged in this proceeding. The issue has been squarely dealt with in USDA case law.

It is axiomatic in administrative law that the agency has prosecutorial discretion to pursue those violators where it can make its case . . . violators are not excused because violations in similar circumstances were not prosecuted, or the violator was not sanctioned in the same fashion as other violators. *In re. Tipco, Inc.*, 50 *Agric. Dec.* 871, 900 (1991), *aff'd per curiam*, 953 F. 2d 639 (4th Cir. 1992), cert. den. 113 Sup. Ct. 84 (1992). The legitimate exercise of prosecutorial discretion does not constitute disparate treatment nor can it be construed as an arbitrary and capricious action.

3. The USDA's timing in pursuing a responsibly connected case against Petitioner before the underlying disciplinary action was resolved is proper. Petitioner also contends that USDA exceeded its statutory authority by prematurely determining that Petitioner was responsibly connected to a PACA violator. Petitioner argues that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioner is incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceedings for a licensee are pending, they be joined for hearing.

> (b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b).

To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process.

4. Furr's violated PACA by its failure to timely pay Quality Fruits for multiple loads of produce. While I allowed Petitioner to challenge the underlying violation alleged to have been committed by Furr's, there is no evidence in the record that Furr's did not in fact commit the violation charged by the PACA Chief. It is undisputed that Quality Fruits did not pursue its claim against Furr's in bankruptcy court when it had the opportunity to do so, and so the findings of former Chief Judge Hunt's Decision Without Hearing Based on Admissions of February 6, 2003 apply to this proceeding. RX3.

5. Petitioner was not responsibly connected to Furr's. While Petitioner was one of the director's of Furr's during the time Furr's committed its PACA violations, Petitioner has met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

(a) Petitioner was not actively involved in the activities resulting in a violation of this chapter. There is no serious dispute that Petitioner was not directly involved in the activities relating to Furr's failure to pay Quality Fruit for produce. No evidence was introduced by Respondent as to this issue, and Petitioner testified without contradiction that he never participated in Furr's purchases of perishable agricultural commodities, that he never was involved in any aspect of Furr's day-to-day business activities, that he never saw any departmental breakdowns on fruit and vegetable payables, and that fruit and vegetable purchases were never discussed at board meetings. Tr. 24-26. He not only had no knowledge of whether particular companies were being paid by Furr's, but also had no idea who Quality Fruits was until the commencement of this proceeding. Tr. 27-28. He did not know about Furr's bankruptcy until after it had been filed, and had no role in the bankruptcy proceedings or in the discharge of obligations in the course of those proceedings. Further, he had no check writing or purchasing authority, and would have had no authority to discharge the debt, even if he knew about it.

Respondent, however, contends that Petitioner was "actively involved" within the meaning of the Act. The principal explication of the standard for whether a person is actively involved is stated in *In re Michael Norinsberg*, 58 *Agric. Dec.* 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that " if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test." Respondent contends that because Petitioner participated in corporate decision making, voting for or against budget resolutions, he should be found to have exercised "judgment, discretion or control" as per the *Norinsberg* holding. As Petitioner points out though, the board of directors did not have before themselves decisions as to which creditors to pay, but only had jurisdiction over matters brought to the board's attention by Furr's management. There is no evidence in this record of any issues concerning the buying or selling of produce, or the payment or failure to pay for produce, that was ever brought to the attention of the board

during the period of Petitioner's service. Tr. 25-28. And it is a considerable stretch to contend, as does Respondent, that the fact that the board considered a refinancing plan intended to restructure Furr's debt, and to liquidate the shares of Fleming in Furr's, constitutes "active involvement" in a decision not to timely pay Quality Fruits. Further, Furr's indebtedness to Quality Fruits had occurred 20 months before the board even considered this refinancing plan, so the violative acts occurred long before any board "involvement" in the decisions regarding financial restructuring. In *Maldonado v. USDA,* 154 F. 3d 1086 (9th Cir. 1998), the court held that the president of the company was not "actively involved"—even though he was authorized to co-sign checks, because he had not been involved in the particular sale which lead to the violation and did not make the decision as to which bills were paid. Petitioner here was far more removed from the transactions in question than was the officer in *Maldonado*.

Similarly, the Judicial Officer in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474 (1998), found several factors to be significant in his decision that Salins was "actively involved," including his day-to-day participation in the company, his "long-term, substantial involvement" in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of "financial information to assist in the decision making process." *Id.*, at 1490. None of these factors are present here.

Unless Respondent contends that a member of the board of a violating corporation is automatically deemed "actively involved" in any transaction that occurs during his time of service on the board—a position plainly not supported by the statute or the case law—there is no basis for me to find Petitioner "actively involved" in the activities leading to the violation that Furr's committed with respect to Quality Fruit.

(b) Petitioner was only nominally a director of a violating licensee or entity subject to license. Once again, Petitioner bears the burden of demonstrating, by the preponderance of the evidence, that he was only a "nominal" member of the Furr's board, in order to defeat the proposed finding that he was responsibly connected to Furr's.

Petitioner has demonstrated that he served on the board at the request of Fleming, his employer of over 39 years, as one of their two representatives on the board. Fleming was entitled to two representatives out of the ten-person board as a consequence of their significant ownership of Furr's stock. The Petitioner himself had no ownership in Furr's, was being paid by Fleming on a "retainer" type of salary for the period between the time he "retired" from Fleming at age 63 and his reaching the age of 65, at which time he was entitled to full retirement benefits and was paid on an hourly basis by Fleming for his service on the Furr's board. Petitioner had absolutely no connection with Furr's other than to serve as Fleming's chosen representative on Furr's board.

Respondent has offered a number of reasons to support its contention that Petitioner was responsibly connected to Furr's. Prominent among these reasons are that Petitioner was educated was an "experienced and knowledgeable businessman", Tr. 137, that he was on the real estate committee, that he "did participate in at least one meeting," [*Id].*, and that he was present at an October 13, 1999 meeting "at which important financial records were discussed."[*Id].*, at 135. These reasons do not elevate Petitioner's role above that of a nominal member of the board. It is undisputed that he only served on the board as a representative of Fleming,[2] and that only Fleming paid him for his time, travel and other expenses. There is not a shred of evidence that he ever acted in any capacity other than as a representative of Fleming. While he did serve on the real estate committee, the testimony is undisputed that he did so because he had to be on at least one committee as a board member, and that the position was essentially that of a "rubber-stamp." While he once "participated" in a meeting, Petitioner testified without rebuttal that it was only because he was asked to nominate an individual who had already been preselected to be the new CEO. Tr. 32. If anything, these activities confirm the nominal nature of Petitioner's participation.

Likewise, the uncontradicted fact that Petitioner was an

[2] While he intended to remain on the board after Fleming liquidated its investment at Furr's, he did not participate in any additional meetings, nor get paid anything, from that time until the company was in bankruptcy.

"experienced and knowledgeable businessman" does not somehow transform his role on the Furr's board to other than nominal. He clearly served not in his own right but as the designee of Fleming. In *Minotto v. USD*A, 711 F. 2d 406, 711 F, 2d 406 (D.C.Cir. 1983), the Court overturned a finding that a board member was responsibly connected, ruling that a director must have an "actual, significant nexus with the violating company,"*Id.*, at 409, and should be in a position where he "knew or should have known of the Company's misdeeds." *Id.*, at 408. While one of the factors relied on in both *Minotto* and *Maldonado* was the lack of business training and experience of the cited parties, the fact is there is no evidence that Petitioner knew or should have known that Furr's had not paid Quality Fruits—it was never discussed at a board meeting—and no evidence that he would have had any authority to even inquire into the status of individual unpaid accounts. The unrebutted testimony of Petitioner and the Board's minutes illustrate that individual accounts payable were never reviewed at any board meetings. Likewise unrebutted is his testimony that he had no power or ability to counteract the actions of Furr's board members or employees. Tr. 25, 28, Ex., P-1—P-4.

In *Salins, supra*, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. In *Salins*, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Likewise, Salins had particularized knowledge of the company's financial difficulties, and a "sophisticated level of information" inconsistent with nominal status. Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. He actively participated in corporate decision-making. He had check-writing responsibilities, and "could be considered the only indispensable officer" of the company. He signed numerous corporate documents, including PACA licenses, answers to reparation complaints, etc. And his receipt of significant salary and bonuses was inconsistent with that expected to be paid to someone serving in a nominal capacity. *Id.*, at 1492-95.

Mealman, on the other hand, appears to be the prototypical nominal board member. He clearly served at the behest of Fleming. There is no indication that he had access to any Furr's records, he had

no particularized knowledge of the company's financial condition until it was brought up at a board meeting, had no knowledge and played no role in the company's decision to file for bankruptcy, had no knowledge of or relations with individual creditors of the company, had no significant participation in the corporate decision process other than to rubber-stamp actions at board meetings, had no check writing responsibilities, signed no corporate documents, and received no salary or other benefits from Furr's. It is difficult to imagine a board member serving in a more nominal capacity than that served by Mealman.

Conclusion and Order

Petitioner has shown by a preponderance of the evidence that he was not responsibly connected to Furr's Supermarkets, Inc. Petitioner was not actively involved in the activities resulting in a violation of this chapter and was only a nominal member of the Furr's Board of Directors. Mealman's Petition for Review is granted.

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.

In re: CHARLES R. BRACKETT AND TOM D. OLIVER.
PACA Docket No. APP-03-0004.
Decision and Order.
Filed: March 16, 2005.

PACA – Responsibly connected – Intervenor, not authorized to file as – Trustee in bankruptcy failed to file –Employee, failed to oversee principal.

Andrew Stanton, for Complainant.

M. Greene, for Respondent.
Decision and Order by chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision, I find that Petitioners Charles R. Brackett and Tom D. Oliver are each responsibly connected to Atlanta Egg & Produce Co., Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that both petitioners were actively involved in the activities resulting in the violations by Atlanta Egg, and that neither petitioner was a nominal partner, officer, director or shareholder of Atlanta Egg.

Procedural History

On October 29, 2002, letters from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, separately notified both petitioners that an initial determination had been made that they were "responsibly connected" to Atlanta Egg & Produce Co., Inc., as that term is defined in 7 U.S.C. § 499a(b)9. With respect to Petitioner Brackett, the determination was based on records showing he was president, a member of the board of directors, and a 33.3 percent shareholder of Atlanta Egg from February 1995 through February 2001; with respect to Petitioner Oliver, the determination was based on records showing him to be secretary, treasurer, a member of the board of directors, and a 33.3 percent shareholder during the same time period. On November 26, 2002, Petitioners filed a joint letter disputing their responsibly connected status and urged that the Department reconsider its preliminary finding. On February 12, 2003, James Frazier, Chief of the PACA Branch, Fruit and Vegetable Programs, issued separate letters to each Petitioner, stating in each case that it was his determination that each Petitioner was responsibly connected to Atlanta Egg, and informing them of their right to file a petition for review. Petitioners filed such a petition on March 12, 2003.

In the meantime, USDA filed a disciplinary complaint under the PACA against Atlanta Egg on October 23, 2002. At that time, Atlanta

Egg was in bankruptcy proceedings and a bankruptcy trustee was managing its assets. Atlanta Egg did not file an answer to the complaint, and the Agency filed a Motion for Decision Without Hearing by Reason of Default. While that motion was pending, Petitioners filed a Motion to Intervene in the Atlanta Egg proceeding, so that they could raise defenses to the alleged disciplinary violations. Since USDA case law unequivocally denies any non-party the right to intervene in disciplinary cases, I denied the Motion to Intervene on December 4, 2003, and signed the Decision against Atlanta Egg that same day. In the same series of rulings, however, I held that due process considerations supported allowing Petitioners to challenge the existence or severity of the Atlanta Egg violations in their "responsibly connected" case.

On June 30, 2004, I conducted a hearing in this case in Atlanta, Georgia.[1] Andrew M. Greene represented Petitioners and Andrew Y. Stanton represented Respondent. The parties subsequently filed briefs.

Factual Background

Petitioner Charles R. Brackett graduated from the University of Georgia in 1974 with a degree in poultry science. Tr. 15. Since that time he has been employed in the poultry and egg industry in a variety of capacities. Tr. 15-17. His current position is live production manager of Hillandale Farms, Lake City Florida. Tr. 17.

Petitioner Tom D. Oliver, after receiving a political science degree from Mercer University and serving in the military, has also been in the poultry and egg business for over 30 years. Tr. 161-2, 175-6. He has worked in his family business, Chestnut Mountain Egg Farm, Chestnut, Georgia, since 1971 and is currently president. Tr. 162.

Brackett and Oliver, along with Oliver's late brother-in-law Perry Hammock, purchased Atlanta Egg from Harry Raptis in early 1994.

[1] At the hearing, I heard testimony from both Petitioners, and from Judy Lao and Josephine Jenkins of the PACA Branch. I received into evidence Petitioners' Exhibits 1 through 66, and Respondent's Exhibits 1 through 84, 86 and 87. Also in evidence are the certified copies of the Agency's records for each Petitioner. BCRX refers to Petitioner Brackett's certified record, while OCRX refers to the certified record of Petitioner Oliver.

Tr. 17-19. Brackett supplied $4,900 of the $10,000 purchase price and received 49% of the stock; Oliver and Hammock each supplied $2,550 and each received 25.5% of the stock. Tr. 22, 60. Brackett was named the president of Atlanta Egg, Oliver the treasurer, and Hammock the secretary, and all three were also members of the board of directors. Tr. 23-24, 32, 162, 164.

Brackett desired to hire his former wife's son, Greg Hutson, to manage the company, even though he was only 23 and had no experience in running a business. Tr. 62. At the time they purchased Atlanta Egg, located at the farmers market in Forest Park, Georgia, it was principally a business engaged in the purchasing and selling of eggs, two areas in which both Petitioners had considerable background and expertise. Tr. 18. Oliver testified that he saw it "as a place to distribute some of our eggs," Tr. 178, referring to eggs produced at Chestnut Mountain Egg Farm. By the time Atlanta Egg ceased doing business, only 20% of its business involved eggs, with the remainder in produce. Tr. 34.

Because of Hutson's inexperience, he was closely supervised at first, although he was allowed to take more responsibility for the conduct of the business as time passed. Tr. 62-63. The principal method of supervision was by telephone—with daily contact at first, gradually diminishing to perhaps four calls per week between Brackett and Hutson by 2000. Tr. 66. In addition to communicating with Hutson, Petitioners spoke with each other about the status of the business approximately twice per month. Tr. 67. When Petitioner Oliver was in Atlanta—about every six weeks or so—he would drop by for a visit, and to have lunch with Hutson. Tr. 165-66.

With Hutson running the daily business, Atlanta Egg increased in size from four to 13 employees. Tr. 22, 33. In 1998, Petitioners each received a $10,000 distribution from the business. Tr. 61. After the death of Hammock in 1998, the stock was redistributed so that Hutson became a stockholder as well. Tr. 24, 163, BCRX 7, pp. 5-6, OCRX 7, pp. 5-6. Petitioners and Hutson each now owned a third of the stock in Atlanta Egg, while Hutson was made vice-president and a director of the company, with Oliver adding the position of secretary to his previously held position of treasurer. *Id.* With the company apparently having a profit of around $100,000 in early 2000, Hutson

received a $30,000 distribution, but Petitioners elected to leave any distribution they were entitled to in the business. Tr. 48.

In 1996, Petitioners decided to allow Atlanta Egg's insurance to lapse, deciding that they could not justify the expensive cost of the insurance in light of the exposure they had with their inventory. Tr. 72. In May 2000, Atlanta Egg's inventory and records were destroyed by fire, leading to severe short-term cash flow problems. Tr. 30-31, 69. As a result of these problems, each Petitioner discussed their situation with several of their suppliers. Tr. 70-72, 184.

Beginning in August 2001, a series of problems were discovered that led to the closing of Atlanta Egg. On one of Oliver's visits, Oliver arrived at Atlanta Egg and found that Hutson was not present and things were in disarray. Tr. 35-36, 167-69. Oliver called Brackett to discuss the situation and shortly thereafter they met with Hutson in Atlanta, after which things appeared to improve. Tr. 36. Then in December 2001 Brackett dropped by Atlanta Egg and once again found the business closed "to the extent that another employee had to break in to open the business that morning." *Id.* Shortly after that, a similar scenario occurred, at which point Petitioners decided it was time to fire Hutson, which they finally did in January 2002. They then looked at Atlanta Egg's books and discovered that the business had apparently been "severely mismanaged for quite a number of months," Tr. 40, that Hutson had apparently stolen from the company, and that "any thinking person could review the records in front of him and realize that business couldn't continue." *Id.* Petitioners then decided to close the business and file for bankruptcy.

Both petitioners attended what appear to be annual meetings of the Atlanta Egg board, as well as at least two special meetings. Tr. 32, 182, BCRX 8, pp. 5-14, 17-22, OCRX 8, pp. 1-16. At the February 2002 meeting, petitioners took the action of removing Hutson from his positions at Atlanta Egg. BCRX 8, p. 22.

As president, Brackett had the authority to supervise, direct and control Atlanta Egg, including presiding at shareholders meetings, signing stock certificates, signing checks, hiring and firing employees, etc. He signed the stock certificates, was authorized to sign checks, issued the weekly payroll checks, paid for invoices, paid Atlanta Egg's PACA license fees, and signed the initial application for a PACA license. Tr. 24-26, 57-58, PX 62, BCRX 7, p. 23. He communicated

with Hutson on a regular basis, received information concerning purchases and sales of produce and eggs, and regularly reviewed a variety of financial documents. Tr. 66-67, 69. When Atlanta Egg filed for bankruptcy, Brackett signed the petition. BCRX 9, pp. 2-4, 7.

As treasurer, Oliver had custody of corporate funds, including receiving, disbursing and depositing such funds, and was responsible for maintaining Atlanta Egg's accounts, etc. PX 62, pp. 15-16. Oliver was also authorized to sign checks and occasionally did so. Tr. 164-5. He met with Atlanta Egg's accountant at the end of each year, provided the accountant the necessary information for tax filing regarding receivables, payables and inventory, and signed the annual tax returns on behalf of the company. Tr. 185-6. He was also responsible for maintaining Atlanta Egg's insurance coverage, and fully participated in the decision, along with Brackett, to let the insurance lapse. Tr. 32, 71, 171-2.

There is no dispute concerning the failure of Atlanta Egg to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over $923,000[2] from February 2001 through March 2002. No answer to USDA's disciplinary complaint against Atlanta Egg was ever filed either by petitioners or the trustees in bankruptcy. On December 4, 2003, I denied Brackett and Oliver's Motion to Intervene in the disciplinary hearing, holding that the Petitioners had no right to intervene in disciplinary cases. On that day I signed a default decision against Atlanta Egg, finding that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA. However, over the objection of counsel for Respondent, I stated that in the interest of assuring due process to Brackett and Oliver, I would allow Petitioners to attack the violation findings against Atlanta Egg. However, at the June 30 hearing, no such evidence was presented.

Statutory and Regulatory Background

[2] There is some dispute as to whether the amount owed to several of the creditors should be reduced. *See* discussion, *infra*.

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in 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.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, which in this case would be Atlanta Egg, 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.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Charles R. Brackett, one of the petitioners in this matter, was part of a group who purchased Atlanta Egg & Produce Co., Inc. in early 1994. Since that time he has served as president and a board member of Atlanta Egg. While he originally owned 49% of the stock of Atlanta Egg, he owned 1/3 of the company's stock during the period from February 2001 through March 2002. He is a college graduate who has been involved in the poultry and egg business since 1974.

2. Tom D. Oliver, one of the petitioners in this matter, was also part of the group who purchased Atlanta Egg. He was first treasurer and a board member of the company, as well as a 25.5% stockholder, but with the death of Harry Raptis he also became secretary and a 1/3 stockholder in the company. He maintained this role and ownership level during the period from February 2001 through March 2002. He is a college graduate who has been in the poultry and egg business since completing his military service over 30 years ago.

3. Both Brackett and Oliver actively participated in the management of Atlanta Egg. They hired Greg Hutson to perform the day-to-day management of Atlanta Egg, but supervised him fairly closely at first. They made major corporate decisions, including the decision to let their insurance lapse, to contact creditors and work with a bank to keep the business going after a major fire, to remove Hutson from the company, and to file for bankruptcy.

4. As president, Petitioner Brackett had significant authority, including hiring and firing, signing of checks, reviewing financial documents, applying for and renewing Atlanta Egg's PACA license, signing a variety of corporate documents including stock certificates, and presiding over shareholders meetings. He participated in corporate decision-making and was actively involved in Atlanta Egg.

5. As secretary and treasurer, Petitioner Oliver had significant authority, and participated in significant corporate decision-making, including the decision to let Atlanta Egg's insurance lapse, to fire Hutson, and to file for bankruptcy. As treasurer, he had the authority to sign checks, was responsible for the company's finances, provided the information for, and signed, Atlanta Egg's tax returns, and had custody of corporate funds. As secretary, he signed the minutes of numerous corporate meetings, and co-signed the stock share certificates with Petitioner Oliver.

6. Atlanta Egg, during the period from February 2001 through March 2002, failed to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over $923,000.

Discussion

As a preliminary matter, I reaffirm my earlier ruling that Petitioners can, in a limited fashion, challenge the underlying violations against Atlanta Egg, which led to Respondent's charges that Petitioners are responsibly connected to a merchant that violated the PACA, and where such claim has not been litigated before the Agency. I also reject Petitioners' arguments that (1) Respondent's investigations were faulty, (2) that the bankruptcy stay should have

applied to the Atlanta Egg proceeding, (3) that Respondent's failure to turn over a variety of documents denied Petitioners due process, and that (4) USDA exceeded its statutory authority, and violated both Petitioners' constitutional due process rights and the APA, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Finally, I conclude that the evidence overwhelmingly supports a finding that both Petitioners were responsibly connected to Atlanta Egg. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original complaint. While the issue is largely moot in this case, since Petitioners did not produce any evidence indicating that Atlanta Egg did paid the 80 creditors in a timely manner and in full, as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, Tr. 10, and has urged me in its opening brief, at 19, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. As I have recently ruled, the approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. *In re. Glenn Mealman*, 64 *Agric. Dec.* ___(slip. Op. 7-9) (Feb. 8, 2005). Yet both the Act and the Rules of Procedure recognize the very close relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require 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).

I find Respondent's reliance on *In re Danny L. Brand d/b/a Danny's Food Service*, 53 *Agric. Dec.* 1628, aff'd 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioners technically were not parties to the disciplinary proceeding, as that was instituted after Atlanta Egg was in the hands of a bankruptcy trustee, and Petitioners contended that they had no opportunity to participate in that proceeding. Indeed, I upheld Respondent's objection to allowing Petitioners to intervene in the disciplinary proceeding. Not allowing the Petitioners to challenge the existence of the underlying violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure, and due process.

2. Petitioners' challenges regarding the conduct of the investigation, and the impact of the bankruptcy proceedings against Atlanta Egg, and the alleged failure to turn over "key" documents, are without merit. While I allowed Petitioners to challenge the factual underpinnings of the disciplinary violation against Atlanta Egg, no specific evidence was presented indicating that Atlanta Egg did not commit any of the violations that were the subject of the default decision. Petitioners contend that the investigation conducted by the PACA Branch was faulty, but focuses its criticism on alleged uncertainties in the exact amounts that Atlanta Egg owed, and not on the uncontested findings that 80 creditors were owed many hundreds of thousands of dollars. Since Judy Lao, a marketing specialist with PACA, testified without challenge that her findings as to the number of violations and the amounts due and unpaid were based on Atlanta Egg's own records--records specifically pointed out to her by Petitioner Brackett, I find there is overwhelming evidence supporting the claims against Atlanta Egg. Tr. 86-88, 106, 109. Likewise, the contention that Ms. Lao's telephone verification, in the days before the hearing, that Atlanta Egg still owed substantial amounts to its nine biggest creditors, was hearsay and inaccurate ignores the fact that she was merely confirming what she was told by Atlanta Egg representatives—that substantial funds were owed and it was not likely that they would be paid. Further, such a follow-up was consistent with the need to determine whether Atlanta Egg was paying

their creditors slowly or not at all, as spelled out by the Judicial Officer in *In re. Scamcorp*, 57 *Agric. Dec.* 527 (1998).

With respect to the bankruptcy filing, Petitioners' contention that the bankruptcy stay provisions apply to PACA disciplinary and responsibly connected proceedings is not in accord with either USDA or federal court rulings. *E.g., In re Ruma Fruit and Produce Co., Inc.*, 55 *Agric. Dec.* 642 (1996). The instant proceeding represents "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . ," 11 U.S.C. § 362(b)(4), and as such is not subject to the bankruptcy stay. Both the disciplinary action taken against Atlanta Egg and the responsibly connected proceeding against Petitioners fit within this exception to the stay. Indeed, section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), specifically exempts PACA license revocations from the general exception preventing the government from denying, revoking, suspending or refusing to renew a license.

Allegations concerning Respondent's failure to produce certain "key" documents requested under the Freedom of Information Act (FOIA) likewise do not constitute a violation of due process. Petitioners had the option to appeal FOIA delays or denials under the rules of that statute. While it is somewhat puzzling that these documents were not disclosed, particularly in light of my ruling that I would allow Petitioners' to present evidence challenging the disciplinary violations, it is understandable that the PACA Branch would treat the underlying documents for the disciplinary hearing as not part of the record of the responsibly connected proceedings. It is even more puzzling to me why Petitioners did not seek such documents via a subpoena duces tecum in the instant proceeding.

In any event, these documents would have not aided Petitioners in meeting their burden of proof. The evidence was overwhelming and largely undisputed that Atlanta Egg had committed numerous significant violations of the PACA's prompt payment provisions. The fact that eight reparation complaints triggered the investigation of Atlanta Egg is of no relevance to their committing the violations as charged, particularly where the violations were generally admitted by Petitioners and supported by the findings of the investigation.

The failure to turn over an outline of documents drafted by a former employee is likewise not an error. Josephine Jenkins simply testified that a former employee drafted an outline of the documents that were submitted for the PACA Branch Chief's review. Tr. 139-40. There is nothing to refute the Agency's contention that the responsibly connected determination was made in reliance on any documents other than those included in the certified record provided for each petitioner. The Agency has based its decision solely on the documents in the certified record, so the cases cited by Petitioners to the effect that an agency must disclose the evidence it relied on in making its decision are simply inapposite.

3. The USDA's timing in pursuing a responsibly connected case against Petitioners before the underlying disciplinary action was resolved is proper. Petitioners also contend that USDA exceeded its statutory authority, and denied them due process rights, under the constitution and the Administrative Procedure Act, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Petitioners argue that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed, and that Respondent's approach is a "cart-before-the horse approach to the administrative process." Pet. Br. at 6.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioners are incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceeding for a licensee are pending, they be joined for hearing.

> (b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning

> of 7 U.S.C. §499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. §499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b).

To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process of resolving these cases.

4. Atlanta Egg violated PACA by its failure to pay 80 creditors for 683 lots of perishable agricultural commodities in the amount of over $923,000. While Petitioners have questioned whether the total unpaid amount owed by Atlanta Egg might be slightly overstated, there is no evidence in this record that would show that Atlanta Egg did not commit the violations alleged by the PACA Chief. Thus, it is undisputed that Atlanta Egg failed to pay 80 creditors for 683 lots of perishable agricultural commodities. Although Petitioners have contended that the amount of money still owed in the eight reparation cases may have been less than originally alleged, there is no dispute that substantial payments are owed to each of those eight creditors, and there has been no challenge to the allegations concerning the remaining 72 creditors. Thus, the findings in my December 4, 2003 Decision Without Hearing By Reason of Default apply to this proceeding.

5. Petitioners Charles R. Brackett and Tom D. Oliver were each responsibly connected to Atlanta Egg. Neither Petitioner has met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 1/3 shareholder of a violating licensee or entity subject to license.

(a) Both Brackett and Oliver were actively involved in the activities resulting in a violation of this chapter. Although Petitioners may not have been aware of or participated in the specific transactions that were the subject of Atlanta Egg's violations, by virtue of their major role in the company they must be deemed to have been actively involved in the activities resulting in the violations. By virtue of their significant role in the founding of Atlanta Egg, by their participation in all manner of significant corporate decision making including the hiring of Hutson, the decision to allow Hutson to expand the egg business into one that was largely produce, the decision to let the company's insurance expire, the decision to file for bankruptcy, by their significant ownership interest and performance of significant corporate functions, the Petitioners easily meet the standard for "actively involved" set out in the statute and in the case law.

The principal explication of the standard for whether a person is actively involved is stated in *In re Michael Norinsberg*, 58 *Agric. Dec.* 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that "if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test." The Judicial Officer in *In re Lawrence D. Salins*, 57 *Agric. Dec.* 1474 (1998), stated that in determining whether an individual is actively involved, the adjudicator must look beyond whether a petitioner was directly involved in the purchase of the produce that was not timely paid for. Rather, he found several factors to be significant in his decision that Salins was "actively involved," including his day-to-day participation in the company, his "long-term, substantial involvement" in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of "financial information to assist in the decision making process." *Id.*, at 1490. Unlike the situation in *Mealman, supra*, it is apparent that in this case Petitioners were closely and heavily involved in the corporate decision making process, as was Salins, and so are actively involved.

Thus, Petitioner Brackett was a co-founder of Atlanta Egg, and was president, director and a 1/3 shareholder in the corporation during the time the violations were committed. He was intimately involved in the decision to hire Hutson, who is the son of his ex-wife, and was fully aware that Atlanta Egg was expanding into the produce business, rather than being just involved in the egg business as was his original intention when he co-founded the company. As president, Brackett exercised many of the powers set out in Atlanta Egg's corporate by-laws, including presiding over board meetings, signing the share certificates, and signing checks. He was directly involved in both the hiring and firing of Hutson, and had full hiring and firing authority at all times. He signed Atlanta Egg's initial application for a PACA license, as well as the checks for payment of PACA license fees, and reviewed the company's monthly bank statements. He, along with Oliver, made the decision to file for bankruptcy. He was personally involved in many decisions that led to the company's bankruptcy, including determining the level of supervision of Hutson, participating in the decision not to insure the company's property, participating in a variety of post-fire activities with creditors and the securing of a bank loan to insure that Atlanta Egg's business would continue, and allowing Hutson to continue to run the business long after serious problems were discovered. Under *Norinsberg* and *Salins*, Petitioner Brackett was unquestionably involved in corporate decision-making and thus was "actively involved" with Atlanta Egg.

Under the same analysis, Petitioner Oliver was likewise "actively involved" with Atlanta Egg. He was a co-founder of the company, and was secretary, treasurer, director and a 1/3 shareholder in the company at the time the violations were committed. His duties as treasurer included being responsible for the financial aspects of Atlanta Egg's business, and he was directly involved in disbursement of funds, and was authorized to sign checks on behalf of the company and occasionally did so. He reviewed financial matters at least annually with the company's accountant, provided the accountant with the documents necessary to prepare the tax return, and signed the returns on behalf of the company. He jointly made the decision not to purchase insurance, which clearly contributed to the company's financial problems after the fire, and was involved in securing the

post-fire bank loan and in some of the discussions with company creditors. Further, he was the officer who first discovered the significant problems with Hutson's management of Atlanta Egg, which he discussed with Brackett. Even though Hutson's conduct should have indicated significant problems were occurring in the business, Oliver did not see fit to examine the company's books, nor did he and Brackett see fit to terminate Hutson until months passed. He was involved in all manner of corporate decision making for Atlanta Egg and as such he was "actively involved" with the company.

(b) **Neither Brackett's nor Oliver's positions as major shareholders, corporate officers, and directors of Atlanta Egg were served in a nominal capacity.** Petitioners must defeat both prongs of the two-prong statutory test to satisfy their burden of proof that they were not responsibly connected to Atlanta Egg. Although I have already found that they did not satisfy their burden that they were not "actively involved," I will examine the claim that their roles as owners, officers and directors were "nominal" in the interest of judicial economy. Even if my findings that Petitioners were "actively involved" with Atlanta Egg were to be reversed, Petitioners bear the burden of demonstrating, by the preponderance of the evidence, that they were only "nominal" 1/3 owners, officers and board members of Atlanta Egg in order to defeat the PACA Branch's findings that they were responsibly connected to Atlanta Egg. Petitioners do not come close to meeting this burden.

To briefly reiterate, any director, officer, and owner of over 10 per cent of the stock of a company that commits a disciplinary violation leading to suspension or revocation of their PACA license must show, not only that they were not "actively involved" as discussed above, but that they were only acting in a nominal capacity with respect to each of these roles. In *Minotto v. USDA,* 711 F. 2d 406 (D.C.Cir. 1983), the Court overturned a finding that a board member was responsibly connected, ruling that a director must have an "actual, significant nexus with the violating company,"*Id.*, at 409, and should be in a position where he "knew or should have known of the Company's misdeeds." *Id.*, at 408. Here, the record overwhelmingly demonstrates that each petitioner had a significant nexus with Atlanta Egg from its inception, and particularly during the time leading up to

and throughout the period the company was violating the PACA. Petitioners decided to hire Hutson, not to carry insurance, to decrease the supervision over Hutson, to allow Hutson to greatly expand the scope of their business, to not remove Hutson once they found out he was not properly performing his job, to not closely review the books as soon as they began to suspect things were going wrong, and to finally fire Hutson and go into bankruptcy. This is more than sufficient to constitute a significant nexus.

Moreover, the Judicial Officer and the courts have held that ownership of over 20% of a company's stock is sufficient in itself to rebut a contention that an individual is serving in a nominal position, *In re. Joseph T. Kocot*, 57 *Agric. Dec.* 1517, 1544-45 (1998), and is sufficient "to make a person accountable for not controlling delinquent management." *Siegel v. Lyng*, 851 F. 2d 412, 417 (1988). Here, Petitioners had (and eventually exercised) the authority to both hire and fire the individual allegedly responsible for causing the disciplinary violations--actions not consistent with serving in a nominal position. The fact that Petitioners chose not to exercise their authority in a timelier manner does not mean that they did not have the authority.

The Judicial Officer has also looked at the educational and business background of those alleged by the PACA Branch to be responsibly connected, as a factor in determining whether they are only serving in a nominal position. Both Petitioners here are well educated, each with decades of business experience. While their experience has been more in the area of the egg and poultry business, they each have years of experience in running a business. Brackett graduated college with a degree in poultry science in 1974 and has worked in the poultry and egg business since that time, including 18 years at Crystal Farms, where he became the firm's national sales manager, eight years as president of New Morn Farms, and his current position as live production manager at Hillandale Farms. Oliver also is a college graduate who has worked at his family's Chestnut Mountain Egg Farm, of which he is now president, since returning from military service in 1971. He was and is the "financial man" for Chestnut Mountain Egg Farm. Tr. 176-77. While this factor is not dispositive in itself, it stands in sharp contrast to the education and

training of the petitioners in *Norinsberg, supra*, or in *Maldonado v. USDA*, 154 F. 3d 1086 (9th Cir. 1998).

In *Salins, supra*, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. (1) In *Salins*, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Both petitioners here have had full access to all financial documents, and were in a position to review accounts if they had so desired. (2) Salins had particularized knowledge of the company's financial difficulties, and a "sophisticated level of information" inconsistent with nominal status. Here, Petitioners knew well before the company filed for bankruptcy that the company was in a financially difficult position, and their own actions helped contribute to this situation. Further, they were each in a position to review financial documents whenever they desired, and failed to investigate or take any drastic action when it should have been clear to them that Hutson was putting the company in a precarious position by not showing up for work. (3) Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. Here, Petitioners directly met with some creditors when the company was in a crisis after the fire, and clearly had the ability to determine whom their creditors were and what their status was at any time. (4) Salins actively participated in corporate decision-making. As discussed, *supra*, both Brackett and Oliver were actively involved in all manner of corporate decision making. (5) Salins had check-writing responsibilities. Both Brackett and Oliver were authorized to sign checks, although Brackett signed them on a more regular basis. (6) Salins signed numerous corporate documents, including PACA licenses, answers to reparation complaints, etc. Brackett signed Atlanta Egg's stock certificates, PACA license applications, the bankruptcy petition and numerous other corporate documents. Oliver signed the minutes of board meetings, stock certificates and the company's annual tax returns. (7) The final factor cited by the Judicial Officer was whether substantial compensation was received. Here, both petitioners had expectations of financial gain. They each received $10,000 in 1998, and each declined $30,000 payments in 2002, deciding instead to reinvest those funds in the company. Since their original investments in the company totaled

approximately $7,500, the $20,000 in actual payments and $60,000 in declined payments are not insignificant. Nor is such profit taking and reinvesting consistent with serving in a nominal capacity. *Id.*, at 1492-95.

CONCLUSION AND ORDER

Petitioners have failed to show, by a preponderance of the evidence, that they were not responsibly connected to Atlanta Egg & Produce Co., Inc. at a time when Atlanta Egg committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Each petitioner was actively involved in the activities resulting in a violation of this chapter. Neither petitioner served in a nominal capacity by virtue of their activities as 1/3 owners, officers, and directors of Atlanta Egg.

Wherefore, I find that Charles R. Brackett and Tom. D. Oliver are each responsibly connected to Atlanta Egg.

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.

G & T TERMINAL PACKAGING COMPANY, INC. AND TRAY-WRAP, INC.
PACA Docket No. D-03-0026.
Decision and Order.
Filed March 28, 2005. [1]

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[1]This decision is being issued pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary. 7 C.F.R. §1.142.

PACA – Bribery – Extortion – Informant, RICO Act, via plea bargain.

Ruben Rudolph and Clara Kim, for Complainant.
Linda Strumpf, for Respondent.
Decision and Order by Administrative Law Judge William Moran.

In this administrative disciplinary proceeding under the Perishable Agricultural Commodities Act, ("PACA"), 7 U.S.C. § 499a *et seq*. and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture, 7 C.F.R.§ 1.130 *et seq*. the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, ("USDA") alleges that the Respondents, G & T Terminal Packaging Company, Inc. ("G & T") and Tray-Wrap, Inc. ("Tray-Wrap"), "willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA, 7 U.S.C. § 499b(4), by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate or foreign commerce." Complaint at 4. If it is determined that the Respondents so violated Section 2(4) of the PACA, the USDA seeks an order revoking the licenses of the Respondents. A hearing was held in New York City from October 25, 2004 through November 1, 2004 before the undersigned federal administrative law judge, ("Court"). For the reasons which follow the Court finds that the USDA has failed to establish the alleged violations of Section 2(4) of the PACA and accordingly the case is DISMISSED.

I. THE COMPLAINT

The particulars of the Complaint allege that the Respondents, acting through, in the case of G & T, its president, director and 100% stockholder, Anthony Spinale, made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities which G & T purchased in interstate commerce. The illegal payments are alleged to have occurred on July 15, 1999, twice on July 26, 1999 and again on August 13, 1999. On each of those occasions the Complaint relates that Mr. Spinale paid

$100 (one hundred dollars) to an Agriculture inspector. In the case of Tray-Wrap, the Complaint alleges that Tray-Wrap, acting through the same Anthony Spinale, in his capacity as either employee or agent, made illegal payments to a USDA inspector in connection with six federal inspections of perishable agricultural commodities which Tray-Wrap purchased in interstate commerce. The illegal payments are alleged to have occurred on March 24th and March 26th 1999, April 23, 1999, May 20, 1999, and June 16th and June 23, 1999. The Complaint alleges that on each of those dates Mr. Spinale paid $100 (one hundred dollars) to an Agriculture inspector.

The Complaint also relates, in Paragraph IV, at pages 3 and 4, that on October 21, 1999, the same Mr. Anthony Spinale was indicted by the United States Attorney for the Southern District of New York. The indictment included the same facts alleged in this Complaint and the essential charge that Mr. Spinale made cash payments to a USDA inspector. The Complaint then relates that on August 21, 2001, a judgment was entered in the U.S. District Court for the Southern District of New York in which Mr. Spinale pled guilty to a single count of bribery of a public official. The consequence of this plea will be discussed herein.

II. FINDINGS OF FACT [2]

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[2]The findings of fact, as set forth in this section of the Court's decision, are based on the record evidence, both testimonial and documentary, and include credibility findings. The Court fully considered the post-hearing briefs and response briefs filed by the parties. If a particular argument from those briefs is not expressly discussed herein as such, it either means that the Court deemed it unnecessary to do so, in light of the matters discussed in the decision or that the Court determined that it was otherwise unnecessary to expressly address it. It should also be noted that the Respondents filed an objection to the late delivery of the USDA's Response Brief to Respondents' Counsel's office. Respondents' Counsel did not receive its copy of the USDA Response Brief until two days after it had been submitted to the Court. As the Court did receive the USDA Response Brief on the date due, there is no basis to conclude that the USDA had an opportunity to review Respondents' Response Brief before filing its own Response Brief. Therefore, as the Court ruled in a conference call with the parties on March 22, 2005, it would not grant Respondents' request that the USDA Response Brief

(continued...)

William J. Cashin, (Cashin), the Complainant's first witness at the hearing, was a produce inspector for the USDA, starting in 1979. Most of his duties were performed at the Hunts Point market. Tr. I 66 (10/25/04)[3]. His job involved visiting wholesaler locations and performing inspections based on USDA standards and documenting his observations. The inspection document is referred to as an "inspection certificate."[4] Tr. I 67. The purpose of the inspection is

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(...continued)
not be considered. Accordingly, all the post-hearing briefs filed by the parties were considered by the Court.

[3]The hearing began on 10/25/04 and lasted six days. The transcript however does not list the pages sequentially for the entire hearing. Rather, for each day, the transcript begins with page one. Therefore, except for the first reference to a given day, which will include the date, rather than repeating the date for each reference, this decision will refer to each day of hearing with a sequential Roman Numeral followed by a page number. For example, references to testimony for the first day, 10/25/ 04, will be noted as follows: "Tr. I," followed by the applicable page number and, accordingly, the last day's transcript references will appear as: "Tr. VI," followed by the applicable page number. The Court asked the parties to submit transcript errors to it and they did so. However, USDA did not appear to appreciate the fundamental premise that transcript errors refers to *errors* made by the Court Reporter because several of its "Proposed Corrections" involve amending the transcript to have it read as USDA would have liked it to appear and in those instances the transcript is not in error. For example, at Tr. I 35 USDA proposed that the words "On April .." be deleted. The problem is USDA counsel said those words and therefore there was no transcript error. For that reason, each of the objections raised by Counsel for Respondents are sustained by the Court. In contrast, where errors noted by USDA were typographical *errors*, the Court, as well as Respondents' Counsel have no issue with such corrections and those typographical errors are incorporated by reference. *See* Complainant's Proposed Corrections to the Transcript, an undated five page document received by USDA OALJ/OHC on January 7, 2005 and Respondents' Response to "Complainant's Proposed Corrections to the Transcript, which is also undated but received by the Court on February 22, 2005, and which is also incorporated by reference. Accordingly, while typographical and/or spelling errors are accepted, efforts to edit what the witnesses, the attorneys or the Court stated in the transcript may not be revised.

[4]The inspection certificate is also known as the FV-300. Tr. I 132. It is the "formalization of all of the information [the USDA inspector] gather[s] into the document ..." Tr. I 72. After noting essential information such as the name of the firm,

(continued...)

to provide a picture, in words, of what the produce looked like. There are two basic types of defects: quality and condition. Tr. I 71. Quality defects are defects that existed when the product was packed or when grown and so they do not change. For example a product may be 'misshapen' which is a quality defect. In contrast, condition defects do change. Examples of condition defects are decay or rot. Tr. I 71. Inspections for produce[5] are not mandatory. Instead, wholesalers call the USDA and request an inspection. A fee is charged for these inspections. Tr. I 68.

Cashin began inspecting produce at G & T in 1979 when he was a trainee. He stated that G &T and Tray-Wrap were day operations. [6] By 1983 or 1984 he was regularly inspecting G &T and Tray-Wrap. [7] Tr. I 72. As time went on, around the mid-1980's to about 1990, he was inspecting G &T and Tray-Wrap "almost every day." Tr. I 73. Cashin's contact at both facilities was Mr. Spinale. Cashin did not know what Mr. Spinale's position was with either of these concerns, although he assumed he was their owner and buyer. Tr. I 74. In any event, it was Mr. Spinale who requested the inspections and the person who would point out the products he wanted inspected. As Cashin put

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the commodity being inspected, date and time of the inspection request, the inspector looks at the product and "run[s] samples." Cashin would examine specimens and determine simple percentages, calculated by weight or by count. Upon noting defects he would arithmetically determine the percentage of defects found. Tr. I 70.

[5]There are different types of inspections. Some products, (i.e. commodities) have "grades," that is USDA grade standards. Quality, which is also referred to as "grade," and condition are evaluated too. Some products don't have grade standards; they are rated by condition only. Tr I-67. A grade standard for produce refers to the standard established by Congress for particular products. For example, for a particular product to be listed as U.S. #1, it would have to meet certain established requirements. Tr. I 71.

[6]Generally Hunts Point opens for business around 10 p.m. Tr. I 202. G & T and Tray- Wrap, by contrast, were daytime operations. Tr. I 202.

[7]G & T and Tray-Wrap were both located at Hunts Point and both those names appeared together on the office door there. Tr. I - 76.

it, "[h]e was the person who would say 'Well, I looked at this and I saw these problems here, there." Tr. I 75.

Cashin stated that Mr. Spinale gave him money in connection with Cashin's inspections at G &T and Tray-Wrap. He added that those payments were not for the fee that the USDA charges to do those inspections because those fees were collected through a bill sent to those companies. Tr. I 77. Cashin stated that the money Mr. Spinale gave him "was for helping him on the various inspections." Tr. I 79. Originally, the amount he would receive was $100.00 *per visit* but after G & T and Tray-Wrap relocated to Hunts Point, the amount was $100.00 per inspection. Tr. I 79 - 80. These payments began "when [Cashin] first started [doing inspections] on [his] own, [which was] around ... 1983 or 1984." Tr. I 80. These payments continued until Cashin left, having been arrested for his corrupt practices in 1999. Tr. I 80. Typically, after Cashin had completed his inspections, Mr. Spinale would motion for him to come over to a remote part of the warehouse and then hand him money, adding only "Here, hold on to that" when he would do so. Tr. I 80, 93. Cashin said he knew that he would receive money every time he visited Mr. Spinale. He acknowledged getting paid whether the inspection graded as U.S. Number one or not. Tr. I 81. To the question whether there was "some sort of understanding that [he] had with Mr. Spinale," Cashin stated: "Originally, it was an understanding that [Cashin] was helping him, and then later on, [Spinale] was just still paying.
I don't - - that I don't know."[8] Tr. I 81.

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[8]Cashin was surprisingly vague when asked about his conversation with Mr. Spinale regarding their understanding. He could not recall what Mr. Spinale said to him in the alleged conversation, nor specifically what he said to Mr. Spinale. Tr. I 146. Cashin asserted this conversation occurred "about 1983." Nor could he remember how long he had been dealing with Mr. Spinale prior to the momentous conversation. Tr. I 147. The Court observes and finds that Cashin's words, that he was "helping" Mr. Spinale is not the equivalent of asserting that he altered, that is, downgraded, a produce inspection from its true condition. Nor, the Court observes, has USDA demonstrated a single instance when Mr. Spinale was involved in a produce inspection which downgraded produce and made it appear in poorer condition than it really was. Perhaps the best summation from its star witness, Cashin, regarding the purpose of the payments

(continued...)

Explaining the background of this arrangement's origination, Cashin stated he was first trained in his job by Bob Snolec [ph]. This occurred around 1979 or 1980. Cashin told Snolec he (Cashin) "was taking money in the market from some of the wholesalers ..." Snolec revealed he already knew this about Cashin, as some of the wholesalers had told him. As Cashin related it, Snolec then told Cashin "'Tony is okay. He's a good man. ... Work with him, help him out, and he'll take care of you,' which meant that he would give me money, of course." Tr. I 82. Cashin also told Mr. Spinale "...I'll be coming here a lot, I think and, you know, I'll help you like Bob helped you." Cashin defined "help" as increasing the number of containers reported on the certificate to closely reflect what was actually manifested. This was due to the fact that some of the packages may already have been sold by the time the inspector arrived.[9] Thus, the certificate would overstate, and thus not accurately reflect the amount of product that the inspector viewed[10] during the inspection. Tr. I - 87. "Help" also included "to increase on the certificate, under the defects, the percentages of condition - - usually the condition defects to closely - - to go over the good delivery standards. The 'good delivery' standards are a parallel set of standards within the produce industry,

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(...continued)
was his acknowledgment, "I don't know." Tr. I 81

[9]Cashin amplified this explanation stating, as an illustration, that if a manifest reflected 1,100 items but the wholesaler had sold a few hundred of the items, the wholesalers would want the certificate to reflect 1,100 items, not 900. Thus, if 10% decay were found, the wholesaler could tell the shipper the 10% decay applied to 1,100 items. In this way, the wholesaler would get a credit on the whole shipment of 1,100, not just on 900 items. Tr. I 87.

[10]As alluded to, this doesn't completely tell the story. Due to delays in inspections and the fragile nature of produce, it was common for merchants to sell off some of a load while awaiting an inspection. There is no evidence in the record to suggest anything other than that this was a widespread and unofficially sanctioned practice in this USDA office.

along with the USDA standards[11]." The last way "help" was provided was in the temperatures recorded on the USDA certificate. Cashin explained that produce is shipped at fairly cold temperatures but that once the shipping container is opened, the temperatures will rise. If the temperature goes above the industry accepted level, then the blame for product deterioration is shifted from the carrier to the receiver or wholesaler. Thus, receivers or wholesalers do not want a certificate to reflect a temperature above the industry accepted level. Tr. I- 84. Cashin stated that if the certificate reflected a higher percentage of condition defects affecting good delivery standards, then the wholesalers could renegotiate the prices with the shippers and in some cases get money back if more deterioration in the product was reflected in the certificate. Tr. I - 85.

Although Cashin stated that the money he received from Mr. Spinale influenced his inspection findings, the specifics he offered were hardly damning. Cashin stated Mr. Spinale would say to him: "Look at these potatoes[12] over here. They have a lot of problems." Cashin would then look at a few bags and then the two would talk "[a]nd *if the load had problems* and we came up together or separately with a - - with some problem, usually together, then I would write it

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[11]Cashin added that these good delivery standards were set a bit higher than the USDA standards. He believed this was done to provide some room between the USDA standards and the actual arrival. Although he "never did understand what it was all about," he thought wholesalers wanted the numbers reported on the USDA certificate to be just above the "good delivery standards" so the wholesalers could re-negotiate the prices with the shippers. Tr.I -84.

It is of particular importance to note here that Cashin *never* directly asserted that he increased the percentage of defects *for any specific load of produce that he inspected for Mr. Spinale*.

[12]Cashin testified that potatoes, along with other types of produce, were traded on the futures commodity exchanges. When he started as a USDA inspector potatoes were traded on the Mercantile Board, but this business practice was discontinued shortly after Cashin was no longer a trainee. The potatoes would arrive at the New York Food Auction where, in order to be eligible for sale, they had to be evaluated as U.S. Number 1. Tr. I, 118. Cashin also agreed that Mr. Spinale had loads from the Mercantile Exchange. In fact, Cashin stated that USDA Regional people would come to the exchange when potato loads were being inspected "*to make sure they passed.*" For obvious reasons, Cashin agreed that such a practice would be in violation of the certification on the Inspection Certificate. Tr. I 121.

as such." Tr. I 88. (italics added). Cashin stated that Mr. Spinale would pay him "cash to *inspect* produce ... *every time* [he] went there." Tr. I 88.

Cashin admitted that he had a role in the investigation that led to the criminal indictment of Mr. Spinale. Tr. I 88, 89. On March 23, 1999 Cashin was arrested and charged with bribery and conspiracy to commit bribery. Tr. I 89. He decided to cooperate with the FBI and the Department of Justice. They requested him to wear a 'wire' (i.e. a secret recording device) under his USDA outfit. He used this to record his conversations with the wholesalers when he went to work at the Hunts Point market. He would then hand over the tapes and any money received from the wholesalers at the end of each day and review his day's activities. Later on, in May 1999, he was fitted with a video tape device.[13] Tr. I 89, 90. Cashin's surreptitious assistance to the authorities continued until August 1999. Thus, he was at Hunts Point with a video camera from about the second week of May through the middle of August. Yet, despite three months of this activity, no recordings were introduced at the hearing of his interactions with Mr. Spinale.[14]

When directed to CX 1, at pages 3, 4, Cashin asserted the document was an "FBI 302." Tr. I 96. Cashin stated that the FBI agents prepared these but that he had input into their content. He recounted that he met with the FBI agents on days he received money from wholesalers and he would review his day with the agents. The agents would take notes during these reviews. After that Cashin "*guess*[*ed* that] they went back to their office, and they drew up the 302 document." Tr. I 97 (emphasis added). When asked about CX1-

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[13]This device was concealed in a canvas bucket that he carried to the inspections. The bucket contained various booklets and tools he would employ during inspections. The federal authorities fitted a camera in the bottom of the bucket. As with his recordings, Cashin would turn in his videos on a near daily basis. Tr. I 91. It is of note that no audio or videotapings were presented in this administrative proceeding.

[14]Nor were any recordings introduced of Cashin's interactions with anyone in this matter.

4, which referred to "SOURCE," Cashin asserted that this referred to him. Tr. I 97, 98. As an evidentiary matter, the Court will explain herein the significant legal problems with the claims of Cashin regarding the 302s.

The Court observes and finds that there were enormous infirmities, as a matter of proof, that Cashin was the 'source' referred to in the document. For example, when directed to pages 3 and 4 of CX 1, which are the 302s associated with that exhibit, it was noted by the Court that Cashin's name does not appear. Cashin had no answer to the observation that his name is nowhere identified as the 'source.' Although Cashin did note that the 302s listed Hunts Point market and Tray-Wrap, he admitted he was *not* the only inspector that inspected Tray-Wrap during that period of time. Tr. I 101. Therefore, from the face of those documents there is no way to discern that Cashin is the source referred to in those pages. While the inspection certificate refers to an inspection at Tray-Wrap at 1:30 p.m. on March 24, 1999, the 302 does not mention a time, nor does page 3 of CX-1 appear to be in sequence with page 4 of that exhibit, as page 4 starts with "(3)," but the preceding page does not list a (1) or a (2). Tray-Wrap's name does not appear on page 3 of CX-1 either. Large sections of these pages, particularly CX-1 at page 3, were in a redacted form. While the exhibit was, by stipulation, admitted, this does not overcome its probative infirmities.[15] Clearly, the USDA Counsel needed to have an FBI witness testify as to these matters, but they did not do so, either in their case on direct nor, though specific opportunity existed to do so, in any rebuttal evidence. This is, after all, a legal proceeding and while in a casual setting one might "deduce" each of these answers, such a practice does not satisfy the government's proof obligations in a hearing. The document is offensive in other respects as well. For

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[15]USDA counsel's reliance on the stipulation to the admissibility of the 302s represents naivete or ignorance of the effect of the stipulation. True, the parties agreed that the 302s were authentic 302s and they represent what they state they are, but that does not mean that their admissibility proves more than the terms of the stipulation. USDA counsel failed to perceive the difference between, on the one hand, admissibility and, on the other hand, the *weight* to be afforded to the documents. As noted, the deficiencies in the 302s are explained herein.

example, it characterizes the $100 payment as a "bribe." Of course, this goes to the heart of the Respondents' contentions regarding exactly what was transpiring here, as the Respondents' position is that, effectively, Mr. Spinale was being "held-up" by these corrupt, convicted USDA inspectors. Confirming the problems with this exhibit, when the USDA attorney attempted to rehabilitate Cashin, by asking if the inspection certificate (CX1, at page 5) was an accurate representation of Cashin's inspection at Tray-Wrap on March 24, 1999, Cashin responded: "I don't remember." Tr. I 104. Further, Cashin first saw CX1, pages 4 & 5, only when he prepared for the criminal trial. Therefore, his review of the document was in a time frame several years after 1999. Tr. I 105. Cashin acknowledged that the FBI *never* provided him with a typed copy of this report nor did it ever ask him to look it over for accuracy, either shortly after it was created or, for that matter, ever. Cashin agreed that, other than surmise, he had no independent basis for knowing that he was the only individual working for the FBI and no independent basis for knowing that the report is referring to him when it refers to a visit to Tray-Wrap on March 24, 1999. Tr. I 106. Accordingly, for all these reasons, no probative weight can be afforded to pages CX1 at 4 and 5 of this exhibit. Other deficiencies with the 302s existed and these will be discussed *infra*.

Cashin also asserted that he was the source for the *other* 302s in the record.[16] Tr. I 98. However, the Court finds that the fatal infirmities described with the 302s in CX 1 were present for each of the 302s. Cashin claimed that the incidents related in the form 302 appearing in CX 1 were an accurate reflection of the events that took place at that time. Tr. I 98, 99. Regarding this exhibit, Cashin stated that, on March 24, 1999, he inspected a load of tomatoes for Tray-Wrap and that Mr. Spinale gave him $100.00 in cash. Tr. I 99 and CX 1-5, Inspection Certificate # K-678086-0. The USDA inspection fee was

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[16]A 302 is associated with each of the dates cited in the Complaint. The problems identified by the Court with the 302 associated with CX 1 are endemic to the 302s for each of the government exhibits, CX 1 through CX 9.

$66.00 and Cashin related that the fee was apart from the $100 he received from Mr. Spinale. Tr. I 100.

Cashin was next directed to CX 2. As mentioned, it is accurate to state that the same infirmities identified above with respect to CX 1 existed for CX 2 as well. Cashin, in response to questions from USDA counsel, noted similarities between the information contained in pages 3 and 4 of CX 2 (i.e. the 302s) and page 5 of that exhibit (the inspection certificate bearing his signature). Tr. I 108. However, when asked by counsel for USDA whether the cash Mr. Spinale paid him in connection with the inspection reflected on Inspection Certificate K-678091-0 "influence[d him] in *any way*," he responded: "*I don't remember*." (emphasis added) Tr. I 108.

In apparent recognition of the problem he had before him, Counsel for USDA did not spend long with CX 2 and when he moved to CX 3, he tried to adjust to this dilemma by asking Cashin "[w]hat transpired, *according to the 302*, on that day?" (emphasis added). *Reading* from the 302 report, and decidedly *not* relying on his own memory, Cashin reported that he went to Tray-Wrap, inspected a load of tomatoes, and was paid $100 by Mr. Spinale. But when asked if the $100 influenced his inspection, Cashin again could only state: "*No, I don't remember*." (emphasis added) Tr. I 109. It bears repeating that, as with CX 1 and 2, the same fatal evidentiary deficiencies were present for CX 3.

Still, on direct examination, Cashin maintained that the money from Mr. Spinale did influence his inspection results. He claimed that usually this influence was reflected in the percentage of defects found. He asserted that Mr. Spinale would be "very specific and tell [Cashin] what he wanted written down or just made worse than what I actually found. Sometimes he would want it written exactly [as Cashin had] found." Tr. I 109-110. However, it is significant that when he was directed to the *particular inspection* under discussion in his testimony, he was asked if he could recall "which way he asked [him] for help?" Cashin's response was: "*No, I can not*." (emphasis added). Tr. I 110. The Court notes again that this is a legal proceeding. Thus, Mr. Cashin's *general assertions* that Mr. Spinale attempted to influence the percentage of defects found in inspections may be of interest to

non-lawyers but they do not speak to the specific allegations in this Complaint, which is after all what this proceeding is all about. The Complaint alleges *specific* "Bribes" on *specific* dates and that is what the government is obligated to prove by a preponderance of the evidence. Therefore, even apart from his lack of credibility, Cashin's general anecdotes about other, unidentified, inspections and Mr. Spinale's alleged attempt to influence such inspections do not advance the USDA's case an inch.

The evidentiary problems noted above continued as Cashin proceeded with his testimony for the other exhibits. When directed to CX 4, he related that he visited Tray-Wrap on May 20, 1999 and upon inspecting a load of tomatoes, Mr. Spinale paid him $100.00. Tr. I 110. Similarly, when asked about CX 5, he stated that on June 16, 1999, he inspected a load of tomatoes at Tray-Wrap and was paid $100 by Mr. Spinale. However, Cashin was merely reading from the 302s; independently he remembered nothing. Counsel for USDA, despite the evidentiary problems noted above with each of the FBI 302 reports, continued to indirectly reference those reports as he moved through the direct examination of Cashin. *See* Tr. I 111. Still, the 302 problems continued to plague the government's case. For example, while Cashin in referring to his June 16, 1999 inspection at Tray-Wrap recited from the 302 of receiving $100 from Mr. Spinale, the 302 states on one page that $200 was received, but the next page refers to $100. *See* CX 5, pages 4 and 5, Tr. I 111,112. Again, it bears emphasizing that it was clear from his testimony that Cashin had no independent recollection of this event or any of the others. When asked to explain the discrepancy in the amounts, the best Cashin could do was to again recite what was listed in the 302. Tr. I 112, 113. *In fact, when asked specifically if he had any independent recollection, Cashin admitted he did not.* Tr. I 113. Significantly, Cashin affirmed that the first time he had ever viewed that document, or any of the other 302s, was "a couple of *years* later" after they had been prepared. Tr. I 113 (emphasis added).

As the government plowed through its exhibits, none of the exhibits escaped the deficiencies noted above. When it moved to CX

6, involving a June 23, 1999 inspection of tomatoes at Tray-Wrap and three loads of potatoes, Cashin stated that he received $400 from Mr. Spinale. But, as with the others, Cashin was simply reading from the 302s to support his testimony. For obvious reasons, the inspection certificate, which is the only document Cashin himself prepared, makes no reference to alleged payments.[17] Thus, as with each of these exhibits, Cashin was merely reciting, robotically, the information contained on the largely redacted 302s, which 302s he had never viewed until *years* after their creation. Understandably, the government spent ever decreasing time in its direct examination of these exhibits. For example, when examining Cashin with regard to CX 7, only a half-page of transcript was involved with that five-page exhibit.

Without intending to belabor the point, but for the sake of completeness, the Court notes that Cashin's testimony for CX 8 was also based solely on the 302s. When asked by government counsel where he was getting the information for his testimony, Cashin stated it was from: "Page four ... [the] first page after the redaction." Tr. I 118. Thus, it is accurate to state that, in terms of the various 302s in the record, the use of Cashin's testimony about these documents was of no greater value than would have been provided if it had been derived from the testimony of a stranger plucked randomly from a city street and brought in to read the content of those 302s.

To cite yet another example, when Cashin claimed that, when viewing the load of potatoes, Mr. Spinale wanted that inspection to be consistent with previous inspections of that load, when asked, on direct, how he knew the loads had been previously inspected, he answered: "It said so in the 302." Tr. I 119. Making matters worse, and further diminishing his testimony, Cashin then retreated from his assertion that the load had been previously inspected. He then lamely stated that he needed glasses and that, upon *rereading* the 302, he

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[17]For informational purposes, it is noted that CX 7-5's reference to BNFE 18602 refers to the number on the Burlington Northern Food Express railroad car. Tr. I 117.

stated that the loads were similar, not previously inspected.[18] Regarding CX 9, which relates, at least in part, to the one count that Mr. Spinale pled guilty, Cashin stated that he went to G & T on August 13, 1999 and that Mr. Spinale gave him "some going away money ... $100 cash for the inspection." Tr. I 125. Cashin made it clear that his testimony regarding this assertion came from the 302, specifically identifying CX 9 at page 15. Tr. I 125. When pointedly asked by the Court if he had an independent recollection that he received $100 for an inspection on August 9, 1999,[19] Cashin admitted it was true he had no such recollection.[20] Tr. I 126. Cashin, referring to CX 9 at page 16, did identify his inspection certificate for a load of potatoes at G &T, which reflected an August 13, 1999 inspection date. Cashin noted that handwritten notes on the certificate reflected paragraphs relating to freezing, that the railcar had been previously inspected and a restriction explaining the limits of the inspection. Tr. I 128.

USDA Counsel asked Cashin, regarding CX 1 through CX 9 if his inspection certificates were "accurate representations of the commodities as [he] saw them on those days?" Cashin stated they were not in that "[b]ecause [Mr. Spinale] paid me bribe money, some of them *could've been* altered to his benefit." Tr. I 129 (emphasis added). Apparently referring to CX 9, Cashin stated that any one of the three factors (the number of containers, the percentages above the

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[18]Cashin stated that, among the corrupt inspectors, for consistency it was their practice when the same shipper sent the same commodities in multiple shipments in sequential days, the inspectors would consult the previous days' inspections so that their results would not conflict.

[19]While the Court did, mistakenly, state "August 9, 1999," Cashin was testifying abut his August 13, 1999 inspection. The Court's misstatement of the date is understandable and only serves to underscore the problems with these 302s. This is because this 302 starts off with an August 13, 1999 date but then proceeds to list the date on subsequent pages as August 8, 1999. *See* CX 9, at 13, 14, 15.

[20]The best Cashin could independently recall was that he received "thank-you money" from Mr. Spinale around the time he left the USDA inspection service. He could not state the amount he assertedly received. Tr. I 126, 127.

good delivery standard, or the alteration of temperatures) *could have* been changed. Tr. I 129. In this regard, one thinks of John Adams remark: "Facts are stubborn things; and whatever may be our *wishes*, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." *Bartlett's Familiar Quotations*, Sixteenth Edition, 1992, 337-15. (emphasis added). In short, Cashin's "*could haves*" do not satisfy the burden of proof.

Significantly, Cashin himself discounted the worth of his own testimony. When directed to the inspections reflected in CX 1 through CX 9 and asked if those reflected the only payments Mr. Spinale ever gave him, he answered: "Other than the thank-you money when I left, over the years, I remember him giving me Christmas money on occasion. *I don't remember much*." Tr. I 130. (emphasis added).

In an attempt to repair the response, USDA Counsel then asked "...over the year, was he paying you for various inspections as well?" To this, Cashin replied: "Yes, he was."[21] Tr. I 130. Cashin's direct examination ended with his self-serving assertion that he never *told* Mr. Spinale that he would not help him if he did not pay money for the inspections and that he never suggested or led him to believe that he would not help him if Spinale did not pay him. In fact, that recounting overstates his response because Cashin was only responding to those questions from the USDA and could only muster for them the unelaborative answer of a simple "no" to them. Tr. I 131.

It is also important to note that Cashin, in responding to questions about CX 1 through CX 9, while asserting that some, *unspecified* Inspection Certificates were inaccurate in terms of reflecting the true condition of the products he inspected, also conceded that some *were accurate*. As an example, he referred to the certificate he wrote on

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[21]Even this attempt to rehabilitate made no headway. Remembering that this Complaint charges specific dates of alleged bribes, as the question from USDA counsel was a completely general question it did nothing to address those specific dates. Further, Cashin's response skirted the central contention of the Respondents that they were paying the corrupt inspectors because they had to in order to get timely and accurate inspections.

August 13, 1999, as reflected in CX 9, at page 16, noting that this would reflect an accurate report because the product would be inspected subsequently by the railroad's own inspectors. As Cashin put it, "I don't believe that this inspection [CX 9, page 16] has been altered, because the railroad's going to come behind me and inspect it." Tr. I 134. But Cashin's example of an accurate inspection hardly helps the USDA's case.[22]

More significantly, when referring to all of the certificates, CX 1 through CX 9, which certificates, being the basis for the Complaint, form the heart of the government's case, *Cashin agreed it was fair to state that he could not state which of those certificates were accurate from those that were inaccurate*. Thus, for any particular exhibit, Cashin had no idea at the time of his testimony in this proceeding if he was looking at one of the "accurate" ones or an alleged inaccurate one. Tr. I 134,138. Restated, he conceded that he had no independent recollection of the events and was relying *solely* on the 302 reports. Tr. I 137. *Accordingly, he conceded that any of them could have been altered but any of them may not have been altered as well!* Tr. I 139,140. *Those reports, it should be recalled, were never reviewed by Cashin for accuracy at any time near when they were made and, in fact, he never laid eyes on the reports until years after their creation.*

As a further example, Cashin also agreed that, as the inspection reflected for CX 5 at 6, this was an inspection for condition only, and no grade defects were listed on the certificate. He conceded that if grade defects had been listed on that certificate, (CX 5 at 6), it possibly would have helped Tray-Wrap because the "checked sum" for the total number of defects found would have been higher. Thus, if grade defects had been included, Tray-Wrap would have been able to claim a bigger allowance from the shipper. Cashin also agreed with counsel for the Respondents that, while he stated that increasing the number of containers reported as present in a load was a means to help a wholesaler because it would allow the wholesaler to claim a bigger allowance, his inspection, as reflected in exhibit CX 1, at page 5, did

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[22]It is also worth noting that by Cashin's own testimony, this single count to which Mr. Spinale pled guilty (i.e. CX 9) was an accurate inspection certificate.

not follow that approach as Cashin's certificate reports that he inspected only ¼ (one quarter) of that load.[23] Tr. I 145. Beyond that, Cashin conceded that he never knew if G &T or Tray-Wrap ever received an allowance from a shipper in connection with any inspection certificate he issued. Nor could he recall ever hearing that such an allowance had been received. Tr. I 198.

Further, Cashin characterized Mr. Spinale's knowledge about potatoes and tomatoes as "extensive," agreeing that Mr. Spinale *was an expert* regarding those products. Tr. I 147, 148. Elaborating, Cashin stated that this expertise of Mr. Spinale extended to identifying defects, bad conditions or problems with those products, as well as to their *marketability*.[24] Cashin also agreed that Mr. Spinale was knowledgeable as to the various types of defects in potatoes[25] and would be able to recognize them. Tr. I 153. In fact, Cashin allowed that Mr. Spinale *knew more than most inspectors about potatoes* and

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[23]Exhibit CX 5, at page 5 reflects the number of containers as 400 cartons.

[24]It is noteworthy that Cashin *volunteered* the last characterization about the scope of Mr. Spinale's expertise, by adding that it included the subject of the *marketability of potatoes and tomatoes.* The question posed had only asked about Mr. Spinale's expertise regarding defects or bad conditions, yet Cashin felt this distinct aspect of expertise needed to be included. In fact, while Cashin maintained that Mr. Spinale was not an expert in terms of *writing* USDA inspection reports, he admitted that Mr. Spinale had "very good knowledge" regarding "what percentages were allowed and what percentages weren't allowed [by] the USDA as far as potatoes and tomatoes... ." Tr. I 149.

[25]Potatoes can have defects and, because of tolerances, still be classified as USDA number one. These allowable defects permit 5% external grade defects, 5% internal defects and "a restricted 1% tolerance for soft rot, but the total internal/external defects can not exceed 8%. Tr. I 158,160. Thus, for example, if external grade defects exceed 5%, then the load would be out of grade one. By comparison, tomatoes can have quality problems involving their shape or scarring. Insect damage can also be an issue. Tr I 160. Like potatoes, there are percentage limits for problems. Cashin was uncertain, but it was his recollection that tomatoes had a 10% total defects allowable. This was composed of 5% for serious damage and 5% for softness and decay. Thus if softness and decay totaled 6%, the tomatoes would be out of grade. Cashin also believed that a consignee has the right to reject a load form the shipper if the product is out of grade. Tr. I 161.

knew how to distinguish grade defects from other defects.[26] Tr. I 153, 155. In terms of evaluating the quality of a load of potatoes, Cashin agreed that Mr. Spinale's judgment could be counted on by an inspector. Tr. I 157. Cashin also agreed that many times he wrote up accurate inspections for Mr. Spinale. Tr. I 195, 196.

Cashin also conceded that he first starting taking cash payments at "some time in 1980," which was *less than a year* after he started as an

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[26]Cashin testified that the USDA information binder addressing problems that can exist with potatoes was large. Potato defects can include soft rot, black leg and freezing; such defects are scored on sight. Other defects, such as lenticels, which are small white or dark specks on the surface of the potato, are scored on the percentage of the surface which is affected by the defect. Still other defects, such as *fusarium tuber rot* are scored on the basis of the amount of the potato that would be considered 'waste' upon cutting it up. By contrast a misshapen potato reflects a quality factor. *However, despite the large guideline notebook, Cashin emphasized that "all inspections ... [are] a rather subjective process."* Tr. I 150,152. Cashin also agreed that, because the process is very subjective, two inspectors could look at the same load and reach different conclusions about the load. Thus, two inspectors, viewing produce under identical conditions could honestly arrive at different conclusions. Tr. II,10/26/04, 95, 96. In fact, such inspectors could arrive at *significantly different ratings.* Tr. II 96, 97. Further, Cashin conceded that if he were to view a load of potatoes and found 8% grade defects, he would not be permitted to write up his inspection listing 8% defects in the load, because USDA policy did not allow that. Tr. I 188,189. The procedure called for an inspector to call the USDA office in such a situation. This existed because in such circumstances the USDA would want to determine if the load in question had been previously inspected at the shipping point. If it had been previously inspected at the point of its shipping origin that would create an appeal situation. Tr. I 189,190. The import of Cashin's testimony was that he would have to continue to take samples in an instance where there had been a previous inspection by the state so that, at the end of the day, the samples would arrive at an allowable grade and thus be consistent with that earlier inspection. *See* Tr. I 190, 192. Thus, Cashin agreed that if he came across a load of potatoes with 8% grade defects, the Officer in Charge would instruct him to continue taking samples until the percentage of defects fell to under 5%. Tr. I 194. Consequently, Cashin agreed that, although his inspection would ultimately reflect 5% defects, *it would not be accurate*, as he had found, in fact, a higher percentage of defects, but was following the instructions from his supervisor. Tr. I 194.

inspector.[27] Tr. I 162. It is upon the credibility of this nineteen-year veteran cash-taking inspector that the USDA rests its entire case against a man who, prior to these charges, had a spotless record.[28] Cashin admitted that during the entire nineteen years he was employed as an agriculture inspector, other USDA inspectors working at Hunts Point took cash payments as well. Tr. I 161,162. Cashin stated that during the period of taking cash payments he met with other cash-taking inspectors. Tr. I 165. Working together, at times the crooked inspectors would pick up cash payments at the Hunts Point merchants'

[27]Cashin testified that his illegal activity began in 1980 when inspecting a load of leaf lettuce for another produce company. That load involved a "dump certificate," which is a separate certificate declaring that the produce was so poor that it was not sellable. These dump certificates are not used anymore because it involved the USDA evaluating that a load had no commercial value, a conclusion it now avoids expressing. When he arrived for the inspection the produce wholesaler asked him to inflate the number of boxes of bad lettuce. Cashin did so and later received a cash payment for cooperating. Tr. I 163, 164. While the produce wholesaler instructed him to "stop by and see [him] later," Cashin knew he would be receiving money for his corrupt action. Tr. I 164.

[28]To avoid any miscommunication, when the Court states that Mr. Spinale had a prior spotless record, one should not claim that the guilty plea stains that history, as it stemmed from the same alleged events identified in the administrative complaint.

houses for other inspectors who formed the corrupt network. [29] Tr. I-165.

Regarding the day of his arrest, March 23, 1999, Cashin admitted that he was frightened when the FBI arrested him, charging him with bribery and conspiracy to commit bribery.[30] Tr. I -175. He was informed that, if convicted, he would face jail time.[31] Tr. I -176.

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[29]Cashin qualified this response, stating that this arrangement between the inspectors to pick up each others cash payments, *did not apply to his dealings with G & T or Tray-Wrap*. Tr. I 166. Elaborating on the arrangement between the inspectors to pick up each others cash payments, Cashin stated that, in the early 1980s, USDA inspector Dan Auserry [ph] approached him regarding payments from Hunts Point wholesaler Post and Taback. Auserry told Cashin that Post & Taback wanted to "work with him" but that Auserry would have to be the middle man, and in that role would pick up payments intended for Cashin. Cashin described Auserry as "the leader of the group." Tr. I 174. The same arrangement was established for Fruitco Corporation, another Hunts Point wholesaler. As Cashin explained it, Fruitco wanted "to make product move faster ... [and so he] want[ed] to work with [the corrupt inspectors]." Tr. I 170. Other houses were involved as well. For Ruger and Brothers Produce, USDA inspector Malivette was the pick-up man. Tr. I 172. For Wholesaler Paul Steinburg, inspector Eddie Esposito took the cash payments. Tr. I 172. Cashin elaborated that by getting the product to move faster, he meant a "higher turnaround [rate] of the product in the ... wholesaler['s] store. Tr. I 171. The corrupt inspectors would settle their accounts with each other by meeting at Post and Taback's offices. They also made sure, for conformity, that their reports were consistent with one another. Tr. I 173. Cashin conceded that his activity with the other corrupt inspectors "became more like a business..." Tr. I 174. Cashin's understanding was that this would make it possible for the wholesaler "to get a better allowance in order to make the various loads of produce sell faster and better." Tr. I 171. Inspector Michael Tsamis, one of the arrested inspectors, who was nicknamed "the Greek," was the point man to receive Fruitco payments. Tr. I -170.

[30]Later, after deciding to cooperate, the conspiracy charge was dropped. Tr. I-176.

[31]Cashin claimed that he could not "remember" the amount of jail time he was at risk to serve, nor could he remember if the FBI agents referred to the possibility of a maximum sentence. Tr. I -177. This response was simply not credible. Never having been convicted before, Cashin certainly would have remembered critical details such as the possible length of any prison sentence. He also claimed, again with no credibility, that he could not remember if the FBI talked about that he could receive the maximum sentence because he had been taking money for so many years. Tr. I -177. Yet he remembered less critical information such as the name of the special agent for the USDA Office of Inspector General (because the FBI asked that those names not be

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Speaking to the details of his cash payments from Mr. Spinale, he stated that Mr. Spinale would call him over and tell him that he wanted to show him something at some remote part of the warehouse. At the time of handing the cash, Mr. Spinale would say to Cashin: "Here" or "Hold onto to this" or words to that effect. Tr. I -195. Cashin stated that Mr. Spinale never stated what the money was for when handing the cash to him. Tr. I -195. When asked specifically if he ever asked Mr. Spinale for money, Cashin stated: "no." The Court finds this claim, both when asserted by Cashin and upon the testimony received from other witnesses in this proceeding as a whole, to lack credibility. Tr. I 195. The Court is of the view that Cashin was not forthright in his responses when asked if he ever asked or demanded money from Mr. Spinale, before or after doing an inspection. The Court observed a hesitation before Cashin's response and it noted that he looked downward before answering these questions. Tr. II 181.

Cashin agreed that there had been occasions when he inspected potatoes at G &T and produce at Tray-Wrap where he issued a certificate reflecting that the produce was U.S. Number One[32] and that

(...continued)
identified, the parties agreed to refer to this individual as "Mr. G.") and the specific name of another special agent who participated in his arrest. Tr. I 178. Cashin himself later demonstrated his initial response was not credible, as he then recalled that twenty years was the maximum sentence. *Id.* Further, when shown the transcript of his deposition, which occurred not long before this proceeding, Cashin then stated his recollection had been refreshed and that he was informed at the time of his arrest that would likely face the maximum sentence. Tr. I 185, 186. Thus Cashin did remember being deposed on September 23, 2004 in the case of *Anthony Spinale*, *G & T Packaging v. USA et. al.*, Docket Number 03CD1704. Tr. I 178. At that deposition he was represented by an Assistant U.S. Attorney. The Court agrees with the Respondents' observation that Cashin, scared at the prospect of a lengthy time in prison, was anxious to save himself from that fate and would have done anything to please his captors. To suggest that Cashin had his principles and would not fabricate assertions does not deserve the dignity of a comment.

[32] A U.S. number one inspection for potatoes would be a certificate reflecting that the load met the requirements for the grade. Such a certificate would meet the requirements of the contract between the shipper and the consignee. In such a
(continued...)

Mr. Spinale did not ask him to change that grade determination. Tr. I 197. As Cashin agreed that Mr. Spinale was an expert in the produce he dealt with, he conceded that Mr. Spinale would have known in advance of his calling for an inspection that the produce was U.S. Number One grade. Tr. I 197, 198. The Court finds that, in addition to other evidence supporting the conclusion, this evidence supports Respondents' contention that Mr. Spinale called for inspections in order to get a prompt and accurate inspection.

When directed to Complainant's Exhibit 8, at page 4, reflecting a 302 report, Cashin agreed that the report stated that Mr. Spinale told the "SOURCE that the two loads of potatoes were not yet ready to be inspected."[33] As with all of his testimony regarding the 302s, Cashin drew a complete blank about any of the assertions related in those documents. In his words, "*I don't remember. I'd have to go totally by the 302*." Tr. I 203 (emphasis added). Referring to the same Exhibit 8, but this time to his inspection certificate, Cashin stated that the produce was inspected at the team track in Hunts Point market and that they were inspected in the car.[34] Tr. I 204.

Cashin stated that he would not go to any produce house unless he had first received a request for an inspection there. Tr. I 201,202. The Court, based upon the testimony of other witnesses and Cashin's

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(...continued)
circumstance the wholesaler or consignee would not be eligible to receive any allowance because the produce met the grade.
Tr. I 196, 197.

[33]Cashin stated this could mean that the load had not physically arrived at the wholesaler's location yet or that packages had not yet been unloaded so that they could be inspected. Tr. I 200.

[34]Accordingly, as to this particular inspection, which referenced in the 302 that the produce was not ready to be inspected, Cashin agreed that one of the reasons he advanced – that the goods were not present – did not obtain in the instance related for Complainant's Exhibit 8. Tr. I 204. Thus, Cashin assumed that the only reason the goods were not ready to be inspected was that Mr. Spinale had not taken boxes out of the car for inspection. Tr. I 205.

significant need for money to support his 'adult entertainer' friends, finds that Cashin's claim in this regard to be without credibility.

Cashin, upon being referred to Complainant's Exhibit 9[35], at page 16, stated that this was a re-inspection. Tr. I 205, 206. Cashin did not know why Mr. Spinale would request a re-inspection. Tr. I 209. The first inspection, again *based solely on* Cashin *reading* the assertion in the 302 associated with his certificate, was performed by inspector Eddie Esposito. Cashin stated that Esposito was another one of the indicted inspectors. Cashin knew him to be one of those who took cash payments. Tr. I 209. Cashin stated that it was common for him to have received a copy of the earlier inspection. Tr. I 206. Even if he did not have a copy of the results of the first inspection, Cashin would learn the results of that inspection[36], including details such as the percentage of decay found and like findings. Tr. I 208. Cashin agreed that this inspection would have been accurate because the railroad[37] had inspected it and because it involved freezing. Tr. I 209, 210.

Directed back to Complainant's Exhibit 8, which involved an inspection performed on July 26, 1999, Cashin stated that it exceeded the allowable 1 % soft rot, as it had 3 %. The other problems reflected in the inspection were condition defects. Each of those defects count toward the "checksum" which reflects the total of all defects found. In this case that sum was 36%. By comparison, the allowable limit is 8%, with subcategory limits of 5% internal and 5% external. Accordingly, this inspection reflected that the produce was 28% beyond the allowable limit. Tr. I 212, 213.

Each of the lots were inspected for condition only. The 1,855 lot, lot 'A', had 3 % soft rot and 29 % total defects. Thus, for the latter

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[35]Exhibit 9 is of particular importance because, bearing the same date, it is also the ninth count of Mr. Spinale's indictment, which represents the only count to which he pled guilty.

[36]Cashin stated that the details of the earlier inspection could come from the wholesaler, through a copy of the inspection or through his supervisor reading the results to him. Tr. I 208.

[37]Although Cashin stated that the railroad could inspect any load of theirs, generally they did so only if there was a claim involved. Tr. I 210.

category it was 21% over the grade limit. The 430 carton lot (lot 'B'), had 31 % total defects (i.e. 23 % over the limit) and 3 % over the soft rot limit while the 115 carton lot (lot "C") had 7 % soft rot, but no other condition defects. This inspection was not to assess quality defects; it only inspected condition, but Cashin conceded that he would characterize the product as "bad." Tr. I 213 - 215, 218. Assessment of grade defects, had they been requested as part of the inspection, would have made the percentage of problems larger. Tr. I 215. Cashin agreed that at least in theory the wholesaler could reject the shipment simply because it was out of grade, but he added that the particular contract with the shipper controls. He stated that the USDA standards may not be not identical to industry tolerances . Tr. I 216. For example, 'decay tolerance' can be up to double that allowed by the USDA. Tr. I 216. While Cashin did not know if railroad inspectors looked at the loads reflected in Complainant's Exhibit 8, pages 6 and 7, he agreed it was possible and that he would be concerned if his inspection was inaccurate and contradicted by a railroad inspection.

Respondents' Counsel referred Cashin to Complainant's Exhibit 2 at page 5. Cashin, asked how much out of grade the inspection of tomatoes was, as reflected in that exhibit, stated that as the U.S. standard is 5% and this inspection reflected 21% were soft and decayed, the product was 16% out of grade. Tr. II 6. No grade defects were taken for that inspection, as the inspection was for "condition"[38] only. Tr. II 7. Referring to Complainant's Exhibit 3, Cashin stated that the report reflected that under the USDA standard, the tomatoes were 10 % out of grade, which is double the allowed amount of 5%. This inspection, like the one reflected in Complainant's Exhibit 2, was for condition only. As with CX 2, Cashin agreed that if there had been grade defects with the tomatoes, that would have made the inspection report worse. Tr. II 8. Looking

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[38]The Transcript actually reads "*commission only*" but the inspector obviously stated "*condition only*," as reflected in his testimony regarding Exhibit 3, which appears on the same page and connects the type of inspection reflected in Exhibit 2 with the inspection done in Exhibit 3.

at Complainant's Exhibit 4, Cashin noted that the inspection reflected 24% total defects, whereas the allowable amount of defects was either 12 or 14 %.[39] II -8. Thus, the tomatoes were clearly out of grade. *Id.* The same response was elicited for Complainant's Exhibit 5, as Cashin noted that the inspection reflected 20% total defects for the tomatoes, which included 14% decay. The 14% decay meant that the product was 6 to 8% out of grade. Tr. II 9, 10. This inspection too listed only condition defects, not grade defects. Again, Cashin acknowledged that if there had been grade defects, such presence would have made the inspection worse. Tr. II 10.

When Cashin was directed to Complainant's Exhibit 6, at page 5, he noted that it *was* a grade *and* condition inspection. It reflected a total of 45% defects, meaning that it was either 33 or 35 percent out of grade. Obviously this meant, as Cashin conceded, this inspection reflected very significant problems for that lot. Tr. II 11.

Respondents' Counsel showed Cashin Respondents' Exhibit 7 M, containing pages A through W, and pertaining to inspection certificate number K 7673650, which he identified as a copy of a USDA potato inspection that he performed on June 23, 1999 at Chain Trucking.[40] The potatoes were in a railcar. Tr. II 15. Cashin found the load had 13% soft rot and a total of 24 percent defects. As the USDA allows only 1% soft rot, this load was out of grade by 12%. Tr. II 15. This inspection was performed on the same day as the inspection Cashin performed for Tray-Wrap as identified in Complainant's Exhibit 6 at page 5. Tr. II 14.

Turning to Respondents' Exhibit 8 C, identified as showing inspection certificate number K 767366-8, Cashin stated it reflected a potato inspection he performed on June 23, 1999. The inspection certificate lists that it was originally unloaded for SPFE468012. As identified from the original copy of that inspection, it lists Chain

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[39]Cashin could not recall the exact percentage of allowable defects.

[40]Cashin deduced that Chain Trucking was G & T's company because those trucks were present at its location, both at Hunts Point and its earlier location, and because he thought its name was listed on the door at Row B along with G &T's and Tray-Wrap's name. Tr. II 91,92. However, Cashin could only assume that Mr. Spinale owned Chain Trucking. Tr. II 92.

Trucking on it. Chain Trucking is in the same office as G &T and Tray Wrap. When Cashin met with Chain Trucking, he dealt with Mr. Spinale. Tr.II 18, 20. Cashin agreed this inspection was performed on the same day, and at the same location, virtually one inspection right after another, as the inspections reflected in Complainant's Exhibit 6, at page 5 and Respondents' Exhibit 7 M.. Tr. II 21, 22. This inspection, K 767366-8, consisted of two separate lots. The first lot had 18% total defects with 6% soft rot. Again, as only 1% soft rot is allowed, the lot was 5 % over the allowable limit. For total defects, USDA allows up to 8% total defects, but he found 18% total defects. Tr. II 22.

The second lot had 12% total defects and 5% soft rot, meaning that the total defects exceeded the limit by 4% and the amount of allowable soft rot by 4%. Cashin concluded that both inspections reflected that these were bad lots.[41] Tr. II 23.

Cashin next identified Respondents' Exhibit 9 C as a copy of an inspection report he issued for the applicant Chain Trucking, performed on June 23, 1999 at 12:45 p.m., and bearing inspection certificate number K 767364. Tr. II 29, 30. Cashin's inspection revealed 11% soft rot, a number 10% over the allowable amount. It also reflected 26 % total defects, which is 14% over the USDA allowable amount. Tr. II 30.

Referring to all of these inspections listed above, Cashin agreed that all of them were more than 2 or 3 percentage points out of grade and in fact that they were a lot more out of grade than that. Tr. II 31, 32. Put another way, Cashin admitted that all the inspections

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[41] Although lead counsel for USDA objected to these exhibits, preferring the hearing to be limited to the particular inspections cited in the Complaint *and no other inspections*, Counsel for the Respondent asserted that they were part of the criminal indictment. Tr. II 24. Lead Counsel for USDA at first contended these inspections were not part of the criminal indictment of Mr. Spinale but quickly retracted that claim. Tr. II 23, 25. Respondents' Counsel's argument was that these inspections were a part of the 13 inspections in that indictment and have relevance by the fact that they reflected produce that was out of grade as well as by the fact they were all done on the same day and time. The Court agreed that the exhibits were relevant.

reflected "bad loads."[42] Tr. II 32. Yet, despite agreeing that the inspections were significantly out of grade, Cashin conceded that he previously testified that he was reluctant to issue inspections that were out of grade by more than a few percentage points, because he was afraid that to do so would make "the inspections too obvious and cause[] an appeal[43] and a lot of problems ..." Tr. II 32.

Based on the record testimony, the Court finds that the corrupt inspectors, in order to protect themselves and their scheme, would not alter the true condition of produce inspected beyond the few percentage points needed to cause the produce to fail to meet grade. Cashin agreed that there were times when he would enter a railcar, or a trailer, and observe markings on the interior of the railcar or trailer wall. Tr. II 32. Such markings - made with a crayon or marking pen - recorded a number which was circled with a date underneath it. Tr. II 33. The number corresponded to a particular USDA inspection station, as each station had its own number. For example, the Newark, New Jersey number was 37. Cashin explained that anytime he performed an inspection when the load was still in the trailer, he was to place such a marking in it. In this way, a subsequent inspector could trace, by knowing the number and the date, information about

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[42]To make it explicit, the Court finds that for each of the 9 counts, the loads inspected were far out of grade: CX1: 33% total defects; CX 2: 16% out of grade; CX 3: 10% out of grade; CX4: 24% defects; CX5: 6 to 8% out of grade; CX 6: 33 to 35% out of grade; CX 7:12% out of grade; CX 8: 21 to 28% out of grade; and CX 9: 14% out of grade. This, together with the totality of the other evidence in this record, supports the Court's conclusion, as discussed herein, that each of the inspections certificates in this Complaint reflected accurate descriptions of the state of the produce inspected.

[43]Cashin noted that any financially interested party in a load of produce can request an appeal inspection, which amounts to a second look at the load. The procedures require that at least half of the original load must still be present for there to be an appeal inspection. The load must also be identifiable. For example, regarding Complainant's Exhibit 6, at page 5, the Lot ID is identified as 40-GL. In conducting an appeal inspection, in 1999, two inspectors would appear, one of whom would be a supervisor. The amount of samples examined in an appeal would be about twice that of the original inspection. An appeals sheet is created from this second inspection and the results are then sent to Washington D.C., where a decision is made based upon the appeals sheet findings. Tr.II 44, 45, 46. An appeal inspection is differentiated from a reinspection. If, for example, less than half of the load remains, then the inspection is deemed to be only a "reinspection," not an appeal inspection. Tr. II 46.

the load. Consequently, an inspector could tell by this information if he was examining the same load that another inspector had examined. Tr. II 35. If he found such a marking, Cashin would call his office immediately. The office would inform him if the load had been previously inspected. With this information, Cashin would know whether there was any real need[44] to do a second inspection or if the second inspection was an appeal situation. Tr. II 36, 37. Cashin admitted that the unofficial purpose of the call to the USDA office was to make sure the second inspection did not contradict the first inspection.[45] Tr. II 116, 117. While the supervisors at his office could never officially command such an outcome, Cashin understood that his superiors wanted the inspections results to be in agreement. Tr. II 117. Cashin admitted that, at times, he would issue a false inspection in order to have the two inspections be in agreement. Tr. II 118.

Upon being re-directed to Complainant's Exhibit 6, at page 5, (referring to inspection certificate K 767363-5, dated June 23, 1999), Cashin agreed again that the inspection reflected that the load was significantly out-of-grade, as he considered the product to be "very bad." Tr. II 40, 41. Cashin also admitted that in that instance he would have some, limited,[46] concern that his inspection reflect an

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[44]At times, upon advising the person requesting an inspection that there had been an earlier inspection, the inspector would be told that no further inspection was needed. At other times, an appeal inspection was sought. On other occasions, an applicant may want an entire new inspection, apart from any appeal issue. In such situations the entire load would be unloaded. Tr. II 36, 37. According to Cashin, all of this, including noting markings in a trailer and calling the USDA office, was part of the procedure he was to follow. *Id.*

[45]While he hedged at first in this response, calling its use a "control," ultimately Cashin conceded that, unofficially, its real purpose *was* to make sure the inspections did not contradict one another. Tr. II 38, 39.

[46]Cashin believed this risk of an appeal contradicting his inspection findings would be lessened because Tray-Wrap was a "re-packer." As such, it would take larger boxes of produce and re-pack them into smaller containers. The effect of this was that the inspected load would disappear quickly as it was redistributed by Tray-Wrap, in smaller

(continued...)

accurate assessment of the product because of the risk of an appeal from the shipper. Tr. II 42, 43. While he asserted that Tray-Wrap could re-pack a load and get it distributed quickly, he had no knowledge that the load identified in Complainant's Exhibit 6, at page 5, was a load that in fact moved quickly. Tr. II 47. The tomatoes involved in that inspection were size five by six and larger. While Cashin had observed Tray-Wrap re-pack tomatoes, he could not recall ever seeing that size tomato, five by six or larger, ever being re-packed. Tr. II 48, 49, 50.

Notably, Cashin admitted that, on occasion, he would go to G & T and Tray-Wrap and ask them if they had any produce to look at. Tr. II 51. *This is another example of Cashin's complete lack of credibility. While his demeanor, his nineteen year record of admitted corruption, the testimony of other witnesses and other factors all support the Court's finding that Cashin was not worth believing, he even contradicted himself on this significant point, as the day before he had claimed under oath that would not visit a merchant unless there was an outstanding request for an inspection. See Transcript* I at 201-202. He recalled occasions of visiting when the market was closed for a holiday but the USDA was open. While he presented this conduct as innocent activity because there wasn't much to do on such market holiday closings, he conceded that, as the USDA was open on those days, Mr. Spinale would have been able to call the USDA office and request an inspection had he wanted one performed.[47] Tr. II 51,

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(...continued)
containers, to stores. With the load apt to be gone quickly, the risk of contradictory findings was diminished. Thus an appeal would be meaningless if the load was gone before it could be accomplished. Tr. II 42, 43. Cashin stated he had never heard that once an inspection finds that the product is out-of-grade the consignee has to hold the load for 24 hours to enable the shipper an opportunity to make an appeal. Tr. II 43, 44. Again, the point is that Cashin had zero knowledge as to whether this or any of the loads in this litigation were in fact dispersed quickly.

[47]As noted above, Cashin was inconsistent on this issue. Later when Cashin was asked if there were other times when he visited Mr. Spinale's location and asked if there was an inspection he could do, under oath he could only claim "not that I remember," the Court, in viewing the witness' demeanor and, apart from that, in evaluating the
(continued...)

52. This admission makes it clear that Cashin was involved in what amounted to a hold-up of at least some wholesalers, like Mr. Spinale. With no inspection requested, and therefore no plausible assertion for the USDA to argue that Mr. Spinale was scheming to have produce evaluated to be less than its true condition, Cashin was clearly working his shakedown of wholesalers.

When asked about the amount of a product that was to be inspected, Cashin stated that the rule of thumb was to inspect 1%. Tr. II 53. In inspecting a truck load of tomatoes, which typically would contain 1600 boxes, about an hour or two would be required to complete such an inspection, depending on the number of defects found. Tr. II 54.

In the period from 1980 through 1999, and prior to the date of his arrest, Cashin would be assigned to do between four to twelve inspections per day. Tr. II 54, 55. His workday averaged ten to eleven hours. Cashin conceded there were not a sufficient number of inspectors at Hunts Point to accomplish the number of requested inspections. Tr. II 56. Consequently, inspections would lag from one to three days behind. Tr. II 56. Cashin stated that the USDA office received a "tremendous amount" of calls about these inspection delays and that the wholesalers were told the office was "overwhelmed ...[and] couldn't get to it." Tr. II 57. This was significant concession as the products inspected, as everyone knows, are perishable. On the basis of this admission from Cashin, and other witnesses, of the significant and chronic delays in inspections, the Court finds that these delays created an atmosphere which enabled the corrupt inspectors to make demands on the Hunts Point wholesalers who wanted timely inspections of their product. While Cashin asserted that *some* wholesalers, in attempting to deal with the problem of delayed inspections, would call for inspections even when a load had not yet arrived at their place of business, *he conceded that G & T and Tray-Wrap never did that*. Tr. II 58.

(...continued)
credibility of the response itself, determined that Cashin was not truthful in that response either. Tr. II 52.

Cashin also acknowledged that in his years as a USDA inspector he did "cut corners" in performing his inspections. This practice of "shortcuts" was done by Cashin and, to the best of his knowledge, by all the USDA inspectors, whether the wholesaler was paying cash to the inspectors or if it was one of the "nonpaying [wholesaler] houses" that was not. Tr. II 59, 60. One way Cashin cut corners was to examine less than the required number of samples but, as he put it, "if a wholesaler was paying me" he simply didn't draw as many samples because he was being paid and the wholesaler and the inspector had agreed on the numbers. Tr. II 59. Cashin stated that as they could not "officially" tell the inspectors to cut corners, "unofficially" the supervisors at USDA encouraged the inspectors to take such shortcuts. They did this by encouraging the inspectors to work "as fast and as accurate as possible," but it was understood that they were expected to take shortcuts. Tr. II 60, 61.

While the Court accepts that Cashin's supervisors indirectly conveyed that he and other inspectors take shortcuts, the Court expressly finds that, particularly when posed with questions that ran contrary to his perceived interests, Cashin was not a credible witness. Thus on matters of critical determinations to this case, the Court finds that Mr. Cashin was not believable. For example, when questioned whether he ever asked Mr. Spinale for a loan, although he said "no," the Court, viewing him as he responded, concluded that Cashin was not telling the truth.[48] Tr. II 62. When asked, in the very next question, whether he had ever asked Mr. Spinale for a "contribution" to "any kind of project that [Cashin] was involved with," Cashin responded, "Not directly, no." Tr. II 63. Explaining, Cashin asserted that Mr. Spinale "didn't like railroads" and "was always having some sort of problems with the railroads." Yet, Cashin who was involved with a railroad museum, got Mr. Spinale to make a "donation" for the museum. Tr. II 63. Cashin denied that he asked Mr. Spinale for a

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[48]Later, in testifying about one of his fellow corrupt inspectors, Eddie Esposito, and Mr. Esposito's need for money, Cashin admitted that he told Esposito that borrowing money from Mr. Spinale "would be one option." Tr. II 68. Thus, Cashin was aware that Mr. Spinale was a source for loans. This is yet another example of Cashin's lack of credibility; denying that he ever asked Mr. Spinale for a loan, yet telling Esposito that Mr. Spinale was a loan source.

$10,000 donation, and stated that Mr. Spinale actually contributed "around a hundred dollars" for the museum. Tr. II 63. Yet, Cashin, apparently distinguishing that 'contribution,' still claimed that he never asked Mr. Spinale for money. Tr. II 94.

While continuing to deny that he ever asked Mr. Spinale for a loan, Cashin admitted that he knew that one of his fellow corrupt USDA inspectors, Eddie Esposito, had borrowed money from Mr. Spinale. Cashin stated that he did not know if the amount Mr. Esposito borrowed from Mr. Spinale was $20,000, but he was aware that Esposito had "a personal problem." Tr. II 66.[49]

Cashin was then directed to Respondents' Exhibit 40 Q, which involved a potato inspection he performed at Hunts Point on December 17, 1998 for Chain Trucking[50] and bearing Inspection Certificate number K673463-6. As reflected on the Inspection Certificate, it involved two lots of potatoes, both of which were out-of-grade due to soft rot. Tr. II 72. Cashin agreed that the next occasion for him to conduct an inspection, following the December 17, 1998 inspection was not until over three months later, on March 25, 1999, the day after he was arrested. Tr. II 72, 73. Complainant's Ex. 1 at page 5, Inspection Certificate K-678086-0. Cashin admitted that when he made his March 25, 1999 post-arrest inspection he was wearing a "wire," that is, a hidden recording device, for the government. Tr. II 74.

Cashin agreed that he knew Mazie Faraci to be the office manager at G & T/ Tray-Wrap, which was located in Row B at Hunts Point. The main office, where Ms. Faraci worked, was more than a half-mile from G & T and Tray-Wrap's other office at the same Hunts Point market. Tr. II 75, 76. In contrast, G & T and Tray-Wrap's re-packing work took place at Row D at Hunts Point. Tr. II 78. Cashin would visit Ms. Faraci from time to time when he needed information to complete his inspection certificates, such as trailer or railroad car

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[49]Cashin stated that he and Esposito had adjacent desks in the open office space at their former USDA offices. Tr. II 67.

[50]Chain Trucking is listed as the party that asked for the inspection but it was performed at the G & T, Tray-Wrap warehouse. Tr. II 72.

numbers or shipper's addresses. Inspections rarely occurred at Ms. Faraci's Row B location[51] and Cashin stated that he never talked with her about the inspections. Cashin also stated that he never received any cash payments from Ms. Faraci, nor were any such payments ever discussed. Tr. II 77.

Significantly, and as noted earlier, when asked if he could "point to any specific inspection report where [he could] definitively say that [he] altered the inspection report at G & T or Tray-Wrap," Cashin replied, "No, I cannot." Tr. II 82. Cashin also conceded that there were many times when he agreed with Mr. Spinale's evaluation of the load being inspected. Tr. II 82.

Counsel for Respondents asked Cashin if it would be fair to characterize the cash payments made by Mr. Spinale to Cashin as a tip, as opposed to a payment intended to alter the inspection. However, Cashin evaded an answer by professing he did not know the difference between a tip and a bribe. Further, after Cashin stated that Mr. Spinale would be very specific about a load, telling him the condition or temperatures he wanted to be reflected in the inspection certificate, he could not provide a straight answer as to whether the information Mr. Spinale wanted in the inspection was in fact correct. Instead, while simultaneously agreeing that Mr. Spinale's information could have been correct, he could offer only that he could not remember whether the information was in fact correct. Tr. II 83, 84. The Court, dissatisfied with this apparent lapse in Cashin's ability to recall such fundamental information, inquired further:

> The Court: So, Mr. Cashin, are you stating that there were no instances in your dealings with Mr. Spinale when in fact you concluded that he was correct, or you just have no recollection at all?
>
> Mr. Cashin: There were times he was correct, and there were times where he was very specific in the numbers -- for example, he would come up to me -- this is just an example -- and say,

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[51]On the rare occasions when Cashin made an inspection at Ms. Faraci's Row B location, he would work alone, conducting the inspection without a representative from G & T or Tray-Wrap being present. Tr. II 78.

> see this car of potatoes out here? He would say it had - - you know, put down five to six percent soft-rot. The car was late. You know, it would go through and maybe the car wasn't late. He would just say just put down five, six or seven percent soft-rot.

Tr. II 84.

When asked if ever had the opportunity to look behind Mr. Spinale's assertion of the produce condition, Cashin stated that he would get "an idea of what the potatoes looked like" by going through a few samples. In those instances he maintained that "the potatoes did not indeed have five or six percent soft-rot, that they had other little problems, but not soft-rot." Tr. II 85. However, in the face of that assertion, Cashin was unable to point to *any* specific inspection where this occurred.[52] Tr. II 85. Further, Cashin acknowledged again that Mr. Spinale is an expert on the subject of the condition of tomatoes and potatoes and that his evaluation of the product was correct.[53] Tr. II 87.

In response to a question from Respondents' Counsel, inquiring about Complainant's Exhibit 5, at page 6, (Inspection Certificate 767032), Cashin conceded that grade defects, had they been included in the inspection report, would have made the inspection results worse

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[52]In fact, when Cashin attempted to rehabilitate himself on this point, he first claimed that with regard to the inspections named in the Complaint, while he could not point to a single potato inspection where Mr. Spinale directed him to write down information that was contrary to his own observations, he claimed that such an event occurred with the tomato inspection reflected in Complainant's Exhibit 5, at pages 5 and 6. *However, he immediately conceded that this assertion rested solely upon his reading the accompanying 302 statement included within Exhibit 5 and was not based on any independent recollection of the events*. Tr. II 86. This Court has already set forth the serious, evidentiary infirmities with the 302 reports associated with the Counts in the Complaint. Fatally, Cashin could not independently recall *any* of the critical information associated with the Counts in this Complaint. *See*, as one of many examples, Tr. II 90. Thus, as to the specific allegations in the Complaint Cashin's testimony was completely valueless to the USDA case.

[53]Nor was the *accuracy* of Mr. Spinale's assessment diminished by Cashin's contention that Mr. Spinale's numbers and scoring were not always consistent with the USDA particular dictates.

and consequently would have afforded Mr. Spinale the ability to claim a larger allowance.[54] Tr. II 88.

It is noteworthy that Cashin conceded that he had no actual knowledge that either G & T or Tray-Wrap had renegotiated the price of *any* of the shipments for which he claimed, as the "designated *reader*" of the 302s, that he had altered the inspection results. Tr. II 92. Nor, for *any* of the inspections for which Cashin claimed to have altered the results, did he have anything to reflect the correct state of the shipment. Tr. II 93. Further, while one would expect that for something as momentous as the first conversation concerning this alleged bribe scheme, one would remember the details, or at least some details of such an event, Cashin maintained that he could not remember *anything* other than mentioning "helping" Mr. Spinale. Tr. II 93. This is simply not credible.

Cashin admitted that when he was arrested on March 23, 1999, he was shown video tapes of his taking bribes. Tr. II 98. In contrast, the government had no parallel evidence showing Mr. Spinale's involvement in such actions. Rather, the video involved Cashin taking money from Southeast Produce, in connection with loads of produce for the Wangs. Tr. II 98. Cashin admitted that he altered inspections for them, and in so doing, issued false inspections, receiving money in return for his actions. Tr. II 98. Further Cashin admitted that he agreed to cooperate with the United States Department of Justice so that he would not have to go to jail.[55] Tr. II 99. Cashin well understood the terms of his bargain with the government that would enable him to avoid any jail time, despite an admitted two decade practice of getting money from produce wholesalers. To avoid jail he had to give "substantial assistance to the government," which he

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[54]Cashin asserted there would be no need to add grade defects because the load already had 14 percent decay, which reflected an excess decay of 9 percent beyond the allowable amount. Tr. II 88.

[55]To reach his goal of avoiding any jail time for his decades of bribe taking, Cashin conceded that he had to get a "5k" letter from the government. To that end, he signed an agreement with the government, which agreement refers to the "5k" letter. Unlike his fellow corrupt inspectors and despite nineteen years of shaking down wholesalers, Cashin realized his goal, and did no jail time. He is employed full-time presently. Tr. II 184.

understood to mean giving "*the government all the help that they asked for*." Tr. II 100 (emphasis added). Cashin agreed that he did just that.[56] Tr. II 100, 101. His goal was achieved, as he did not serve *any* jail time. Tr. II 101, 102. Further, despite the years and years of taking money, Cashin paid *no fine at all*. Tr. II 102. In significant contrast, Cashin admitted that *all* of the other eight corrupt inspectors did jail time. Tr. II 102. Instead, his sentence was only for "time served," an inaccurately employed euphemism, because the "time served" was for his testifying at "all the different hearings and trials from ... the year 2000 ... until ... 2003." Tr. II 101. It is also noteworthy that, while Cashin testified, in connection with his efforts to avoid serving any jail time, to having a secret recording device on him from March 1999 through August of that year, he had *the right to turn the recording device on and off as he wished*. Tr. II 108.

Cashin, asked to explain what is meant by a "consignment load," defined it as a load of produce sent from the shipper to a wholesaler, at an agreed date, with the load to be sold at the best price attainable. The wholesaler then remits a percentage of the sale back to the shipper. Tr. II 109.

Respondents' Counsel questioned Cashin as to why a wholesaler ever needed to request an inspection in that circumstance since the wholesaler's remittance to the shipper is based on the amount of the sale. Cashin's understanding was that the inspection's purpose was to determine the selling price or worth of the produce to the public, *but not to obtain a better price from the shipper*. Tr. II 110. Although Cashin then stated that the inspection results would allow the wholesaler to renegotiate the price of the produce, he could not explain the logic to this, given his testimony that the consignment price is based on the amount received by the wholesaler upon the sale of the produce. Tr. II 110, 111. Thus, Cashin effectively admitted the obvious - - a wholesaler has no reason to seek a fraudulent inspection

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[56]Cashin stated that, for each USDA hearing, he spent about four hours getting "prepped." Tr. II 105. Although he had lost track as to the number of USDA hearings in which he had testified, he thought this proceeding was his fifth such appearance. In addition, he testified in each of the criminal trials. Tr. II 106.

in instances when the actual sale price is determinative of a load's value.

Directed to Complainant's Exhibit 1, at page 5, and pertaining to Inspection Certificate K- 678086-0, Cashin read the certification accompanying that inspection and for which his signature attested it to be an accurate inspection. That certification provided that he had in fact inspected samples of the produce and that the quality and/or condition, as shown by those samples, were as stated in his inspection. In fact, however, when asked if his signed certification accurately reflected the quality and/or condition of the produce, Cashin confessed: "Sometimes [it] did and sometimes [it] didn't." Tr. II 113. Cashin also read into the record the "Warning" which appears to the left of the left of the inspector's signature and accompanies each inspection certificate. It provides: "Warning. Any person who knowingly shall falsify, make, issue, alter, forge or counterfeit this certificate or participate in such actions, is subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both." *See*, *for example*, Government Ex. CX 1, at 5. Tr. II 113. Thus, Cashin, responding to whether he issued false certificates during those nineteen years, answered: "Yes, I did." Tr. II 114. Yet, for all those years of dishonesty at Hunts Point, Cashin's only price was to sing the appropriate songs for the government, or as he put it, to give "the government all the help that they asked for."

In fact, Cashin admitted that one of the variations of his decades-long false inspection certificates, involved issuing a false inspection where the amount of grade defects was *understated*. In this regard Cashin admitted that he was under instructions not to issue an inspection where the grade defects were greater than 5%.[57] Thus, Cashin agreed that understating or diminishing the extent of the problems with a given load was also a false inspection. Tr. II 114, 116. Obviously, this class of false inspections could only operate to hurt wholesalers because the inspection would claim that the produce was in better shape than its actual condition. Cashin also reaffirmed that his instructions were to continue taking samples until the initial

[57]Cashin reaffirmed in his second day of testimony, the assertion he made during his first day that he had to call the USDA office if a load had over 5% defects and that in those instances he had to bring the evaluation of the load down to 5%. Tr. II 115.

out-of-grade findings as to quality defects ultimately reflected findings that the load was within grade.[58] Tr. II 120.

While he agreed that he had been on friendly terms with Mr. Spinale, Cashin was elusive when asked if he had ever complained to Mr. Spinale about his USDA employment, acknowledging only: "I might have. I don't remember."[59] Tr. II 126. Yet he admitted that he was growing tired of his USDA job. He contended that this stemmed from his dissatisfaction with the way in which the office was managed by Mike Wells and Mary Ann Stranch.[60] Tr. II 127.

Cashin estimated that "anywhere from sixty to seventy-five percent" of the wholesalers at Hunts Point were paying the USDA inspectors. Tr. II 128. Yet, it was his understanding that less than twenty percent of those were indicted. Tr. II 128, 129. Cashin identified the eight corrupt inspectors who were indicted as: David Ball, Paul Cutler, Edmond Esposito, Glenn Jones, Elias Malervey, Michael Strusiak, Michael Simous, and Thomas Vincent.[61] Tr. II 135, 136. Cashin stated that this does not represent all of the inspectors who took money but only those who were indicted. Cashin maintained that Mary Ann Stranch, Mr. Luminaci, Dan Arcery, Bob Schmalick *and others* took cash. Tr. II, 136, 137. While apparently excluding himself, Cashin stated that several of the corrupt inspectors had personal problems. For example, he stated that USDA inspector Eddie Esposito had money troubles, that USDA inspector Michael

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[58]While Counsel for USDA eventually got Cashin to agree that taking more samples would produce a more accurate sample, Cashin explained that for a seasoned inspector, such as himself, there is a saturation point and more samples simply will not impact the assessment of the load. Tr. II 160.

[59]This is still another example of Cashin's "amnesia" when it came to matters in which his credibility was involved.

[60]It is an astounding and a revealing insight into this individual that Cashin, an admitted twenty year veteran of taking money from wholesalers at Hunts Point, did not feel constrained from criticizing how others conducted themselves at USDA.

[61]The listed corrupt inspectors reflect the court reporter's phonetic effort at the spelling of these inspectors' names.

Simous had a drug (cocaine) problem and a gambling problem. Inspector David Ball drank a lot and used marijuana. Tr. II 137, 138, 140.

When the subject turned to his problems, Cashin was again evasive on the subject of his financial needs. When asked if he had any "extraordinary financial needs," he could not agree to such a label, but acknowledged that he had "extra financial needs" in the form of a nightclub stripper who was, to say the least, expensive to maintain. Tr. II 141. Cashin would see her *daily*. He informed that whenever she was *at work* (i.e. disrobing) he would "spend a lot of money." While not too expensive from his perspective, he nevertheless stated that his visits to his girlfriend's work site would cost "about $150 to $180" per visit. Tr. II 143. Shopping excursions with his "girlfriend" ran a bit more for Cashin as this would involve "a couple of thousand dollars in clothing and other *necessities*."[62] Tr. II, 144. (emphasis added). Still, he insisted that while she was expensive, she was not extraordinarily so. Tr. II, 143. When asked if his girlfriend cost him over $40,000 per year, Cashin, evasive again, could only offer that he had "never added it up." Tr. II, 146. Clearly these expenses could not be shouldered solely on Cashin's official salary of $43,000, nor were his expenses limited to his girlfriend. For example, Cashin stated that he purchased a new Chevrolet Tahoe truck that, by his testimony, cost $35,000. Tr. II, 145. Nor were Cashin's extraordinary expenses limited to expensive vehicles and his "girlfriend." He also has a sister for whom he is responsible for her support, but he claimed that, prior to 1999, he had no idea what that support cost. Tr. II, 148.

While Cashin, upon redirect, reaffirmed that he received "cash bribes," it is interesting that he described this as cash *for performing*

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[62]Cashin acknowledged that his "girlfriend" had a breast augmentation operation but he denied that he paid for the procedure, asserting "[s]he had the money herself." As was Cashin's custom, he narrowly answered the question about paying for the operation. Tr. II 149. While he was asked if he paid "for an operation *or a trip* for [his] girlfriend," he only answered about the operation. The next question persisted with the issue by asking if he paid "for a trip that she had to take in order to get the operation?" In this response, while still claiming that the girlfriend had the money, Cashin equivocated in his answer by twice using the guarded phrase of "as I remember it" to qualify his answer. Tr. II 149. This is yet another example in support of the Court's conclusion that Mr. Cashin was not a credible witness.

inspections. Tr. II, 152. It is also of note that while Cashin recalled that some wholesalers would ask for specific inspectors and that some of them remarked that they were glad that he was the inspector sent for requested inspections, he could *not* remember associating such a remark with Mr. Spinale, stating: "I don't remember. I don't think so." Tr. II 155.

Directed to USDA Exhibit 9, CX- 9, at page 15, Cashin agreed that he remembered receiving "thank you" money, as reflected in the 302 at page 15. Cashin stated that the "substance of the conversation ... was something along the lines of, well, here take this. I want to say thank you for all the work you did for me or something along those lines." Tr. II 156. However, Cashin could not recall the amount of money received on that occasion, only that he received "thank you" money. Tr. II, 170. However, the Court notes that, even accepting this claim as true, the statement is consistent with Mr. Spinale's position that the money was not to obtain an inaccurate inspection but rather to obtain a timely one.

Cashin reiterated that he could not recall what Mr. Spinale said to him during their initial conversation in the 1980's and that, as to the substance of that initial conversation, he could only recall the substance of what he allegedly said to Mr. Spinale. According to Cashin he told Mr. Spinale in a "business-like and friendly tone" that he was aware of the close working relationship that former inspector Bob Schmalick [ph] had with Mr. Spinale and that he would try to help "along the same lines and along the same ways." Tr. II 158. The Court observes that this retelling also can be construed as consistent with Respondents' contention. The Court noted the unusualness of Cashin's absence of recollection with regard to something as critical as the first conversation of substance with a paying customer. Tr. II 159. It simply is not credible that Cashin would not recall the details of the initiation of his payment scheme with particular wholesalers. Yet he claimed that, regarding the start of his arrangement with Mr. Spinale, he could not remember if he approached Mr. Spinale nor

whether he brought up the subject with Mr. Spinale.[63] Tr. II, 167. Cashin maintained this stance even though he acknowledged that he brought up to Mr. Spinale that he had spoken with Bob Schmalick. Tr. II 168. *Again, the Court reminds that this proceeding does not involve general assertions about Mr. Spinale's alleged actions regarding PACA inspections. Rather, as a legal proceeding, the government has, as it must, charged the Respondents with bribes given to a particular agriculture inspector arising out of PACA inspections on specific dates*. In addition to the aforementioned deficiencies, it is interesting to note that at no point in his testimony did Cashin ever relate that he directly had a conversation regarding altering a report to inaccurately reflect the condition of the goods.

Consistent with Cashin's understanding that his superiors did not want a conflict between his assessment and a previous inspection, he stated that in such circumstances another inspector would have to come out and join him in completing the inspection and that such a situation would take up "a great deal of the workday." Tr. II 161. In this regard it is worth noting that Cashin recalled such an incident involving a railroad car of potatoes at G & T, that it involved three USDA officials reviewing the conflict between the earlier inspection and the inspection at Hunts Point, and, most importantly, that the outcome was *in G & T's favor*, overruling the earlier inspection made at the shipping point in Idaho. Tr. II 162, 180. The inspection had been requested by Mr. Spinale. Tr. II 179, 180.

As alluded to earlier, further questioning Cashin's credibility is the fact that he gave a deposition on September 23, 2004, which was a few weeks before this hearing. This again goes to the issue of his believability as he seemed to have had a memory loss only a few weeks later. In this regard the USDA attorney tried, as an attempt at rehabilitation of the witness, to have Cashin agree that the testimony he gave at the deposition was accurate as to dates and times as asked

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[63]It must also be observed that no matter how many times Cashin was asked about the circumstances in which he received payments from Mr. Spinale, the most damning thing he could claim was the completely equivocal remark to "hold onto this" when a payment was made. Tr. II 165.

in connection with the 302s. With regard to the 302s he testified about at that time, Cashin stated that he believed his deposition testimony was accurate as to dates and times. Tr. II 163. However, the Court again notes that this vague testimony did not focus on any of the particular dates or particular 302s in the record, but rather lumped them all together.

Other aspects of Cashin's testimony unwittingly reveals the true state of his, and the other corrupt inspectors, operation. On redirect Cashin was asked again about USDA inspector Cutler's remark about the "power of the pencil."[64] Cashin elaborated that the tone of Cutler's remark clued him into the conclusion that Cutler "was *shaking people down* for money, too ..." Tr. II 164. That Cashin used the phrase "*shaking people down*" reveals that it was the inspectors who were driving the operation, and, at least in the case of Mr. Spinale, the wholesaler was the victim. While, in attempting to recover from this damaging statement, USDA Counsel got Cashin to agree that he never threatened to make trouble for wholesalers if they didn't pay him and that Mr. Spinale never told him he "didn't like paying [Cashin] ... money," nor did he threaten to stop paying Cashin, all that reveals is that Cashin was smart enough to be subtle in his criminal activity and that Mr. Spinale had enough sense to realize that challenging the corrupt inspectors would cause his business to suffer. Tr. II 164.

As the Complainant's second witness, USDA witness Basil W. Coale has been the Assistant Regional Director, for the Manassas, Virginia USDA office, PACA Branch and he was the individual who conducted the disciplinary investigations of G & T and Tray-Wrap. Tr. II 193, 197. The investigations were initiated following the criminal indictment of Mr. Spinale. Tr. II 198. Coale, in his eighteen year career with USDA, has been involved with hundreds of disciplinary investigations and conducted dozens of them. Tr. II 196.

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[64]Although Cashin claimed he either never heard or wasn't present to hear fellow corrupt inspectors brag about their ability to force merchants to give them money, he did recall the equivocal remark, made more than once by corrupt inspector Paul Cutler, about "the power in the pencil." Tr. II 133, 134.

Mr. Coale defined a PACA license as the license issued when a firm operating subject to the act applies for such a license and pays the appropriate fees.[65] Tr. II 198.

Coale stated that when he began his investigation of G & T and Tray-Wrap in the fall of 2001, he was given documents from Ms. Joan Collson, an auditor for the PACA program. Collson acted as the coordinator of the Hunts Point investigations and she provided Coale with the FBI form 302s. Coale stated that Collson received those documents from the Agriculture Inspector General *or* the compliance staff from the Agricultural and Marketing Services.[66] Tr. II 218.

USDA Counsel directed Mr. Coale to CX 1, pages 3 and 4, which the witness identified as copies of an FBI form 302. Coale stated that form 302s are used to memorialize FBI discussions with a source. For the 302s reflected in CX 1 he noted that these 302s had redactions. Tr. II 220. Coale stated that the redactions were attributable to either special agents' names and FBI file case numbers or to information

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[65]Mr. Coale was directed to Complainant's Exhibits 10A and 10, which he identified as the agency's license record for G & T. These exhibits reflect that G & T has been licensed under the PACA since 1964, and is currently licensed, through April 3, 2005. Tr. II 205. Coale, referring to these exhibits, noted that the original license was signed for by Mr. Spinale, which reflected that he owned 50% of G & T along with George Sayer, who also owned 50%. However, during the period of the alleged violations, from July through August 1999, the records reflect that Mr. Spinale owned 100% of the stock of G & T. Tr. II 206. On the basis of Complainant's Exhibit 10A, Coale stated that, presently, Mazie Faraci is the Secretary, Treasurer and Director of G &T, Anthony Spinale is the Corporate Director, and Mary Spinale is the President and 100% stockholder. Tr. II 207, 208, 209. Mr. Coale was also directed to Complainant's Exhibit 11, which reflects the USDA license record for Tray-Wrap. Tr. II, 212, This reflects that Tray-Wrap's first license application was submitted on April 29, 1970. Tr. II, 214. Mr. Spinale was listed as the company's sole stockholder. Tr. II, 214. Complainant's Exhibit 11A reflects Tray-Wrap's current PACA license, which remains effective through May 13, 2005. Tr. II 213. However, during the period of the alleged violations, Mazie Faraci is listed as the owner of Tray-Wrap. Tr. II, 215. CX 11, at page 19.

[66]Thus the record established by the government is unclear on this point. Either Coale couldn't remember which of the two Agricultural offices Collson told him they came from, or Collson herself didn't know and related to Coale that they came from one office or the other. It is up to the government to establish such facts, including the chain of custody of documents. This confusion adds yet another evidentiary problem to the many associated with the valueless 302s in this record.

relating to matters that did not involve the Respondents in this case.[67] Tr. II 220, 221. Coale was then directed to Complainant's Exhibit 21, which he identified as a letter from the Chief Division Counsel of the FBI's New York Division, "authenticating the FBI 302s that they sent to us." Tr. II 222. Counsel for USDA did not recognize the infirmities with their attempt to connect the 302s in this record to that letter. The letter itself, CX 21, makes *no* identifying association with the 302s associated with this case, nor is it even addressed to any individual at USDA. In fact, the letter bears no addressee.

CX 21 is a single page and the *entire* text of the letter reads:

> The enclosed documents are photographic copies of original FD-302s maintained by the Federal Bureau of Investigation. Redactions have been made where necessary.

Accordingly, there was absolutely no tie established between the nondescript cover letter, dated July 3, 2002 and the 302s in this record. Nor did any witness state that the 302s in this record are the same 302s that arrived with the cover letter.[68] The Court notes that as there were many cases brought against wholesalers operating at Hunts Point, it is significant that there is no indication that this brief and completely unilluminating cover letter relates to documents regarding Mr. Spinale, G & T or Tray-Wrap.

As part of his investigation Coale visited the Respondents' place of business in October 2001 and served copies of the investigative notice and subpoenas requesting documents upon Ms. Faraci.[69] Tr. II 223, 224. Coale stated that the notice requested documents that were

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[67]Coale stated that he knew this because he had seen the unredacted versions of these 302s. Tr. II 221.

[68]A similar problem does not exist for the USDA inspection certificates, although Mr. Coale stated that he also received these from Ms. Collson. This is because the inspection certificates are self-authenticating USDA documents and because they *do* contain information identifying the subject of the inspection. Thus, as to the 302s, Ms. Collson was a critical, but missing, witness to this case.

[69]Complainant introduced a drawing of a sketch Mr. Coale made of the Respondents' office layout.

material to the investigation, which he described as transaction documents related to the time of the alleged violations. Tr. II 225, 226. CX 12. The documents were served upon Ms. Faraci at 8:50 a.m. on October 24, 2001. The subpoenas list some nineteen categories of documents that G & T and Tray-Wrap were to provide in a little more an hour and a half. CX 12, at page 4, and 8. When the documents were not presented by early that afternoon, Mr. Coale presented Ms. Faraci with a demand letter, which set a new deadline for the production of documents at 9:00 a.m. the following day. CX 12, at pages 3 and 7, Tr. II 229, 230. When Coale returned the next day, Ms. Faraci presented him with a letter from the Respondents' attorney[70], the essence of which stated that the records sought by the USDA no longer existed. CX 12 A, Tr. II, 231, 232.

Coale agreed with Counsel for Mr. Spinale that all of the information he sought to be produced through his subpoena upon Tray Wrap and G & T was to be produced in an hour and ten minutes. Tr. III 60. CX 12. Coale also agreed that the information contained within CX 14 and 15 was subsequently obtained from G & T and Tray-Wrap about a week later and that, essentially he was provided with "any records that were less than two years old." Tr. III 61, 62. Further, Coale conceded that under the PACA rules and regulations one is only required to keep such business records for two years. Tr. III 63.

CX 14, consisting of 33 pages, are G & T corporate records provided by that Respondent and pertaining largely to the period from 1996 and 2000. Tr. II 236. They reflect that Mr. Spinale was the President of G & T, presided as the chairperson of the Board of Directors, and was the sole shareholder. Mazie Faraci appears as a co-director of G & T. Tr. II 237. When the same subject was examined for Tray-Wrap, as reflected in CX 15, Mazie Faraci's name appears as the sole shareholder, and as the President of that business. Tr.II, 239. Regarding Coale's testimony that Mr. Spinale is the director, Mary A. Spinale is the principle, and that Mazie Faraci is the secretary, treasurer and director, he agreed that this assertion was derived from

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[70]The letter was signed by Ms. Linda Strumpf, Esquire, who is the Respondents' trial counsel in this proceeding.

USDA records and was based upon the renewal application. CX 10, at pages 2 and 3. Tr. III, 56. Based on these records, Coale agreed that in 2002 there was a change in ownership in G & T. Tr. III, 58.

Coale was next directed to CX 16, which is a copy of the cover page and page 469 of the Red Book Credit Services publication from March 1999. ("Red Book"). Tr. III,[71] 10/27/04, 3, 4. Mr. Coale described it as a produce trade reference book. It includes financial rating information. For Tray-Wrap, Mr. Spinale is listed as the contact person. Coale was also asked by Respondents' Counsel about CX 16, and its excerpts from the Red Book Credit Services. Coale acknowledged that both the Blue Book and the Red Book are used as industry references in this regard. Tr. III, 68. Coale reiterated it as his understanding that the information in these books is self-reported, but admitted he had no direct knowledge of that claim. Tr. III, 69.

Coale was also questioned about the criminal indictment of Mr. Spinale, as reflected in CX 17. Coale stated that Mr. Spinale was indicted for bribery of a public official. Tr. III, 6. Reading from the exhibit, Coale stated that the total amount of the bribery alleged in the indictment was $1500. Tr. III, 8, 9. He was then directed to CX 18, a certified copy of the judgment in the case against Mr. Spinale. Within this exhibit, Coale noted that it reflects that Mr. Spinale pled guilty to Count 9, bribery of a public official. CX 18, page 1. Count 9 alleged that the bribery took place on August 13, 1999. Tr. III, 13. CX 18, page 1. Coale was then directed to CX 9, which duplicates the indictment pages noted above.[72] CX 9 also includes an "FBI 302" and Coale noted that the 302 referred to August 13, 1999 and that the Inspection Certificate included within this exhibit also bears that date. Tr. III, 14. CX 9, at page 13, 14, 15. Coale also read from the indictment that Count 9 refers to $300 as the amount of bribe money and that the 302 also refers to the same amount of money. Still, Coale had no explanation for the fact that the second and third pages of this

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[71]Day three of the hearing, October 27, 2004, is referred to as "Tr. III."

[72]The Court did express that the unredacted version would likely show that the August 9th date was a typographical error by virtue of date references in the unredacted version. Tr. III, 19.

302 listed the date *as August 9, 1999*, while the first page of this 302 lists *August 16, 1999*. Tr. III, 15, 16. Because of these inconsistencies, Counsel for USDA offered to present the unredacted version of the Form 302 in CX 9 as part of its effort to show that the 302 included with CX 9 is one document. Tr. III,18, 19. The Court noted, upon examining the unredacted version, that the only aspect which supported the USDA position that the pages were all part of the same 302 was that the paragraph numbers continue consecutively from one page of the 302 to the next.[73] Tr. III, 27. Thus, USDA counsel was unable to substantiate that these pages in fact were a unit.

Mr. Coale was also asked about CX 1, and he affirmed that he had previously seen the indictment and 302 included in that exhibit. Tr. III, 31. Mr. Coale noted that the indictment referred to an alleged $100 bribe on March 24, 1999 and that the inspection certificate included within this exhibit bears the same date. He also noted that the 302 references the name

Tray-Wrap. Tr. III, 32, 33. Mr. Coale made similar observations with regard to CX 2, where he noted that Count 2 of the indictment lists a $100 bribe amount associated with March 26, 1999 and that the inspection certificate lists the same date. Coale also noted that the 302 lists Mr. Spinale's name as well as Tray Wrap's. Tr. III, 33, 34. Both the 302 and the inspection certificate also refer to product inspected as tomatoes. Tr. III, 34. This process continued for CX 3, 4, 5, 6, 7, and 8. For CX 3, Coale noted that the inspection certificate and the 302 both referred to April 23 and both include reference to Tray-Wrap. Mr. Spinale's name appears in this 302, although it does not appear in the inspection certificate. The 302 lists that an inspection was done at approximately 11:30 a.m. while the inspection certificate lists 11:35 a.m. and both refer to the product inspected as tomatoes. Tr. III, 35, 36, and CX 3. For CX 4, the indictment refers to May 20,1999 and $100 bribery amount, while the 302 shares that date, and refers to an inspection of tomatoes at Tray-Wrap on that date at approximately the same time, and declares that Mr. Spinale paid a

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[73]Other aspects, such as continuity of names from one page of the 302 to another, were not present. Tr. III, 28.

$100 bribe.[74] The inspection certificate that is part of CX 4 shares the same date and approximate time. For CX 5, the indictment lists June 16, 1999 as the date on which a $100 bribe was made by Mr. Spinale, while the 302 included within this exhibit conflicts, as it relates that the bribe amount was $200. The dates in the 302 conflict as well, as June 15th and June 16th are listed dates of activity.

For CX 6, Coale noted the indictment recites a bribe payment of $400 on June 23, 1999 and that the 302 refers to the same date and amount and includes Mr. Spinale's name. Tr. III, 40. The inspection certificate also lists the same date and it involves a tomato inspection, which is the subject of the 302 as well, and both refer to Tray-Wrap. Tr. III, 41. USDA Exhibit 7 (CX 7) lists, in indictment Count 7, the alleged date of the offense as July 15, 1999 and the bribe amount as $100. The 302 included with this exhibit also lists the July 15th date, and refers to Mr. Spinale and an inspection of potatoes at G & T's facility and the inspection certificate shares the date and time listed in the 302 as well as the product inspected. For CX 8 the indictment lists July 26, 1999 and a bribery payment of $200. The 302 included with this exhibit lists the same date, indicates that potatoes were the commodity and includes Mr. Spinale's name.

USDA Counsel, referring Mr. Coale to CX 19, which is the transcript of Mr. Spinale's appearance and guilty plea before Magistrate Ronald L. Ellis on January 26, 2001, noted that Mr. Spinale stated that he "told [Cashin] the specific amount [he] wanted him to put in the inspection report. On the other dates in the indictment [he] paid Mr. Cashin $100 per inspection to influence the outcome of the report." [75] Asked about the 302s in the record, Coale reaffirmed that he received them from Ms. Collson, an auditor with the PACA Program, Office of the Chief, and that when he saw the

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[74]Of course the characterization of the exchange of money as a "bribe" in this or any of the problematic 302s in this record is a legal conclusion for the Court to make.

[75]As to Mr. Spinale's relationship to G & T and Tray-Wrap, USDA Counsel points to the remark made by Mr. Spinale's legal counsel in the criminal proceeding to the effect that if Mr. Spinale had to serve jail time those companies would go out of business. Tr. III 53.

302s they were in an unredacted state. Collson was not the person who created the 302s. Tr. III 88. Coale also saw the 302s as they were prepared for the hearing with the redactions added. Tr. III 73. Coale stated that Collson told him that she acquired the 302s from the FBI. Although Coale also believed that the FBI authenticated the 302s by virtue of the letter which is CX 21, that letter hardly achieves that objective. As discussed, CX 21 is merely a cover letter from the FBI bearing a date of July 3, 2002 and referring to enclosed copies of FD-302s; there is *no* indication *at all* as to case involved, nor the number of 302s enclosed. To be direct, CX 21 is a useless exhibit, with absolutely no probative value in this case. Coale conceded that he had no knowledge of what individual(s) produced the 302s and that none of them bore any signatures. Tr. III, 77. Coale also conceded that he has never met the person who signed the cover letter comprising CX 21. The most Coale could offer about the USDA's receipt of the 302s was that he *thought* they had been received by a Mr. Stanton, a USDA attorney with the Office of the General Counsel. Tr. III, 78. Coale also conceded that the 302s do not indicate who the "source" is. [76] Coale was also flummoxed regarding CX 9, pages 13, 14, and 15,[77] in that, while he contended they were consecutive pages from the same document, he could not explain why the dates did not match[78] for those pages. Reluctantly, Coale had to concede that he had no actual knowledge that those pages were all from the same

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[76]The fact that Coale claimed that Cashin told him that he, Cashin, was the source referred to in the 302s hardly proves the point. First, Cashin's memory was a vacuum as to all of the 302s. Beyond that, Cashin never saw the 302s until years later, nor was Cashin present when the 302s were prepared nor were they ever presented to him in order that he might review them for accuracy. As with Cashin, Coale never saw the 302s until years after they were prepared. Tr. III, 81, 82.

[77]Although Counsel for USDA offered to introduce a largely unredacted version for government exhibit CX 9, at pages 13, 4, and 15, it was agreed to return that largely unredacted version, thereby keeping the original CX 9 in the record. This was done because the parties, and the Court, agreed that the only difference between the versions, for the purpose of this hearing, is that the unredacted version shows an uninterrupted sequence in the paragraph numbers within those particular pages. Tr. III, 99.

[78]As noted, page 13 of CX 9 lists August 16, 1999, while the next two pages of that exhibit list August 9, 1999. CX 9, 13, 14, 15.

document. Tr. III, 83. *In fact, Coale agreed that he never had any discussions with any FBI agents regarding the 302s*. Tr. III, 96. Coale also conceded that his view that the Counts in the indictment correlated with the 302s in the Complainant's Exhibits was actually only a deduction he made based on the fact that the same dates listed in the counts in the indictment also appeared in the 302s which accompanied them. Tr. III, 90. 91.

In fact, when the Court specifically asked Coale whether it was:
fair to state that the statements [he] made about the correlation, [that] there's nothing unique about [his] personal knowledge about this case which enabled [him] to make those statements about the correlations between, for example, the 302s and the particular related inspection certificates, but rather – tell me if this is a fair characterization. What you did was what any person of reasonable intelligence could do, which is, to whit, you looked at the 302s, you looked at the dates of the particular counts that were involved and then you looked at the inspection certificate and you made certain common sense observations about some commonalities there, correct?" Mr. Coale answered succinctly, "Correct." Tr. III, 92, 93.

Coale also agreed with the Court's further observation:
And if we pulled someone in off the street who had reasonable intelligence and - - didn't have a college degree, but was literate, [he or she] could've made the same observations that you made
about those correlations, right?
Coale again acknowledged, "Yes." Tr. III, 93.
Coale agreed that those concessions applied to all of the critical government exhibits, CX 1- 9, which exhibits parallel the indictment counts. Given these acknowledgments, Coale's description of Mr. Spinale's payments as "bribe payments" was derived solely from *his* translation of the "cash payments" language in the 302s, to *his* "shortened" replacement expression of "bribe." Tr. III, 95, 96.

Accordingly, on the basis of the information related above, the Court makes the following observations and findings concerning Mr. Coale's testimony. First, in providing "testimony" about the 302s, Mr. Coale functioned solely as a 'reader' identifying and knowing nothing more about any of these documents than an individual selected at random from the New York City telephone book. Further,

Mr. Spinale pled guilty to a single count, a fact USDA counsel seemed to blur during direct examination. Coale later acknowledged that Mr. Spinale pled guilty *only* to Count 9 and that the remaining counts were all dismissed. Tr. III, 54, 55. Thus, the USDA cannot bootstrap its case by transmogrifying a plea to a single count in a criminal proceeding into the multiple counts alleged in this administrative complaint. In addition, the phrase used in the plea, that cash was paid "to influence the outcome" is equivocal in that it does not necessitate a finding that the "influenced outcome" was an inaccurate outcome.

Beyond those observations, as pointed out by Counsel for Mr. Spinale, Coale's direct testimony omitted that *immediately* after Mr. Spinale admitted in his plea to telling Cashin the specific amount he wanted listed in the inspection report, he told the Magistrate:

Your Honor, I would like to state that I never intended to defraud the shippers who had sent me the produce. Tr. III, 55.

With the conclusion of the government's case, save the sanction testimony which it asserted was, by 'custom' in these proceedings presented at the close of the Respondents' evidence, it would not have been unreasonable for the Court to have entertained a motion for dismissal by reason of the government's failure to present a prima facie case. As such a motion was not made, the Respondents proceeded with their evidence.

The Respondents' first witness, Ms. Mazie Faraci, stated that she is employed by G & T and Tray-Wrap as the office manager and that this entails taking care of the records. Tr. III, 108. Ms. Faraci stated that she owns Tray-Wrap and is its President, owning 100 percent of its stock. She has been with G & T for forty years and with Tray-Wrap for thirty-five years, since 1964 and 1969, respectively. Tr. III, 109. Ms. Faraci stated that she was a stockholder from the time Tray-Wrap was first formed. Her working relationship with Mr. Spinale preceded these businesses, as it began in 1964. Tr. III, 110. Her business relationship with Mr. Spinale was that she provided the financing and took care of the books, while he did the buying, selling and packing of tomatoes. Her investment was $25,000 and, at the outset, she owned all of the Tray-Wrap stock. Tr. III, 111, 112. In this respect, Ms. Faraci believed that any assertion in the original

PACA license application in 1969 indicating that Mr. Spinale was the sole stockholder was at odds with the facts. Tr. III, 112.

Ms. Faraci distinguished her work location from Mr. Spinale's. She works at Hunts Point Market at Row B, address number 266, whereas Mr. Spinale works at Row D, address number 401. She estimated that the two addresses were about a mile apart. Tr. III, 114. The packing and shipping occurs at Mr. Spinale's work location. Tr. III, 113. Ms. Faraci stated that the name "Chain Trucking" does not appear on the door of her office location. Tr. III, 114. Ms. Faraci believed that Chain Trucking is owned by a nephew of Mr. Spinale, Vincent Mineo. Tr. III, 115. In the period from 1980 to 1999, Ms. Faraci stated that she had never been present during a USDA inspection. Tr. III, 115. Her contact during this time period with any USDA inspectors was rare, limited to a few times when an inspector dropped by for the name of a shipper or like information and she was not familiar with Cashin. Tr. III, 116. Nor did she ever have any conversations with Mr. Spinale regarding cash payments to any USDA inspectors. Tr. III, 116. Ms. Faraci also stated that she never approved cash payments by Mr. Spinale to USDA inspectors and that she first became aware of such actions when Mr. Spinale was arrested and indicted. Tr. III, 117. Ms. Faraci conceded that while she owned the business, she could not 'fire' Mr. Spinale, because she had no knowledge about the produce business. Her role was to provide the capital and maintain the records.[79] Tr. III, 122-123.

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[79]Given the Court's decision in this case, Respondents' alternative argument,(assuming that the Court were to have found Mr. Spinale engaged in bribery), that the USDA cannot hold the Respondents liable in any event because they did not know of Mr. Spinale's alleged activity and would never have approved of it, is moot. However, the Court must add that it does not subscribe to Respondents' Counsel's reading of *Post & Taback* to support that contention. The Department of Agriculture's Judicial Officer rejected the argument that as Post & Taback did not have actual knowledge of Alfisi's conduct with Cashin, those actions could not be deemed to be violations by the Respondent. In reaching the conclusion that the PACA licensee need not have actual knowledge of the violations, the Judicial Officer cited *H.C. MacClaren, Inc. v. U.S.D.A.*, 342 F.3d 584, (6th Cir. 2003) and *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, (2nd Cir. 2003) as authority for that conclusion. Thus, were the Court faced with this issue, it would have rejected Respondents' contention

(continued...)

Mr. Anthony Spinale testifying on behalf of the Respondents, stated that, at the time of the hearing, he did not consider himself employed by anyone. In 1999, however, he acknowledged being employed by G & T and that he was its president and owned its stock. Mr. Spinale did not, in the formal sense, complete high school. Tr. III 127. His formal education ended in the 7th or 8th grade. However, when he was in the military he took a test that ranked him as having the equivalent of a high school education, although he was uncertain as to the actual effect of that test. Tr. III 187. Mr. Spinale served with U.S. military in Korea. Tr. III 188. Mr. Spinale stated he formed G & T, a business involving packing potatoes, in 1964. Tr. III 132. He believed that Tray-Wrap, which was also his idea, was started in 1969. Tr. III 135 -136. Prior to starting Tray-Wrap, Ms. Faraci was an employee of Spinale and he chose to go into the tomato business with her. Tr. III 136. Spinale stated that the employees of G &T, Tray-Wrap, and another company, Mr. Sprout's, were all actually employed by G &T and certain expenses were then passed on to Tray-Wrap and Mr. Sprout. Tr. III 137. The same arrangement exists today. Tr. III 138. For example, as to Tray Wrap, a business that receives tomatoes and repackages them in smaller packages, G & T charges Tray-Wrap an amount above its actual labor costs by charging a per-package fee. Tr. III 138- 139. Mr. Spinale agreed that he ran everything regarding G & T. He would buy the product, sell it, see that it was re-packed properly, make sure that the product was of good quality, and he would determine if it needed a USDA inspection. Tr. III 140. In buying the product, generally he would work through brokers and order the potatoes he needed for any given week. Tr. III 140. He was also involved in the selling of the product, selling it to chain stores. Tr. III 141. Tray Wrap's repackaged tomatoes are sold to chain stores. Tr.III 148.

Mr. Spinale stated that he would order a USDA inspection if he felt the product was bad. Tr. III 151. He denied that he would order an inspection if he thought the product was U.S. Number One. Tr. III 151. His determination that a product was bad came from his years of

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(...continued)
regarding excusing employer liability for an employee's acts.

experience and involves his personal examination of the load in question. Tr .III 151. His operation moved from 230th Street to its present D 400, Hunts Point location, around 1991. Tr. III 152. He stated that the operation changed with that move, as he could no longer package the amount of potatoes that he was selling. Tr. III 152-153. He gave work to M & M Produce, another repacker, as a result of this problem. Tr. III 153. In contrast, Spinale packages all the tomatoes at the 400 Row D Hunts Point location. Tr. III 153.

Mr. Spinale stated that during the 1980s, before moving to Hunts Point, when he was located at the 230th Street location, there was a USDA inspector at the factory every day and a RPIA (Railroad Perishable Inspection Agency) inspector present. Tr. III 156, 157. He added that there was a USDA inspector at that location every day from the time he was 19 years old until 1988. Tr. III 157. There was so much to inspect, the USDA kept an inspector at that location all the time. Tr. III 158. At that time it was his practice to have all loads of produce inspected. Tr. III 157. Mr. Spinale stated that he never made any cash payments to any USDA inspectors while at the 230th Street location. Tr. III 160. The Court having observed Mr. Spinale in making that assertion and noting that no evidence to the contrary exists in this record, finds that the statement is true.

Although Cashin asserted that he spoke with Mr. Spinale in 1983, Mr. Spinale denied ever having any conversation with Cashin in 1983. Tr. III 160. Rather, Mr. Spinale believed he first met Cashin a year or so after he had moved to Hunts Point Market. Tr. III 160. He had no recollection of seeing Cashin at the 230th Street location nor did he recall an alleged incident in 1983 when a potato inspection was overruled when two other inspectors came to the site. Tr. III 161. Given Cashin's poor memory for more recent and far more critical events, the Court does not adopt Cashin's version.

Mr. Spinale stated that once he moved to Hunts Point in 1991, there was no full time inspector present all the time, as had been the case in the earlier location. Tr. III 163. At his Hunts Point location, Spinale's rail siding can only hold two cars which was less than the capacity at the earlier location. All the vendors at Hunts Point have a rail siding. Tr. III 163. However, Spinale stated he didn't use his siding on Row D. Instead loads go to "team track" first. Tr. III 163.

Team Track refers to tracks behind the market itself where the trains come in and the railroad separates the trains in order. Tr. III 164. Mr. Spinale would determine if a load needed inspection by having a truck partially unload the potatoes at Team Track. He would then look at them as they were coming off the truck or he would have his employees bring him some samples from the load and from those samples he would determine if an inspection was needed. Tr. III 164. Normally, he was the only one who decided if an inspection was warranted. Tr. III 164-165. By contrast, Mr. Spinale viewed tomato inspections to be easier because they arrived by truck and thus he would be able to view them right away. Tr. III 165.

Speaking to the 1990's, Mr. Spinale explained his practice regarding ordering a USDA inspection. Nearly all his requests would be made by him, using the telephone. Tr. III 168.

Mr. Spinale stated that when he would call for a USDA inspection to be conducted, that office would ask for the product involved, its size, and grade and whether the inspection was for grade or condition. Tr. III 170. His usual practice was to request an inspection for both grade and condition although at times he would not bother to have the inspection evaluate the grade. Tr. III 171. In those instances, his focus was on the condition of the produce. Tr. III 171. In those "condition" inspections, Mr. Spinale's intention was to make the shipper, that is the sender of the produce, aware that there were issues of decay and softness with the produce. Tr. III 171-172.

Mr. Spinale noted that a potato can change in its condition while in transit but that its grade would not change. Temperature, i.e. heat, or delay are reasons that can cause the condition to change. By contrast, a "grade defect" will not change due to transit. Such defects refer to appearance issues, such as a potato that is bent, crooked, has large cuts or is otherwise visually unappealing. Tr. III 173-174. The same observations are true for tomatoes as their condition can change during transit. Tr. III 174. Tomatoes come in different sizes: 6-7s, 6-6s, and 5-6s for example, with the 6-7s referring to the smallest. Tr. III 178. Spinale does not repack the 5-6s unless there is decay present. Some produce is sold directly from Hunts Point. Tr. III 179. This occurs from 266 Row B. Tr. III 179. By comparison, only a small percentage of potatoes are sold right from Hunts Point. Tr. III 180. Very little, only about 1%, of the potatoes are repacked by G & T.

Tr. III 180. Potatoes, like tomatoes, come in sizes: 120s, 100s, etc. down to 40s. Tr. III 180.

When asked about 1991, when he first moved his business to Hunts Point, Mr. Spinale stated that he had "quite a lot of problems" with USDA inspections at that time. Tr. III 189 -190, 201. He felt he could not receive a fair inspection as he found himself always disagreeing with the inspectors' evaluations. Tr. III 190. As an example, he would believe that a load of tomatoes was 60 percent number one, but the inspector would list them as 80% number one. Tr. III 191. He noted that under an "appeal inspection" he could get someone else down to look at a load when he did not agree with the inspector's evaluation. Tr. III 192. Mr. Spinale stated that when he first came to Hunts Point, he didn't have too many different inspectors come to his place of business. He felt that the people considered him "kind of difficult to work with." Tr. III 192. At any rate, in 1991 and 1992, Cashin and inspector Strusiak and possibly inspector Esposito would come to his place of business. Tr. III 193. USDA's Mike Wells would occasionally do an inspection too. Essentially at that time there were three or four regulars. Tr. III 193. Spinale considered himself to have a reputation for being difficult because he was very 'hands-on' and thus directly involved. He did not delegate much and so he would look directly at the produce in question. Tr. III 193-194. He believed he was therefore "a little bit more knowledgeable" than many would be. Inspectors knew that he was knowledgeable and that he would insist on an accurate evaluation. Tr. III 194. At that time, in 1991, Wells was the head of the department for USDA's Agricultural Marketing Service and Mary Ann Stranch was his assistant. Tr. III 195-197. When he requested an appeal inspection usually two other inspectors would arrive but Mr. Spinale stated that they always affirmed the original inspector's determination. Tr. III 195-196. As he viewed it, Mr. Spinale believed that USDA was displeased that it had to do appeal inspections. Tr. III 196. His opinion was based on the tone of voice of the USDA people. Tr. III 197. In his view USDA didn't want to have conflicts between the receiver and the shipper. They wanted things to run smoothly and an appeal inspection threatened to make things to upset things. Tr. III 196. As a consequence of the affirmations of the original inspections,

and his view that such reviews were not correct, Mr. Spinale was not pleased with the results of his appeals. Tr. III 198. In fact, as evidence of his displeasure, on occasion he would call for an informal review, which is the next step after an appeal inspection. Tr. III 199. This would involve higher-ups flying in from Washington, D.C. . Still, he would not win in those cases either as they would concur with the earlier inspections' conclusions. Tr. III 199.

Mr. Spinale related that sometimes it would take two days for an inspector to arrive after a request for an inspection was made. Tr. III 201. While awaiting the inspection some of the product would be sold, in the time that elapsed between the request and the actual inspection but in general he would try to save about half of a load for the inspector to see. Tr. III 202. Mr. Spinale stated that Tray-Wrap only ordered inspections when "there was something bad."

He also stated that he did complain about the delay in inspections and inaccurate inspections, to USDA's Mike Wells. In addition he called Washington Agriculture employee 'Don Parrity' [ph], about this issue. Tr. III 204, 206. Spinale related that Parrity tried to pacify him, telling him "we're having problems with the inspectors..." Tr. III 205.

By way of background to the issues in this proceeding, Mr. Spinale related that he knew a "Lou Guerra" [ph], a wholesaler at Hunts Point and that in the fall of 1991 he met with Mr. Guerra on the platform at 400 Row D. They had a long acquaintance, predating their Hunts Point location, and Mr. Spinale was complaining to Mr. Guerra about the difficulty of working with the Agriculture inspectors, stating that they were unqualified and did not provide a fair or timely inspection. Tr. III 208 - 209. To this complaint, Spinale related that Mr. Guerra made a gesture, rubbing together two fingers, and by that suggesting that money was required to solve the problems. Guerra then told Spinale that he would "send somebody to see [him] and he'll mention [Guerra's] name and [that Mr. Spinale would] know what [he had] to do." Tr. III 209- 211. Mr. Spinale then related that the next time he requested an inspection, Cashin showed up. Tr. III 211. When Cashin appeared, he told Spinale words to the effect that "Lou [Guerra] said that I should say hello to you." Tr. III 211, 214. After Cashin completed the inspection Spinale slipped him a $100. Tr. III 211.

This was done without Mr. Spinale saying a word to Cashin nor did Cashin say anything to him. Tr. III 211- 212.

Mr. Spinale also asserted that inspectors are required to look at 1% of a load but that he knew, from examining the inspectors worksheets, that this was not done. As an illustrative example, he observed that if he had 1600 boxes, the inspector's worksheet might only list 8 to 10 inspected, not the 16 required. Tr. III 216. This conclusion on his part also was based on the short amount of time it would take for the inspection to be completed. Tr. III 217. Using his example, Mr. Spinale believed that it would take an hour and a half to inspect 16 boxes. Tr. III 218.

Mr. Spinale stated that the inspectors who were part of what he described as a "soft extortion" scheme worked closely together. As one example, he related that on occasion Cashin would tell him that a particular inspector would come by and that "he's all right." However, when not advised about a particular inspector, Spinale would not give him money. When that occurred, the inspector would make remarks to the effect "what are you going to do with all your money?" or "why don't you spring for dinner?" Tr. III 226. In fact, the only inspector Spinale could recall that never took money was Ms. Stranch. Tr. III 226. Spinale added that he never gave money to Mike Wells, or to a woman inspector Hernandez, [sp] either. Tr. III 229.

Having described the system employed by these inspectors, Mr. Spinale maintained that he could not get a fair inspection from the other inspectors. Tr. III 230. In support of this contention he stated that, before he started making cash payments, he would point out to inspectors that their inspection results were "nowhere close," but all he would get for a response was the inspector responding, "Well look, that's what I found. I can't help that." Tr. III 230. Regarding the cash payments to inspectors, Mr. Spinale specifically denied that he ever asked any inspector to alter an inspection. Tr. III 230, 231. He also denied ever asking for "help on an inspection." Tr. III 231. Further, he denied ever asking a shipper for an allowance where the product actually met grade and he denied ever receiving an inspection that reflected a condition that was worse than the actual condition of

the produce.[80] Tr. III 231, 234. Both in assessing the credibility of Mr. Spinale's testimony regarding these critical issues and upon consideration of the record in this case as a whole, the Court finds that Mr. Spinale was credible as to these contentions.[81]

Again, consistent with the Court's findings noted above, the Court specifically asked Mr. Spinale questions, with Spinale looking directly at the Court and after he had been reminded that his answers were under oath. In that setting, Mr. Spinale denied ever asking a USDA inspector to alter an inspection, nor did he ever ask an inspector for "help" on an inspection, nor did he ever have an inspector downgrade an inspection so that it would not reflect the truth. Spinale added, directly facing the Court, "[w]hen these people came to me, all I wanted them to do was look at the product, give me a fair inspection. I never watched them when they were doing it, never said boo to them one way or another. If I had a complaint I would call the office and make a complaint. I wouldn't get involved with the inspector." Tr. III 235.

The Court also asked: "And so is it your testimony that you never had an objective, that is, a goal of trying to get an inspection appear to be - - appear to rate the product as worse than it really was, so that you could then go back to the shipper and get some sort of discount?"

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[80]Despite the required cash payments, Spinale believed that, even after he started giving them, he would at times still get an inaccurate inspection, in that the inspectors never wrote up grade defects as they were supposed to do it. Elaborating, he stated that an inspector would call his office and report that he found 9 to 10 percent grade defects, but that the office would instruct the inspector to keep inspecting the load with the end result being a report reflecting only 4 or 5 percent grade defects. The Court notes that in this respect Cashin's testimony and Mr. Spinale's are in accord.

[81]Interestingly, neither G & T nor Tray-Wrap are receiving USDA inspections presently. According to Mr. Spinale the USDA wanted him to sign a statement that he will not sue the United States, nor the USDA nor the inspectors or anybody that has anything to do with the USDA. Tr. VI 159. This demand, which the USDA did not contradict, seems odd from a government department which is asserting that Mr. Spinale was a wrongdoer. Such a stance could be construed as reflective of a concern that Mr. Spinale could have a legitimate basis for contending that he was the victim of soft extortion rather than a willing participant in a bribery scheme. The Court also notes that none of these assertions by Mr. Spinale were challenged by USDA during the hearing, though it had the opportunity for rebuttal evidence.

Mr. Spinale responded, convincingly: "I never did that." Tr. III 236. When asked if he was sure of this, he reiterated that he "never did that" and he added "I'm positive and I'll prove it." Tr. III 236. The Court determined, based on its credibility assessment and the evidence in this proceeding as a whole, that Mr. Spinale was truthful.

Mr. Spinale was asked by his counsel to focus upon Gov. Ex. 1, at page five, CX 1- 5, which is identical to Respondents' Exhibit 1 A, RX 1 A. Tr. III 244. The indictment lists the date for Count 1 as 3/24/99. Tr. III 242. Mr. Spinale said that Count, upon review of his records from 1999, refers to inspection certificate number K678086-0. Thus the inspection on that load pertains to Count 1 from the indictment. Tr. III 244. Unlike Cashin, Mr. Spinale was able to recall what happened in connection with that inspection: "Mr. Cashin came down to do this inspection and I hadn't seen Mr. Cashin in about three and a half months .... [a]nd he ... was doing this inspection, and I told him I only wanted 400 boxes looked at, and he went and he did the 400 boxes. And after he looked at the 400 boxes, he came back to me and he says, aren't you going to have the other ones looked at? And I says, why? I says, they look all right to me. He says no. He says they're not too good. So I went back to look at them again and I said hey, Bill, there's nothing wrong with those tomatoes. Those tomatoes are all right. And he wrote up this inspection, which incidentally was just done for condition. I didn't ask for grade, it would've been a worse inspection than this. But it was only 400 boxes. He wanted me to take an inspection on 1600 boxes."[82] Tr. III 245-246.

Mr. Spinale explained that he only wanted 400 of the 1600 be inspected because he believed that only 400 of them were bad. Tr. III 246. Further, he asked for an inspection only as to 'condition' because he believed that would be enough to obtain an allowance from the shipper. Thus he did not need the inspection to include an assessment of the grade of the tomatoes. Tr. III 246. Mr. Spinale,

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[82]Mr. Spinale's recounting of this inspection, which was unrebutted by the USDA, and accepted as credible by the Court, does present a strong "odor" that Cashin, who was then a marionette for the government, was trying to set up Mr. Spinale.

directed to RX 1 C,[83] was asked if he received an allowance on that

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[83]USDA's lead Counsel objected to R's Exhibits 1 B, 1 C, and 1 D, based on Respondents initial claim that the exhibits did not exist. USDA Counsel stated that its PACA investigator was told that the records no longer existed. USDA Counsel also related that these records had been subpoenaed and then added, "not providing records is a sanctionable offense - - violation of the PACA, and also not - - disobeying a subpoena of the USDA is also sanctionable to various extents, and it can be enforced, I believe, through the U.S. District Court if it comes to that. ... the fact that they did exist and they exist today, - - even today, shows that the Respondents have had nothing but contempt for our subpoena and for the investigation, having had impeded our investigation ... and ....Respondent should not be able to use any of these documents. And also because these documents exist, there will be further review as to other sanctionable - - other possible disciplinary actions stemming from the fact that these documents do still exist." Tr. III 248. (emphasis added). In ruling on the objection, USDA counsel affirmed, upon inquiry by the Court, that, despite counsel's outrage concerning the admission of these documents, in fact they had received them from counsel for the Respondent as part of the Court's prehearing exchange requirement and had them since March 2004, *some seven months prior to the hearing*. Tr. III 249 - 250. Further, despite the long period of time USDA had these documents in its possession, Counsel made no objection to the exhibits until the first day of the hearing, October 25, 2004. Tr. III 253. The Court also expressed disdain for the threat made by USDA that it may bring further actions against the Respondent in connection with this issue. Tr. III 251-252. This Court was troubled and felt that is was entirely inappropriate that lead counsel for USDA's arguments concerning an evidentiary matter was not limited to the merits of that admissibility issue by including within its argument "an implicit threat ... that this is more trouble that the government can ... bring on down the road." Tr. III 252. Speaking as an Officer of the Court, Counsel for the Respondent represented to the Court that in fact G & T did not have those records at the time they were subpoenaed. All of those records had been turned over to Mr. Spinale's *criminal* attorney after his arrest in 1999. Accordingly when Counsel for Respondent in this *administrative* proceeding, Ms.Strumpf, went to G & T, there were in fact no records. Tr. III 254. Respondent's counsel in this administrative proceeding personally viewed this to be the case. Tr. III 254- 255. The upshot of this was that Counsel for the Respondent did not receive the records until about June 2003. Tr. III 257. Having heard both sides on this issue, the Court found a clearly credible explanation for the delayed delivery of the documents, which delayed delivery absolutely caused no disadvantage to USDA Counsel in this administrative proceeding. Despite Respondents' Counsel's honest explanation, Lead Counsel of USDA did not withdraw his objection. This caused the Court to note again that while it had not and could not have made any decision about the case at that juncture, as the evidence was ongoing and the Court would need to resolve conflicts in testimony, it was concerned from the tenor of the USDA lead counsel's remarks, suggesting, in the Court's words "the idea that there's an implication that the hand [of government] will come down again if [the outcome of this case] doesn't turn

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shipment. However, before that response could be elicited, the remainder of the trial day was spent on the resolution of the USDA's objection to the admission of Respondent's Exhibits 1B, 1 C, and 1 D, as discussed in footnote number 83.

To accommodate the schedules of witnesses for the Respondents, Mr. Spinale's testimony was interrupted and did not resume until day five of the hearing. Upon resumption of his testimony Mr. Spinale was first asked about his initial meeting with Cashin and related that it began in the early 1990's, when his business moved to Hunts Point. Tr. V 143.[84] Subsequently, Counsel for Respondent asked Mr. Spinale about a meeting with Cashin in December 1998.

Mr. Spinale stated that Cashin came to him at that time and asked him for a loan, seeking $20,000. Mr. Spinale declined and Cashin reacted by getting "a little angry," and brought up that Mr. Spinale had loaned money to his "Italian friend." Tr. V 144. Mr. Spinale stated that he was aware that Cashin was involved with some "ladies" (i.e. the adult entertainers) he considered it a "waste of money."

Mr. Spinale was then directed to RX 40 Q, USDA inspection certificate K 673463-6, dated December 17, 1998. Tr. V 148. The inspection applicant was listed as Chain Trucking and Cashin was the inspector. This inspection took place at the time of Cashin's request for the loan from Mr. Spinale. Tr. V 150. Spinale was then directed to CX 1-5, inspection certificate number K 678086-0, dated March 24, 1999, another inspection performed by Cashin for Tray-Wrap. Spinale then stated that he never saw Cashin after the December 17, 1998 inspection until the March 24, 1999 inspection. Tr. V 151-152. Prior to the December 17th inspection, Cashin was a frequent visitor to Mr. Spinale's Hunts Point location. Tr. V 152. In general, when

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out to the government's liking in this case, that troubles me." Tr. III 260. It is inappropriate for the government, with its virtually limitless resources, to threaten continual litigation until it prevails against the Respondents.

[84]Mr. Spinale's testimony resumed on October 29, 2004. It began on October 27th but was interrupted to allow other witnesses for the Respondents to testify. Mr. Spinale's resumption of testimony is designated by "Tr. V"

Mr. Spinale would request an inspection he would see Cashin a couple of times a week, yet Cashin did not appear for any inspections during the period after December 17, 1998, until his reappearance some three months later on March 24, 1999, which was shortly after he was arrested. Tr. V 153.

Mr. Spinale was then redirected to the exhibits which USDA Counsel had objected to, RX 1 - A through D [85] and in particular RX 1- C. As discussed in the recent footnote above, the Court found no merit to USDA's objection and found the threat by USDA, which accompanied the objection, that it can bring new actions against Mr. Spinale until it achieves the litigation outcome it desires, to be patently offensive. Picking up with the subject matter that was about to be addressed when he last testified, Mr. Spinale identified RX 1C as a bill from a tomato shipper, Six L's Packing Company, and RX 1A as the inspection certificate (K 678086-0) relating to the same shipment as RX 1-C. Tr. V 155. Mr. Spinale stated that Tray-Wrap received an $800 allowance on the shipment, which dealt with 400 boxes of tomatoes. The inspection revealed that the tomatoes were out of grade by 26%. Tr. V 174. Asked why only 400 boxes were inspected, Mr. Spinale explained that there were different lots on this load but only the 400 lot had problems. For that reason, he only had the 400 lot inspected. Tr. V 156. Referring again to RX 1 A, which is a copy of inspection certificate K 678086-0, dated March 24, 1999, Mr. Spinale confirmed, and the certificate itself as well as the handwritten notation on that document support, that he requested an inspection of only 400 cartons. Tr. V 227. For the inspection reflected on RX 1A, Mr. Spinale identified Cashin as the inspector who arrived to conduct it.[86] Mr. Spinale asked Cashin where he had

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[85]Mr. Spinale agreed that this inspection was included in the charges in the indictment. Tr. V 159. Thus, RX 1A is the same document as CX 1 -5 and was the basis for Count 1 of the indictment and one of the ten incidents alleged in this PACA administrative action bearing the same date and inspection certificate number.

[86]Through the testimony of Mr. Spinale it was pointed out that he had no ability to request that a particular USDA inspector conduct a requested inspection, and consequently he would not know in advance which inspector would appear for a given inspection. Tr. V 158. This testimony, which was unrebutted, supports Respondents'

(continued...)

been for three months, but he received only an unmemorable response. Upon showing Cashin the 400 tomatoes, Cashin initiated whether Mr. Spinale would want the other tomatoes inspected, claiming to Mr. Spinale that the other tomatoes were "pretty poor." However, when Mr. Spinale went back to look at the other tomatoes, he told Cashin to "forget about it ... those tomatoes are good." Tr. V 159. Respondents' Counsel asked Mr. Spinale about any cash payment to Cashin regarding the inspection reflected in RX 1A. While Mr. Spinale stated that he gave Cashin $100 for the inspection, he added that it was never for the purpose of having Cashin change or falsify the inspection. Tr. V 190. Mr. Spinale noted that he received an $800 allowance for that problem lot and that when allowances were sought he would work through the broker involved with the sale. Tr. V 165, 170 and RX 1C. Mr. Spinale addressing the insinuation that he would want Cashin write up the whole load as bad, stated that this inspection refutes that claim, as he asked only that 400 of the cartons be inspected. Tr.V 228. Accordingly Mr. Spinale believes this load is indicative that he acted honestly, as he only sought the limited inspection of 400 tomatoes even though the load consisted of 1600 tomatoes. Tr. V 175. The Court concurs that by forgoing the opportunity to inflate the degree of problems with the load, this evidence supports Mr. Spinale's position that he sought only fair, accurate and timely inspections. It is noteworthy that USDA Counsel *did not* recall Cashin to rebut Mr. Spinale's recounting of these events nor, for that matter, did USDA Counsel recall Cashin for any rebuttal testimony despite keeping him available for such purposes.

Mr. Spinale also confirmed his familiarity with the invitation from the Department of Agriculture for shippers to file claims against merchants connected with Operation Forbidden Fruit.[87] Yet, he stated Six L's never filed a claim against Tray Wrap. Tr. V 160. This is

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(...continued)
claim that Mr. Spinale called for inspections when he had legitimate grounds to question the quality of a shipment of produce.

[87]The FBI investigation of the corrupt USDA inspectors and their activities with some of the merchants at Hunts Point was dubbed "Operation Forbidden Fruit."

significant as many growers filed actions against wholesalers who had dealings with the corrupt USDA inspectors and such growers prevailed even where it could not be demonstrated that the particular inspections involved were inaccurate. *See: Koam Produce Inc.,* 213 F.Supp.2d 314 (S.D.N.Y. 2002) and *B.T. Produce Co. Inc.*, 2004 WL 2913252 (S.D.N.Y.).

Upon being directed to RX 2 A through 2 C, involving K 678091-0, a March 26, 1999 inspection, (CX 2-5), of a load of tomatoes received by Tray-Wrap, and also shipped by Six L's, Mr. Spinale stated that the inspection reflected 20 % soft rot with the tomatoes. Tr. V 161-162. He noted that meant the tomatoes were 15 % over the allowable limit. Tr. V 163, 173. Mr. Spinale then identified RX 2 B as the invoice from Six L's associated with that inspection. Tr. V 163. Yet, Mr. Spinale did *not* take an allowance on that shipment and paid the full invoice price. Tr. V 163- 164, 167. Mr. Spinale, speaking generally, but in a way that evidences his credibility, and his honesty as a merchant, explained that there were times when he could claim an allowance yet opted not to do so when the market was very strong for a particular product. Thus, there were occasions when, even though a particular load of tomatoes could have problems, the tomatoes could still be sold for a "considerable profit."[88] In such circumstances he would forego an inspection. Tr. V 172- 173. Further, the check from Tray-Wrap matches up with the invoice from Six L's and shows that Tray-Wrap in fact paid the full amount of the invoice. Tr. V 178. RX 2 C and RX 2B. As true for RX 1A, while Mr. Spinale gave Cashin $100 in connection with the inspection reflected in RX 2A, he never asked Cashin to change the inspection in any way. Tr. V 191, 193. Accordingly, despite the government claims, this is an example, and the Court so finds, of Trap-Wrap

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[88]Faced with this plain evidence of Mr. Spinale's honesty, the USDA had to create, through sheer speculation, the "benefit" the Respondents would receive. According to USDA, Mr. Spinale could use his forbearance to obtain better quality produce from the shipper in the future. USDA Reply Brief at 11. Of course, this is not the type of benefit that USDA premised this proceeding upon. That benefit was a wholesaler's use of an inspection that inaccurately reflected the goods to be worse than their real condition in order to renegotiate the price downward. Without the real benefit present, the USDA was relegated to concocting other "benefits" that the Respondents supposedly received.

paying the full invoice even though it could have justified an allowance.

Turning to RX 3 A through 3 G, pertaining to inspection certificate K 679811-0, (CX 3-5), Mr. Spinale confirmed that all of those exhibits relate to the same shipment. Tr.V 183. Mr. Spinale, noting RX 3D, stated that Steven Heyer is a tomato broker, who purchases tomatoes for Tray-Wrap. This particular load involved 1600 boxes of size 6-7 tomatoes, and as reflected in RX 3D, there was no charge for these tomatoes. Tr. V 184. RX 3D. Mr. Spinale explained that this came about when a plan by tomato growers backfired. The growers had insisted on a set price but the market would not support it. To deal with this the growers kept their "set price," but this was a fiction as they made every third load "free." Tr. V 185. RX 3F and 3G show that Tray-Wrap paid the freight for these tomatoes, but nothing for the tomatoes themselves. Tr. 186. This load is particularly instructive about what was actually going on in this case. This is because, regarding inspection certificate number K 679811-0, the question arises why would Mr. Spinale request an inspection of tomatoes that he received free of charge? The answer, which the Court finds to be credible and for which the Court closely observed Mr. Spinale's testimony, was explained by Mr. Spinale, who stated that "Cashin came in one day and ... said [he] need[ed] something to look at." Mr. Spinale, understanding that this was another hold up by Cashin, directed him to the RX 3 load and paid him "his usual gratuity." Tr. V 188, 194. Mr. Spinale didn't tell Cashin he had nothing for him to look at because he knew Cashin "was looking for some money." Tr. V 188. Of course, Mr. Spinale never showed the inspection to the shipper, as he rhetorically observed , "How could I get an allowance on a free load?" Tr. V 188. The Court also notes that the government had ample opportunity to go through the USDA records and find, for example, if it existed, that Mr. Spinale had called in for an inspection of this load prior to Mr. Cashin's appearance. The fact the government failed to introduce such obvious evidence and that it never recalled Cashin to rebut Mr. Spinale's recounting of the events,

demonstrates again the lack of substance to its charges against Mr. Spinale.[89]

Referring next to RX 4, A through G, (CX 4 - 5) pertaining to inspection certificate K 765769-5, dated May 20, 1999, relating to a load of tomatoes, Mr. Spinale confirmed that all of the exhibits within RX 4 pertained to the same shipment of tomatoes, from Mecca Farms. Tr. V 199. Mr. Spinale noted that the inspection certificate recorded that the product was out of grade by 60%, yet he did not request an allowance from the shipper because he did not need one. Tr. V 202. Mr. Spinale explained that Mecca Farms was one his better shippers and that in this instance, as he would not be losing money, there was no need to obtain an allowance. Accordingly, he paid full price. RX 4 B, C. Tr. V 203. When asked why an inspection was requested on the produce if he had no intention of seeking an allowance, he stated that he used the inspection as a way of demonstrating to the shipper that there were quality problems and hopefully the next delivery would bring in better tomatoes. Tr. V 204. Through the dark prism employed by USDA and even though there was no evidence to support the assertion, it suggested that Mr. Spinale even had a nefarious motive in doing this, alleging, again without any evidence to support the claim, that Mr. Spinale was doing this for future *favors*. In making such a claim the USDA appears not to recognize the distinction between evidence and rank speculation.

Mr. Spinale also stated that around the time of this May 1999 inspection he telephoned USDA's Mike Wells, who was in charge of the Hunts Point USDA office, to inform him that Cashin had been acting peculiarly in that he was shaky and nervous. Mr. Spinale's concern was that Cashin could be having "mental problems" but Wells dismissed the concern, telling Mr. Spinale that Cashin was simply a "moody guy." Tr. V 205. Despite the apparent ease of challenging this assertion, USDA, as it did with the entirety of the Respondents' evidence, made no offer of rebuttal.

Mr. Spinale was then directed to RX 5 pertaining to the load described in inspection certificate number K 767032-6, dated June 16,

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[89]Of course the Court recognizes that the charges are against Tray-Wrap and G & T since they hold the PACA licenses, but any real world analysis must acknowledge that this case really is about Mr. Spinale and his alleged conduct.

1999, (CX 5 - 6), and he identified RX 5 B as the bill from West Coast Tomato, Inc. for that load. Mr. Spinale stated that, at a minimum, the tomatoes, which had serious decay, were out of grade by 12 percent. Tr. V 210. The broker for this load, Steven Heyer, contacted Mr. Spinale concerning the problems. According to Mr. Spinale, Mr. Heyer didn't want to take the load because of the problems but the shipper asked for Mr. Spinale to take the load anyway. Tr. V 212. Because he had a good relationship with West Coast Tomato, Mr. Spinale accommodated the shipper. In this way the shipper would have a record to show his growers that there were problems and to justify that the return would be less than the farmers would have hoped to receive. Tr. V 212. In this instance, Mr. Spinale paid $4 per box plus the freight expense and the temperature report expense. West Coast Tomato never raised an objection against Mr. Spinale in connection with this load. Tr. V 217. At the time of this inspection, Mr. Spinale asserted that Mr. Cashin was a "nervous wreck" who was no longer capable of doing a competent inspection. Tr. V 218. Because of that, Spinale told him what to put in the inspection, all of which was a correct and accurate description of the load. Tr. V 218. In addition, Mr. Spinale learned through Steve Heyer that the FBI contacted Bob Spence, the shipper of this load, and Spence, (to the FBI's likely dismay) informed them that Mr. Spinale was correct – the tomatoes *were* bad when they left Florida. Tr. V 220. The Court notes that this is yet another example of the USDA leaving a significant assertion by the Respondents unrebutted, even though USDA had several resources to contradict the claim, if they believed Mr. Spinale's claim was untrue. These resources included the ability to call Mr. Spence and/or the FBI in the rebuttal phase. For obvious reasons, the Court adopts Mr. Spinale's testimony regarding the events surrounding this load and the poor condition of the tomatoes.

Next, Mr. Spinale testified with regard to his criminal indictment and guilty plea in this matter.[90] He read from the second page of the indictment, the first line of which states: "[Count] SIX [Date] 6/23/99 [Amount of Bribe] $400. "Mr. Spinale stated that Cashin did

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[90] See, for example, CX 1, or CX 17, which are but two of the many places in the Complainant's exhibits where the same pages from the indictment are repeated.

four inspections at his place of business on June 23, 1999.[91] He identified Inspection Certificate K 767363-5, dated June 23, 1999, as reflected in RX 6A, CX 6 -5, as the same inspection listed in the sixth count of the indictment and pertaining to the load described in that inspection certificate. Tr. V 230. Mr. Spinale confirmed that all of the exhibits within RX 6, that is A through F, pertained to that load and the Court finds that those exhibits show that to be the case. Tr. V 230. That load, he noted was outside of the acceptable limits by at least 35%. Mr. Spinale stated that there was an allowance for the problems with this load of $4,800 or $3 per box. Thus, Tray-Wrap paid 70% of the original invoice price. Tr. V 236. The end result was that, after the allowance, Tray-Wrap paid Pacific Tomato Growers $12,560 for the load.[92] Tr. V238. Mr. Spinale acknowledged that he gave Cashin $100 for the inspection reflected in RX 6 A. Tr. V 240. However, Mr. Spinale specifically denied that he discussed with Cashin how he wanted the inspection to read, nor did he ask him to alter the inspection, nor did he ask him to falsify his inspection, nor did he ask Cashin to write down anything that was not in fact present in the inspection. Tr. V 242. Viewing Mr. Spinale while he responded to those questions, the Court finds that Mr. Spinale was truthful in these responses and that the exhibits in RX 6 support his testimony as well.

Mr. Spinale was then asked about RX 47 A through S as well as RX 48 A through D. Tr. V 242, 243. Mr. Spinale then identified RX 47 as involving a complaint filed on behalf of Pacific Tomato by the

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[91]The USDA attempted to shutter the Court's consideration of the three other inspections performed by Cashin on the same date as CX 6, June 23, 1999. These other three inspections, as reflected in RX 7 M, RX 8 C, and RX 9 C, were part of the criminal indictment but were not included in the administrative complaint because PACA does not have jurisdiction over trucking companies. Tr. II 26. The Court overruled USDA's objection, noting that the documents were relevant to appreciating the full context of the charges brought against the Respondents. That USDA sought to have these excluded only served to highlight the fact that each inspection was proven, on the record evidence, as accurately representing the condition of the produce. *See* testimony of Harris Cutler *infra.*

[92]As discussed herein, the shipper never filed a complaint against Tray-Wrap concerning this load,

Florida Fruit and Vegetable Association. Tr. V 244. From Mr. Spinale's perspective this was all part of the encouragement by USDA for growers to file claims as a consequence of the Forbidden Fruit operation. Tr. V 245. Yet, as Mr. Spinale observed, the Florida Fruit and Vegetable Association complaint, though written in March 2000, did not include the June 23, 1999 inspection reflected in CX 6. Tr. V 247-248. Further, as highlighted by Mr. Spinale, the entire Florida Fruit and Vegetable Association complaint against Tray-Wrap was dismissed, as verified by RX 48 A, which is a letter written by the USDA, dated May 13, 2003.

Next, Mr. Spinale was directed to RX 7, A through W. Mr. Spinale identified RX 7A as the cover of the envelope used by Mazie Faraci for G & T and in which envelope she inserts the shipment papers related to the information on the cover. Tr. V 254- 255. The exhibits within RX 7 all relate to the same railcar, SPFE457290, and this information also appears on the cover sheet of the envelope. Tr. V 257- 259. RX 7 A. The same records of G & T reflect that the shipper was Gold Ribbon Potato Company and that 1240 100 lb sacks of small white potatoes were involved and that they were shipped on June 2, 1999, arrived on June 22nd and were unloaded the next day. Tr. V 259. Mr. Spinale stated that in 1999 it took railcars coming from California about eight or nine days to make their journey to New York. Obviously, this meant that these potatoes were quite late in arriving. When they did arrive Mr. Spinale called for an inspection and this is reflected in RX 7M, which bears inspection certificate number K 767365-0, and is dated June 23, 1999. Tr. V 260. Cashin was the inspector for this load. Tr. V 260, RX 7 M. The inspection notes that the "applicant states originally unloaded from SPFE457290." RX 7M. Mr. Spinale stated that the inspection was for condition only, not grade. He noted that the potatoes were 20 percent out of condition, that is the potatoes failed to meet grade by at least 20 %. Tr. V 262. Next Mr. Spinale identified RX 7 N, as Inspection Certificate number K 767704-0, which is also dated June 23, 1999, and which certificate bears both Cashin's signature and that of USDA's Marianne Stranch. The certificate notes that it is a "corrected" certificate, and that it supercedes inspection certificate number K 767365-0. It also states that the applicant stated the

potatoes were originally unloaded from SPFE457290. Mr. Spinale stated that the second certificate was issued, on the same day, because Cashin listed Chain Trucking on the first certificate, not G & T Packing as it should have been listed. Tr. V 266. Mr. Spinale then stated that, per RX 7 T, the potatoes were invoiced for $3 a sack. Tr. V 269. Mr. Spinale then identified RX 7 - O as a "Corrected Memo" from Ball Brokerage, indicating that there was a settlement pertaining to this load at $1 per sack, plus payment by G & T for the freight. Tr. V 270. Mr. Spinale, upon examining the other exhibits within Respondents' RX 7, noted that there was a railroad claim filed on Gold Ribbon Potato's behalf and that the potato company was paid $2481 in connection with that claim, with the result being that it was paid in full for the potatoes. Tr. V 271, RX 7- I.

When Mr. Spinale's testimony resumed the following day, he stated that a shipper by the name of Gonzalez began a reparation action against Tray-Wrap, but that it later withdrew the claim. Tr. VI 78.[93] This occurred because PACA *awarded Gonzalez money* but Tray-Wrap took the matter to court where it was disclosed that Tray-Wrap *never* purchased tomatoes from them, causing the matter to be withdrawn. Tr. VI 78. Based on the evidence in this record, a detached observer, with the Gonzalez matter as an example, could conclude that the remedy for the excesses of the corrupt USDA inspectors also brought about excesses in terms of some of the reparations USDA allowed.

The direct examination of Mr. Spinale then returned to June 23, 1999 and the four inspections Cashin performed at Respondents' place of business at that time. Tr.VI 79, RX 7, A through W. Mr. Spinale stated that the inspection reflected in RX 6 A, RX 8 C and RX 9 C were also inspections performed by Cashin on that date, June 23, 1999, and the exhibits confirm this to be the case. Tr. VI 81. At that date Mr. Spinale directed Cashin to the tomato inspection first, as he believed that was the easiest for him to perform. RX 6 A. Tr. VI 82 -83. From there Cashin went on to the potato inspections. Cashin, according to Mr. Spinale, came over to him and told him the potatoes

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[93]For continuity, this decision continues to discuss Mr. Spinale's testimony. This testimony resumed at Tr. VI at page 76, which represented the last day of the hearing.

were running at 50 to 60 percent problems. However Mr. Spinale disagreed with that assessment and told him not to write down such numbers. Cashin then asked Mr. Spinale to tell him what numbers to put down in his inspection and Mr. Spinale obliged, dictating the amounts for Cashin's inspections. Tr. VI 84. Mr. Spinale stated that he had concluded that Cashin was then incapable of writing a fair inspection and further that his dictated amounts were consistent with the true condition of the produce. Tr. VI 84. Counsel for USDA stipulated that RX 9 C and 9 D refer to the same inspection, both dealing with June 23, 1999 inspections. Tr. VI 94. Though repetitive, because it is important, it needs to be noted again that the USDA, though Cashin was available, did not present him for *any* rebuttal testimony. Accordingly, in addition to the Court's conclusion that Mr. Spinale testified credibly on these matters, it is also noted that there is *no* contradictory evidence in the record as to these events. Mr. Spinale described his payments to Cashin as soft extortion. He believed he had no choice but to pay Cashin or he wouldn't get a fair, fast or accurate inspection. Tr. VI 98 As the inspections involved produce, obviously it was important to have prompt inspections. The four inspections accounted for the $400 paid by Mr. Spinale, as it was $100 per inspection.

Mr. Spinale then identified RX 10 B, pertaining to inspection certificate K 768741-1, issued July 15, 1999. He then identified RX 10 H and 10 I, as inspection reports, K 662108-0 and 662107-2, done in Elba, New York on July 21, 1999, for "Markey's Produce," which is formally known as Markey's Wholesale. Mr. Spinale came into possession of these inspection reports from Harris Cutler when he inquired if Mr. Cutler had other potatoes shipped around the same date as the inspections he had ordered for G & T. Tr. VI 101-102. Next Mr. Spinale was shown RX 44 as an article that was placed in a newspaper. The article related that a USDA official suggested that shippers review their records for downward grades[94] of produce for

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[94]This is another example demonstrating that the original thrust of the USDA action was directed towards those wholesalers who, acting with corrupt inspectors, engineered inspection certificates which falsely represented the condition of the produce inspected

(continued...)

inspections performed by the indicted inspectors and determine if the same lots had such problems noted when shipped to locations other than Hunts Point. Tr. VI 104. Mr. Spinale saw this suggestion by USDA as a good idea for him to apply as well and that was the idea that brought about the introduction of the Markey inspection certificates. The Court observes that Mr. Spinale's recognition of the USDA suggestion – that shippers look to other shipping destinations to see if similar problems were noted for the same lots – is not the conduct of a guilty man. Rather, the Court notes that such conduct is completely consistent with the conduct of a man innocent of the claim that he acted to have produce downgraded from its true condition. These inspections, as evidenced by RX 10 H and 10 I, which had nothing to do with the Respondents operations and were not conducted at Hunts Point, revealed 34% defects in one and 44% defects in the other. Further, they involved the same product and same shipper as the Spinale certificates.(i.e., Agri Empire's Jim Dandys) and were shipped around the same time. Tr. VI 106. Thus, this is another aspect distinguishing this case from that of *Koam*.

Next, Mr. Spinale was shown RX 11 B, involving inspection certificate K769382-3, issued 7/26/99 at G & T by Cashin and RX 12 B, involving inspection certificate K 769381-5, also issued 7/26/99 at G & T and also done by Cashin. Tr. VI 107-109. Both inspections were done at the same time, one right after the other, and both pertained to potatoes from Agri-Empire. Tr. VI 109. Mr. Spinale stated that he originally requested the inspections on a Friday but that no inspector was available until the following Monday. At that time Cashin appeared but Mr.Spinale told him the product was not available to inspect. Tr. VI 112. However, Spinale told Cashin this because he believed that Cashin was no longer capable of writing an accurate inspection. Tr. VI 113. He was hoping Cashin would go away and another inspector would arrive to do the inspection. Unfortunately, it was Cashin who appeared later and at that time he

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(...continued)
as worse than its true condition. Faced with the overwhelming evidence that no such false downward evaluation occurred in any of the instances cited in this administrative complaint against Mr. Spinale, USDA has scrambled to invent other supposed "benefits" the Respondents received.

did the inspection. Tr. VI 114. Mr. Spinale stated that he probably gave Cashin $200 at that time because there were two inspections involved. Tr. VI 114. Again, Mr. Spinale specifically denied that he asked Cashin to falsify or alter the inspections. Tr. VI 114. Mr. Spinale explained that if a load arrives and is far out of grade he can refuse them to the shipper or to the railroad and in this instance he refused them to the railroad. Tr. VI 115. Once again, it is noted by the Court that Cashin was not recalled to rebut Mr. Spinale's credible testimony on these points. From an evidentiary standpoint, as the Court found Mr. Spinale to be credible, this is significant.

Mr. Spinale was then shown RX 11 B, which he stated reflected that it was inspected on July 26, 1999 in a railcar and RX 11A, which also indicated a railcar was involved and that both RX 11 A and 11 B involved the same railcar, BNFE 18703. Tr. VI 117. The loads involved with these exhibits were from Agri Empire. Tr. VI 119. Mr. Spinale recalled that all the potatoes out of California that year were of very poor quality. The Court again notes that there is *no* evidence in this record which contradicts that assertion and that Mr. Spinale was not the only witness asserting this.

Next, Mr. Spinale was directed to RX 13 C, (CX 9 -16), and inspection certificate number K 770380-4, which involved another inspection performed by Cashin, done on August 13, 1999 and involving a load of potatoes in a railcar. Tr. VI 120. Mr. Spinale stated that RX 13 B, inspection certificate K 770182-4, related to the same railcar, as both had same railcar number. Tr. VI 126-127. The record confirms that the same railcar, number BNSF 799582, did pertain to these two inspection certificates. Thus Mr. Spinale agreed that he had the same load inspected twice, the first time on August 9, 1999 and the second time on August 13, 1999. His explanation for this was that as this was August freezing of potatoes would not be easy to accomplish and, to protect himself and the shipper, he requested the second inspection. Tr. VI 124. As this was a "price after sale" arrangement, he did not have to request an inspection but still felt it would be better to do so and in that way he could help out the shipper. Tr.VI 124, 125. This was so because when potatoes become frozen the fault for that occurrence lies with the railroad. Having two inspections would help verify that was what happened.

This was the single count to which Mr. Spinale pled guilty. He explained that he pled guilty to that one because it was "price after sale" and because no other companies were involved. Tr. VI 125. Mr. Spinale also identified RX 13 CC as involving the same railcar. Tr. VI 126, He also identified a mistake in that it listed the potatoes as 100 lb sacks but they should have been listed as 50 lb sacks since 2400 100 lb bags could not fit in a railcar. Tr. VI 127. Mr. Spinale confirmed that the shipper did file a rail claim on this shipment. Tr. VI 128. Again, at the risk of being repetitive, but noting that this was the single count to which Mr. Spinale pled guilty, the Court observes once again that USDA Counsel elected once again *not* to call Mr. Cashin as a rebuttal witness. Tr. VI 129. The Court signed his subpoena at that time so that he could depart. *See also* Tr. VI at 141.

Mr. Spinale then was asked about RX 40 A and he confirmed that it was an inspection performed at his place of business and that inspection certificate K 234074-3 was the certificate associated with that inspection, which was performed on March 27, 1996. The inspection results indicated "U.S. Number 1" and though he admitted normally he would not seek an inspection under such circumstances, he explained that he had been having problems with the USDA inspectors from that area and he had been getting unjustified rejections on these types of potatoes from the supermarket that was receiving them, so he thought he would request an inspection on them in order to stop having them sent back without cause. Tr. VI 132.

Mr. Harris Cutler was called as witness for the Respondents. Mr. Cutler is the President of Philip G. Ball, Company ("Ball Brokerage") of Clarks Summit, Pennsylvania. Tr. IV[95] 5. His company is a brokerage for fresh fruits and vegetables. One of the primary products it deals with is potatoes. Tr. IV 6. He has been in the produce business for 32 years. It is a family business, which began in 1944. As a broker, Cutler makes contracts, working on behalf of farmers, agricultural cooperatives and packing facilities, helping those groups with the marketing of their product. Tr. IV 6-7. His commission is

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[95]Transcript references to the fourth day of the hearing, October 28, 2004, are designated as "IV," followed by the page number.

based on the number of packages he sells. The Produce Reporter Company, which issues the Blue Book, gives Mr. Cutler's company a very good rating. Tr. IV 8. Mr. Cutler deals with a variety of shippers across the United States. Tr. IV 8. The receivers he deals with are wholesalers, re-packers, processors, and chain stores. Tr. IV 9.

Mr. Cutler, who has known Mr. Spinale since 1978, stated that Mr. Spinale's reputation in the potato business is that of an expert, a very hardworking man, with a reputation for fairness and as one who is extremely careful about what he sends his customers. Tr. IV 10. Mr. Cutler added that he knows personally of Mr. Spinale's reputation for fairness and related that he knows that Mr. Spinale has such a reputation with most of the shippers, and other brokers with whom he trades. Tr. IV 10. Mr. Cutler also stated that he believes that Mr. Spinale's rating in the Blue and Red books is also very good and that these books serve as a means for farmers to determine which merchants are reputable businessmen. Tr. IV 12. Mr. Cutler made it clear that his company does not need to do business with G & T. Thus, his testimony is not biased. Rather, he expressed that his company does business with Mr. Spinale because he has found him to be an honest and honorable person. Tr. IV 18. The Court finds that Mr. Cutler's appearance, as both a reputation witness and as one testifying as to pertinent facts in this case, in itself is a significant statement about the character of Mr. Spinale.

Mr. Cutler stated that in his 32 years of experience with G & T, no shipper ever had a problem with G & T. Tr. IV 19-20. He expressed that there were only a couple of instances where shippers raised questions about G & T, noting that Agri-Empire and D. M. Camp filed actions against Spinale once the USDA announced that anyone who lost money in connection with the dishonest Hunts Point inspectors could get their money back. Agri-Empire, seeing this notice, filed an action against Spinale and D. M. Camp did the same thing.. Mr. Cutler was involved because he was the broker for these transactions. He added that D. M. Camp dropped their claim, after speaking to him about the honesty of Mr. Spinale. Tr. IV 20, 22 - 23. On the basis of his long experience with G & T, Mr. Cutler also asserted that when G & T asks for an allowance, such a claim is consistent with the

condition of the produce at other locations where the same product has been sent. That is, one does not find G & T having a problem with a load of produce, while others who receive shipments from the same farm have no problems with it. Tr. IV 24.

Respondents' counsel then directed Mr. Cutler to RX 7 A through 7 W, starting with RX-7 S, a shipping ticket from Ball Brokerage. This ticket is created by Ball Brokerage once a shipment is loaded and sealed for delivery by truck or railcar. Tr. 28. Ball Brokerage, acting as the broker sells the produce from the shipper, in this case Gold Ribbon Potato Company, to the buyer, here G & T. The ticket was for a railcar of potatoes: 1,240 one hundred pound bags, B size, FOB-GGD, California, with "GGD" standing for "grade guaranteed to destination." Tr. IV 28, 30. FOB, "free on board," means that the in-transit risks would be assigned to the buyer, *not the seller*, unless the ticket said "grade guaranteed to destination," which this ticket has, i.e. it is GGD. In short, if anything went wrong in the shipping process, the burden would be on the shipper to recover any damages. Tr. 29. The railcar's number, as identified on the shipping ticket, was SPFE 457290. Tr. IV 30, RX 7 S. The product stays in the car until it reaches its destination. i.e. the produce is not moved from one railcar or truck to another. Tr. IV 30. Mr. Cutler was then asked about RX 7 T. He explained that it is an invoice from Gold Ribbon Potato Company and it showed the same railcar number – SPFE 457290. The shipping dates, and the amount of potatoes, match between the two exhibits, 7 S and 7 T. Tr. IV 31. Next, Mr. Cutler was asked about RX 7 U, a "Notice of Complaint" involving the same shipment. Tr. IV 32. He noted that on that date, June 23, 1999, his office received information concerning problems with the load. These included temperatures in the railcar between 57 and 70 degrees, soft-rot between 2 to 17 percent, and other defects that totaled 24 percent. Tr. IV 32 RX 7 U. He explained that the words "Action taken" on the document meant that G & T received the damaged potatoes and would try to get the best sale price it could. Tr. IV 33. Along with the Notice of Complaint, Ball would have received a copy of the inspection report, and the fact of such an inspection was noted in RX 7 U. When referred to RX 7 M, the USDA inspection certificate, he affirmed it related to the same load, and pointed out that the same load number, SPFE 457290, appears on the USDA inspection certificate.

Tr. IV 33-34. The inspection certificate bears a consistent date as well, June 23, 1999. It also shows the temperatures in the railcar at between 57 and 70 degrees (Fahrenheit). Tr. IV 33-34. Mr. Cutler stated that he received that inspection certificate from Mr. Spinale. Following that, he sent the notice of complaint to Gold Ribbon. Tr. IV 34.

Mr. Cutler identified the company listed on RX 7 H, "The Traffic Bureau," as his company. Tr. IV 39. The Traffic Bureau files railroad claims on shipments that are damaged in transit by the railroad. Tr. 39. Mr. Cutler noted that RX 7 M refers to 430 sacks, but stated there were actually 1240 sacks in the car. Tr. IV 39 - 40. Mr.Cutler, using the Traffic Bureau, was able to secure a satisfactory settlement from the railroad to satisfy Gold Ribbon's invoice. Tr. IV 40.

When Mr. Cutler was directed to RX 7, D, E, F, and G, he identified them as mimeographed copies of the temperature control tape that evidenced that the cooling for the railcar did not function properly. Tr. IV 41. The temperature tapes reveal that the load started out at 55 degrees, on June 2, 1999. He then noted that the temp dipped to 45 degrees by the first day. RX 7 D, Tr. IV 42. By day two, the temperature had shot up to 90 degrees. The Court finds that the exhibit, RX 7 D, confirms Cutler's statement regarding the temperature and that the same exhibit shows the same railroad car number as SPFE 457290. Mr. Cutler stated that the railroad admitted it was the railroad's problem, adding that any time potatoes are exposed to such temperature swings, from 40 to 90 degrees, all kinds of bad things would happen to them, which were reflected on the inspection of the 430 bags, showing excess decay. Tr. IV 47 Exhibit RX 7 S, the shipping ticket from Ball Brokerage, shows the potatoes were shipped on June 2, 1999. The shipment arrived on or about June 23. Tr. IV 49. RX 7 U. Typically, a load should make its journey from California in about 12 days, so this shipment was late as well. Tr. IV 49. RX 7 O is a "corrected memo" that re-confirms G & T's agreement with Gold Ribbon that G & T would be paying $1 for every 100 lb sack, instead of the original price of $3 per sack. Tr. IV 50. Cutler added that, as per RX 7 O, the claim rights against the railroad would remain with Gold Ribbon. The Traffic Bureau subsequently filed that claim against the railroad. Tr. IV 50. Exhibit RX 7 I, is the

railroad claim statement that the Traffic Bureau sent to Gold Ribbon, along with a check, derived from funds from the railroad, for $2481.00. That amount made Gold Ribbon whole, as the $1 per sack from G & T and the check amount of $2841.00 from the compensation received from the railroad totaled to the $3 per bag that originally it would have received, had the railroad problems not occurred. Tr. IV 50, RX 7 O. Mr. Cutler was then asked about RX 7 K, which he identified as a check from the Norfolk Southern Railway Company, in the amount of $3308. Tr. IV 51- 52. He confirmed that Gold Ribbon received the full payment. The extra amount in that check included The Traffic Bureau's fee. Tr. IV 52. Thus, the record evidence, not to mention the associated credible testimony of Mr. Spinale and Mr. Cutler, indisputably shows that the inspection reflected in RX 7 M accurately reflected the poor condition of the potatoes inspected by the USDA. Although this inspection was not part of the administrative complaint, it was part of the criminal indictment of Mr. Spinale. It is clearly relevant, as it further demonstrates that Mr. Spinale, while he felt compelled to pay Cashin's personal tariff, never acted to influence the inspection of produce to have it reflect anything other than its true condition.

Mr. Cutler was then directed to RX 8, A through N. RX 8 G is another Ball Brokerage Shipping ticket, indicating the shipment listed therein was shipped. Ball was the broker for the shipment. Tr. IV 53 - 54. It also was a railcar, number UPFE468012. The produce, potatoes, were shipped by Ball Brokerage from D. M. Camp to M & M Farms in Goshen, NY. Mr. Cutler, referring to that exhibit stated that on June 1, 1999 D. M. Camp had a car it wanted to ship of white and red potatoes. The load consisted of 499 100 lb sacks of red potatoes at $8 per sack, 386 50 lb sacks of red potatoes at $4 per sack, and 541 sacks of white B size potatoes at $5 per sack Tr. IV 55. Cutler stated that the shipment should have a temperature range between 38 and 42 degrees. Tr. IV 57. He noted that all the exhibits in RX 8 refer to the same shipment, that the railcar number, UPFE468012, was also the same and that the shipment date, June 1, 1999, was also consistent. Tr. IV 58. Cutler identified RX 8 E as the Notice of Complaint generated by his company, which indicated that the car arrived with pulp temperatures of the potatoes between 58 to 62 degrees. Two lots were inspected, one of 215 sacks showing an

average of 6 percent soft-rot and a lot of 215 sacks with an average of 5 percent soft rot. The potatoes also had enlarged, raised and discolored "lenticels" (which are potato air holes or pores), which indicated high temperatures in transit. Tr. IV 59. Cutler then noted that RX 8 C is the inspection for this load. RX 8 C, which in copying did not include the name of the consignee, reflects that it is Chain Trucking. Tr. IV 73. That RX 8 C is the inspection for this load is also reflected in Ball's Notice of Complaint as well, which bears the same inspection certificate number as the inspection. Tr. IV 61. The notice of complaint was sent to the shipper, D.M. Camp. Cutler summarized that the car arrived with problems, as reflected in exhibit RX 8 F, the "Trouble Car Sheet," generated by Ball. As reflected by RX 8 F, Mr. Cutler said it reflected concern on his part because the railcar had stopped moving. Tr. IV 63. The upshot of this was that the railcar took 22 days to arrive at its destination. Tr. IV 65. Normally the time would be between ten to twelve days. Tr. IV 65 - 66. Exhibit RX 8 H, a Ball Brokerage Corrected Memo relating to this railcar, reflects that on August 24, 1999, there was a settlement with D.H. Camp and G & T, which provided there would be an allowance of $2 per bag on the 100 lb sacks, $1 per bag on the 50 lb bags, and $2 per bag on the whites. Tr. IV 66. It also reflects that the Traffic Bureau would file a claim for D. M. Camp. Ultimately, Cutler's company did collect $1397.29 and sent it to D. M. Camp. Tr. IV 67. The railroad's actual check was for $1863.05, the higher amount again reflecting the inclusion of the Traffic Bureau's fee. Tr. IV 68. RX 8 K. Cutler affirmed the obvious: railroads don't pay claims unless they do something wrong, such as having an undue delay in the time to transport the produce or they have temperature problems with the railcar, and the person making the claim can establish such occurrence. Tr. IV 69. Here, both of those problems obtained. It has also been Cutler's experience that the railroads conduct their own investigations before they pay a claim and he estimated that the railroads inspect 95% of the railcars that arrive in New York. Tr. IV 69. In fact, he asserted that in cases where the produce was not damaged, the railroads have challenged such non-meritorious claims by producing their own inspection results. Tr. IV 70. Thus, as with the RX 7 exhibits, the RX 8 exhibits conclusively establish that the

inspection certificate accurately reflected the poor condition of the potatoes that were inspected. By now, it should be obvious from the foregoing evidence of record that Mr. Spinale was not influencing the accuracy of any of the USDA inspections. While paying off the corrupt Cashin to perform a timely, fair and accurate inspection was not, in the perfect vision that accompanies hindsight, a display of good judgment, when viewed in the full context of the circumstances, which include Mr. Spinale's penance through his single criminal plea, those payments hardly form cause for further retribution by having the licenses of the Respondents revoked.

Mr. Cutler was then directed to RX 9 A through 9 M, relating to railcar UPFE12894. Looking at RX 9 H, which is another Ball Brokerage Shipping Ticket, Cutler affirmed that it involved carload UPFE 12894 and that it was shipped on May 29, 1999. The seller was D.M. Camp. Tr. IV 73. The load was to travel from Bakersfield, California to Goshen, New York. It consisted of 1,225 100 lb sacks of white "B" potatoes at $5 per sack, FOB, GGD (grade guaranteed to destination). Tr. IV 74. Cutler affirmed that the shipping ticket, reflecting the same invoice number, matched with the invoice from D.M. Camp in RX 9 E. Upon examining the group of pages within RX 9, Cutler summarized that they show that temperatures were between 57 to 78 degrees and that the refrigeration unit would not operate. This caused various problems with the potatoes: decay, soft-rot, discoloration and lenticels. Tr. IV 75 - 76. These temperature problems demonstrated that there was a railroad problem. Tr. IV 76. RX 9 C, a copy of the applicable inspection certificate, had the same copying problem, with some information being cut off. Counsel for Respondent showed to the satisfaction of USDA counsel that the more complete copy of the same document reflected Chain Trucking as the applicant. Tr. IV 77. Cutler used the information on that inspection certificate for his documents, as reflected in RX 9 I and RX 9 J, its Notice of Complaint. Tr. IV 78. Cutler derived the information concerning the defective refrigeration from RX 9 B, which is an additional inspection report relating to the same load. Tr. IV 79. Cutler then sent copies of the inspection reports and his notice of complaint to D.M. Camp. Tr. IV 79. RX 9 G is another trouble car sheet, a copy of which was sent to the railroad. Cutler informed that RX 8 F and 8 G show that one railcar was sent on the May 31st and

the other on June 1st. Tr. IV 80. Eventually, for efficiency purposes, the railroad connected up the two cars in the trip. Tr. IV 82-83. RX 9 K, the "corrected memo" reflects the agreement between Camp and G & T. Tr. IV 84. Under the agreement, G & T would pay $1 (one dollar) per sack, instead of the original invoice price, but that all claim rights would go to D. M. Camp, with the Traffic Bureau filing the claim on its behalf. Tr. IV 84. The claim was successful: D.M. Camp was paid the full amount of its invoice. This is reflected on RX 9 L. Tr. IV 84-85. Thus, as with each of the foregoing inspections, the evidence demonstrates that the USDA inspections associated with this load of potatoes, RX 9 B, 9 C, and 9 D, accurately reflected the poor condition of this produce.

Next, RX 10, A through I, were discussed with witness Cutler. As with the other exhibits discussed by Mr. Cutler, he identified the shipping ticket from Ball Brokerage, which ticket lists the railcar number. In this case the car was BNFE18602. Tr IV 86, RX 10 E. Cutler agreed that it reflects July 2, 1999 as the date the load was to be shipped to G & T. The load consisted of 2400 50 lb. sacks of size A white potatoes at $3 per sack, FOB - GGD. Cutler identified RX 10 C as the invoice for that shipment. Tr. IV 87. Exhibit RX 10 F is another Notice of Complaint, just as identified in RX 8 and RX 9, except that it relates to railcar BNFE18602. Tr. IV 88. It notes 16 percent enlarged, raised and discolored lenticels, black spots and various other problems with the load. RX 10 F. Tr. IV 89. This information was derived from exhibit RX 10 B, which is the applicable USDA inspection certificate for that load. Cutler also confirmed and the exhibits themselves show that RX 10 B is the same as Complainant's Exhibit 7, at page 5. Tr. IV 89. Both bear the same inspection certificate number: K 768741-1. Tr. IV 90. Thus, RX 10 B is the same inspection certificate as CX 7 - 5. So too, RX 10 F, the Notice of Complaint, drew upon the information contained in that inspection certificate. Tr. IV 90. Exhibit RX 10 G is Ball's corrected memo, created on September 1, 1999, and reflecting that the price was settled at $1.05 per sack, FOB. Tr. IV 88. Cutler stated that the allowance was granted in this instance because the potatoes were "terrible." Tr. IV 91. This was based on the USDA certificate but

Cutler added that he also knew that Agri-Empire had a very bad crop of potatoes. Tr. IV 91. Thus, based on the credible testimony of Mr. Cutler and the Respondents' exhibits associated with RX 7, RX 8 and RX 9, as well as the credible testimony of Mr. Spinale, the Court finds that the June 23, 1999 USDA inspections associated with each of those loads of potatoes accurately reflected the true condition of the produce.

RX 10 H and RX 10 I, reflect Cutler's office file copies of the inspection certificates. It pertains to a railcar load of potatoes shipped to Markey's Wholesale in Elba, New York. These were shipped to Markey's around the same time as the load that went to G & T. Tr. IV 91. RX 10 H. As with the load to G & T, these involved 50 lb sacks, size "A," shipped around the same day, and showing, among similar problems, total defects of 49 percent. Tr. IV 92. Cutler's company was the broker for this shipment. RX 10 H reflects, through a sticker that was added to the exhibit by Cutler, that the produce was shipped on July 3, 1999. By comparison, G & T's load was shipped on July 2, 1999, only a day earlier. Tr. IV 92. Cutler then spoke to RX 10 I, which also had a sticker added to it by Cutler, indicating again a shipment date of July 2, 1999. Cutler indicated this was additional evidence that this crop of potatoes from Agri-Empire had tremendous problems. Tr. IV 94. Thus, Cutler's company was the broker regarding both 10 H and 10 I. In this instance the problem was not traceable to railcar temperature problems, but, based on his long experience, Cutler's educated guess was that these problem potatoes had been left too long in the field before harvesting. Tr. IV 93. As with the others, an allowance was also granted to the receiver of the load. Tr. IV 94. Cutler testified that other loads from this same bad crop were sent to Ohio and the receiver there also received an allowance. The potatoes were so poor, Cutler stated, that the receivers paid freight and "maybe a few cents" for the sacks. This amounted to a net cost of between 25 cents to 50 cents per 50 lb bag. Tr. IV 94. The shipper, Cutler stated, acknowledged there was a problem with these potatoes. Tr. IV 94 - 95. In fact, Cutler said the shipper begged him to get people to accept the loads at whatever Cutler could fetch for it. Tr. IV 95. Significantly, G & T paid $1.75 FOB per bag, which Cutler characterized as "a big return for these [poor] potatoes." Tr. IV 96. By contrast, Markey paid much less per bag than G & T for these

potatoes. Tr. IV 96. The price paid for the Ohio delivery of these potatoes was similar to that which G & T paid. Tr. IV 97. Although the Respondents had already solidly established the accuracy of the USDA inspections involved in these instances, the Markey evidence only serves to augment that conclusion.

Next witness Cutler was directed to RX 11, A through Q. RX 11 N is another Ball brokerage shipping ticket, with the buyer G & T and the seller/shipper Agri-Empire. Tr. IV 97, 100. In this instance the produce was shipped on July 13, 1999 in railcar number BNFE18703. Tr. IV 98. RX 11 N. All of the exhibits within the RX 11 group relate to the same railcar number. Tr. IV 108. Mr. Cutler noted the unusual inclusion of 'creamer' (i.e. very small) potatoes in the load, an item G& T does not typically handle. However Agri-Empire at that time, in July 1999, was desperate to move potatoes so that some return could be realized. Cutler also noted that the terms were atypical, because the potatoes were sent at "price [at] time of arrival." That arrangement is used when there is no market for potatoes because the market was saturated. Tr. IV 99-100. RX 11- O is another "Notice of Complaint" on the Ball letterhead. G & T had notified Ball of the many problems with this load, as reflected on that exhibit. Tr. IV 101.

As with the other notices of complaint, Ball used the USDA inspection certificate, as reflected in RX 11 B which is also identical to CX 8- 7, in preparing its document. Tr. IV 101- 103. Cutler then sent Ball's Notice of Complaint to Agri-Empire. Tr. IV 104. However, in this instance, as reflected in RX 11 P, G & T, as the consignee, refused delivery of the railcar because of the very poor condition of the potatoes. Tr. IV 104. The problems, however, were not attributable to the railroad; rather the potatoes were simply in poor condition from the outset. Tr. IV 112. As such the load failed the terms of the contract, as the problems far exceeded the allowable percentage of problems, which is 7 to 8 percent. Tr. IV 104, 105. When a load has problems to this degree, the shipper can only hope that the consignee will be willing to try to salvage it, obtaining whatever it can for it. Tr. IV 105. On this occasion, after the consignee was unable to find anyone willing to take the load, it implored Ball to see if G & T would try to salvage it. On August 9,

1999, G & T agreed to attempt to salvage the load. Tr. IV 107. RX 11 P. Cutler then described RX 11 Q, which is Ball's "Corrected Memo," bearing a date of September 2, 1999, as reflecting the settlement reached between G & T and Agri-Empire. Agri was pleased with the new agreed price because it covered its freight cost. Tr. IV 109. Mr. Cutler confirmed that at the same time as this poor load, and in the shipping period from July 2nd through September 13th, there was a "continuous stream of poor potatoes," from Agri-Empire, which were being rejected by receivers "across the United States." Tr. IV 109, 110. Accordingly, the Court finds that the evidence of record demonstrates that the inspection reflected in CX 8 - 7, (RX 11 B), accurately reflected the true condition of the produce inspected.

Mr. Cutler was then directed to RX 12 A through 12 U. Tr. IV 113. He agreed that RX 12 K is the Ball shipping ticket reflecting a July 13, 1999 shipment of 2400 50 lb bags of size "A" potatoes, which were priced at a time-of-arrival basis. G & T was sent a copy of the document the next day, July 14th, as reflected on the exhibit. Tr. IV 113, RX 12 K. Cutler confirmed that all of the exhibits within this group, RX 12 A through U, related to the same railcar, BNFE 18405. Tr. IV 114, 120. RX 12 L, another Ball Shipping Ticket pertaining to this load, and bearing the date of August 9, 1999, was sent to G & T and Agri-Empire. Cutler explained that, as with the RX 11 group of documents, this was another situation where the load had been refused; Agri-Empire had no place willing to take the potatoes, and it implored Ball to find someone to help them. As in the prior instance, G & T agreed to attempt to salvage the load, but with no guarantee, even as to whether it would be able to realize enough to cover the freight charge. Tr. IV 115. The Ball "Notice of Complaint" dated August 13, 1999, reflects that the load was originally rejected in July and that there was an inspection showing problems on the order of 30 percent. Tr. IV 117. RX 12 B, the USDA inspection for this load reflecting problems totaling 36 percent, was carried out on July 26, 1999. Tr. IV 119. The inspection reflects numerous problems, including lenticels, discoloration, black spots, sunken and chalky areas. Tr. IV 117- 118. A follow-up inspection was requested by G & T because the load had deteriorated further into decay, as reflected on USDA inspection certificate K 843307-0. Tr. IV 120.

RX 12 C. This occurred on August 13th. Tr. IV 119. RX 12 M is Ball's Notice of Complaint, reflecting the follow-up inspection. The end result was G & T agreed to pay the freight and 25 cents per bag, an amount which was satisfactory to Agri-Empire. Tr. IV 121. Ball's Traffic Bureau filed a complaint about the railcar, but was unsuccessful in the claim because there was no temperature tape in the railcar. The Court asked Cutler to explain the reason for different certificate numbers in RX 12 B and RX 12 M. Tr. IV 122-123. Cutler explained that RX 12 B refers to the initial inspection of July 26th, whereas RX 12 M, refers to the follow-up inspection of the same load, conducted on August 13th. Tr. IV 123. Thus, the Court concludes that the inspection certificate reflected in CX 8 - 6, which is identical to RX 12 B, was an accurate inspection of the produce for that load.

Last, Cutler was directed to RX 13 A through GG. Tr. IV 124. Asked about RX 13 CC, Cutler identified it as a Ball Shipping Ticket dated July 29, 1999 and sent to G & T. Tr. IV 125. It related to railcar BNSF 799582, shipped on July 26, 1999. The railcar was shipped to G & T without an order because Agri-Empire was awash in potatoes. Cutler asked G & T if they would take the load on a price-after-sale basis. Tr. IV 125-126. Thus, under such an arrangement, the price is not determined until the consignee, G & T in this case, actually sells the produce. Tr. IV 126. G & T agreed to take the car under this arrangement. Although the shipping ticket states that the car had 2400 100 lb sacks, Cutler explained that was a typographical error on the Ball ticket, as Agri-Empire only packs 50 lb sacks for this type of potato. Tr. IV 127. RX 13 DD, a Ball shipping ticket dated July 29, 1999 has a handwritten notation on the bottom of the page which reads: "No inspection taken for grade condition per Harris Cutler." Mr. Cutler, who stated that he did not write that notation but thought that it looked like Mazie Faraci's writing, explained that it meant that the railcar had very bad grade defects. His company was advised that the railcar was not going to

be inspected for grade defects. Tr. IV 128. RX 13 E[E][96] is another "Notice of Complaint" from Ball. It is based on a USDA inspection certificate, number K 770182- 4, dated August 9, 1999, and indicating that there was freezing affecting this load of potatoes. RX 13 B. Tr. IV 129. The Notice of Complaint reflects the extent of the freezing problem with the load, a problem attributable to the railroad. Tr. IV 131. Cutler also explained that the notation at the bottom of RX 13 DD was simply to protect the shipper's claim for recovery from the railroad, by noting that the railcar had freezing temperatures. Tr. IV 133. RX 13 D is the invoice from Agri-Empire, which was used to establish the market value of the potatoes in question at the time they were shipped. The invoice notes only the shipment date. Tr. IV 133. That is, when the invoice was created, it was already known there had been a freezing problem, but the railroad would need some basis for establishing the value of the load. Tr. IV 134. RX 13 C, USDA inspection certificate number K 770380- 4, was also identified by Cutler who noted that it involved the same railcar. Tr. IV 135. This inspection certificate also noted the freezing problems. The certificate also referenced inspection certificate K 770182- 4 of August 9, 1999. Cutler also agreed that RX 13C[ ][97] is the same as CX 9 at page 16. Tr. IV 135. Mr. Cutler then identified the railroad temperature tapes in connection with this railcar. RX 13 V, W, X, Y, Z and AA.[98]

The Court notes that this inspection is one of those the government claims was falsified. In fact, it involves the very important inspection

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[96]The Court observes that while the transcript reads that Respondents' Counsel asked about 13 E, it is obvious that the reference was to "13 EE" because 13 E is not a Notice of Complaint, but 13 EE is such a notice.

[97]Here again, the Court notes that the transcript reads Respondents' Counsel asking about whether RX 13 "CC" but obviously the reference was to RX 13 "C" as that is the same document as CX 9 at page 16. Further, Respondents' Counsel's next question *does* refer to RX 13 C. Tr. IV 136. Complainant's Counsel then stipulated to the identity of those documents. Tr. IV 137.

[98]As noted, the original temperature tape had to be used in order for Cutler to testify about it. Subsequently, per the Court's direction, Counsel for the Respondent made new copies of the original tape and the new copies were substituted and they now appear in the record as RX 13V through AA. Tr. IV 181.

for which Mr. Spinale pled guilty to the single count of bribery. Tr. IV 139. *Lead Counsel for Agriculture agreed that the load was frozen, but did not wish to withdraw the claim that the inspection was falsified.* Tr. IV 139.

Mr. Cutler went on to identify the temperature tapes associated with the exhibits listed next above and he noted that the temperature tapes related to railcar number BNSF 799582.[99] Tr. IV 140. At the hearing, he read the tape, noting a fluctuation from 66 degrees to a low of 30 degrees over a thirteen day period. Tr. IV 147. In contrast the temperature should have ranged from between 38 to 40 degrees. Tr. IV 148. In short, the tape itself confirms the accuracy of the USDA inspection certificate information that the potatoes had been frozen. Tr. IV 148-149. As with the other exhibits discussed by Mr. Cutler, the Traffic Bureau filed a claim. RX 13 GG. Tr. IV 149. Once the railroad received the results of the second inspection relating to this car, the inspection of August 13, 1999, the railroad then agreed to pay to settle the claim. Mr. Cutler noted that the railroad itself also inspected this railcar. Tr. IV 151. Cutler's letter of December 12, 2000 also reflects that Mr. Spinale advised that the railroad should carefully review the temperature tape. The upshot of this event, was that the railroad paid $3,250 for the claim and that, when added to the $1,200 that G & T paid for the potatoes, the total constituted a fair settlement overall. Tr. IV 152-153. Thus, consistent with Mr. Spinale's statement at his plea, the evidence shows and the Court finds that the inspection certificate accurately reflected the condition of the produce. Consequently, these exhibits also demonstrate that Mr. Spinale was paying a fee to Cashin, but not to work an inaccurate inspection of the produce.

During cross-examination, Counsel for USDA had Mr. Cutler acknowledge that the in-transit risk for the potatoes in RX 7 was on the shipper, Gold Ribbon. Tr. IV 158. Gold Ribbon was paid in full, between the amount Mr. Spinale paid and the amount the railroad

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[99]While initially there seemed to be a problem with these exhibits, because the temperature tape in question had a gap, this problem was eliminated because Counsel for Respondent produced the original temperature tape, which was somewhat unwieldy because of its approximate four foot length. Tr. IV 142.

paid. Tr. IV 159. Regarding RX 8, Mr. Cutler stated that the shipper also was paid in full, in part by G & T with the balance paid by the railroad claim. Tr. IV 160. Counsel's point is apparently to note that G & T did not end up paying the invoice price. In fact, this was expressly the point of Counsel for the USDA's questions - - that while the shipper was paid in full eventually, it was not paid in full by G & T. Tr. IV 162. Unfortunately, when USDA asked Mr. Cutler what he would have done, if he had known that Mr. Spinale was paying bribes, he received a resounding rebuff. Mr. Cutler testified with great earnestness and credibility that in *twenty years* of knowing Mr. Spinale he knew him *not* to be "cheat or a briber or whatever you're calling him here." Tr. IV 165.

The next witness for the Respondents was Edmund R. Esposito, who was formerly an inspector for USDA at Hunts Point Market. He worked at that job, which is formally titled "agricultural commodity grader," from July 1990 until October 1999 at Hunts Point. Tr. IV 183-184, 189. Mr. Esposito was one of the inspectors arrested during October 1999 in connection with "Operation Forbidden Fruit." Tr. IV 184. He was charged with RICO violations, bribery of a public official, and racketeering. Tr. IV 184. He pled guilty to some charges in March 2000 and other inspectors pled guilty at that time as well. Tr. IV 185. The other inspectors included Dave Ball, Paul Cutler, Glenn Jones, Mike Simous [ph], and Mike Stusiak [ph]. Tr. IV 185. Esposito ended up being sentenced to 24 months in prison and two years probation. Tr IV 187. Because of "good time" he actually served 21 months in prison. Tr. IV 186. As of the time of his testimony in this hearing he had completed his probation period. Tr. IV 186.

Esposito was trained on-the-job by none other than USDA inspector Bill Cashin. Tr. IV 190, 200. When Esposito began working for USDA, Lou Maniacci [ph] was the night supervisor. Around January or February of 1999 Glenn Jones became the night supervisor. As noted, Jones also was one of the USDA inspectors who was arrested. Tr. IV 192. Although inspections were to be carried out in the order received, that is, according to the date and time they were requested, Esposito stated that, for efficiency purposes, it often did not work out that way in practice. Tr. IV 194. While Esposito's supervisor, Officer in Charge, ("OIC") Mike Wells, wanted the

inspectors to do their inspections according to the time requested, Esposito maintained that the inspectors still did them as they wished and that the supervisors didn't push the point too much because "if they made us too mad, well, then we would slow down on inspections and get way behind." Tr. IV 195- 196. Mary Ann Stranch was the assistant to Mr. Wells during this time. Tr. IV 196. When Esposito started at Hunts Point there were about 17 to 18 USDA inspectors working at that location and about the same number worked there when his employment ended. Tr. IV 196-197.

In Mr. Esposito's opinion, there was a shortage of inspectors at Hunts Point. He based this on the fact that their inspections covered more than Hunts Point, as they included all five New York boroughs. His opinion was also based on the inspectors' delay in getting to assigned inspections. Esposito stated that "it might be two or three days before we'd even get to do an inspection for places." Tr. IV 197. Esposito stated that he was one of the most productive inspectors in that he was able to do from nine to thirteen inspections per day. Tr. IV 200. The time to conduct an inspection could vary from five minutes to an hour and a half. Tr. IV 200. Mr. Esposito also stated that his training was minimal, as he was trained for only a week before he was sent out to do inspections on his own. Tr. IV 200. He claimed that inspectors are supposed to go to market training school but that he never received that training until some four or five years after his employment began and only then because he insisted on it. Tr. IV 200. Esposito also stated that Cashin, during the time he was training him, went to some merchants' houses more than others. Tr. IV 202. He explained that at first this was due to bigger merchants having more requests for inspections than smaller houses but later on he learned "there were the houses that were ... a lot funner (*sic*) to go inspect for." Tr. IV 203. Mr. Esposito then related that, after some three or four weeks on the job, Cashin told him about merchants giving cash payments to inspectors for inspections. Tr. IV 203. Others told him of this arrangement too. Tr. IV 203. According to Esposito, he was told by these dishonest inspectors that "we're going to do inspections, we're going to make sure that they're out. We're going to make money. If they don't want to cooperate, then we turn

around and do what we have to do to convince them to pay." Tr. IV 204.

Mr. Esposito stated that Dan Arcery [ph] and Cashin were in charge of the group of dishonest inspectors. Tr. IV 206-207. According to Esposito, some in the group of dishonest inspectors were not indicted. Tr. IV 208. He asserted that something on the order of nine inspectors and thirteen wholesalers were indicted. Tr. IV 209. Esposito added that while former inspector Paul Cutler was one of the dishonest inspectors, he was not part of the "group" of dishonest inspectors, essentially because he was not well liked by the other inspectors. Tr. IV 210-211. Mr. Esposito knew Don Paradis [ph], a USDA employee who was in charge of the inspectors' division in Washington, D.C. Tr. IV 212. Esposito had heard from other inspectors that Paradis used to work at Hunts Point and that he was also taking cash payments from wholesalers. Tr. IV 212. The "group," as Esposito referred to the cabal of corrupt inspectors, would convene at Post and Taback's office in the market or at times in the USDA AMS lunch room at Hunts Point, in Row D. Tr. IV 213. At times, Esposito explained, one person from the group of dishonest inspectors would collect the money for the others. Later they would meet and divide up the money. Tr. IV 216. Some wholesalers preferred to make all their payments to a particular inspector, who would be the collector for the group. Tr. IV 216. The inspectors worked in concert, keeping track of their weekly inspections. Esposito, for example, would meet weekly with wholesaler Paul Steinberg and, effectively present the group's bill for the week. Then Esposito would distribute the shares to the "group." Tr. IV 217. USDA supervisor Glenn Jones was part of the group, as he would take care of inspection assignments and other details. In return the inspectors in the 'group' would each pay Jones $100 per week for his role. Tr. IV 218. Esposito stated that other inspectors collected money from other merchants and distributed it, naming Mike Simous [ph] as the inspector who collected from Fruitco, Elias Malibut [ph] as the inspector who collected from Rubin Brothers. For Post and Taback, Esposito stated that Stusiak [ph] and Cashin made the collections. Tr. IV 222. Esposito's legitimate salary from USDA was about $41,000 in 1998 and 1999. Tr. IV 223-224.

Esposito, like Cashman, admitted that he had some expensive habits to maintain. In his case, it was gambling, not women. Tr. IV 224. The amounts he would gamble varied from week to week but went as high as $30,000. Tr. IV 225. Having unusual expenses was not unusual among the dishonest inspectors. Esposito stated that Tommy Vincent, Dave Ball and Mike Simous [ph] were addicted to cocaine. Tr. IV 225. Cashin, he noted, was addicted to strippers, i.e. female "adult" entertainers. Tr. IV 225. While only an estimate, Esposito believed that somewhere between 30 to 50 percent of the merchants at Hunts Point paid inspectors. Tr. IV 227.

Mr. Esposito stated that he dealt with merchants who would not pay the inspectors by "screw[ing] them." Tr. IV 227-228. As an example he stated: ... if they had a load that was out of good delivery tolerances to where they could get an adjustment, I might make it in (sic) good so where they won't make nothing off of it. ...I would adjust the inspection. If they had an inspection that might fail good delivery, I might go in there and change - - you know, change the numbers and make sure that it passed a good delivery, and they would not get an adjustment on it. Or I would just change temperatures and make the inspection worthless. Tr. IV 228.

Mr. Esposito was not afraid that he would be exposed if a merchant asked for an appeal inspection because: "...the people coming down to do the appeal, most of the time, were people that were doing it like me and they would cover me." Tr. IV 229. In fact, as the Court noted, Esposito laughed and smiled when asked about the risk of an appeal inspection. Tr. IV 229. Esposito added that he also laughed because he recalled that Mr. Spinale used to call a lot of appeal inspections on him and that he also called a formal review on him. Tr. IV 230. He said he had a way of dealing with merchants that balked at paying or tried to pay him less than the standard amount. He would tell the merchant: "...no, you're going to pay me that much. And when they tried to give me what they wanted to give me, [i.e. less money than demanded], the next time I'd come down, I usually screwed them. Tr. IV 231. By "screwing them," Esposito meant making a bad load evaluated as "good." Tr. IV 231. When he would "screw" a merchant, the result was the merchant would get in line with

the inspectors' demands. Tr. IV 231. But, even then, the merchant would be effectively punished for not paying right up front because the inspector would not rewrite the original inspection. As Esposito put it: "...he [the merchant] would have to eat that one." Tr IV 231. Once a merchant got in line with the program, so to speak, Esposito stated that he would thereafter write up an accurate inspection "[f]rom there on out." Tr. IV 232. Esposito also stated that the inspectors would slow down their inspections whenever they felt someone "was messing" with them. This would cause the inspections to back up. In terms of the number of boxes inspectors were supposed to examine, Esposito stated they did not examine the one percent that were to be examined for an inspection. Instead they would examine about half that number. Tr. IV 234. This was their practice, whether the merchant was paying or not, because it allowed them to do more inspections and more inspections obviously meant more money. It also benefitted USDA because it increased the office's revenue, as there is a fee for each inspection. Tr. IV 235. Although the inspectors filled out a worksheet, they would simply record that they examined more boxes than they actually examined. Tr. IV 236.

In short, as expressed by Esposito, he felt like he was "God" and that he "wanted money for what I was doing and if you didn't give it to me, then I would do what I had to do to make sure you would ... by mess[ing] the inspections up that it would do you no good." Tr. IV 240- 241. Esposito stated that he tried to force the merchants to make cash payments and that the other inspectors worked the same way. As Esposito put it, it was "a system ... in place before [he] got there ..." Tr. IV 241- 242. Esposito also maintained that there were differences among the merchants who paid them. Some just paid although the inspectors did no favors for them, but there were others who paid and for whom favors were done. Tr. IV 244, 248. For the first group, they received the normal, fair inspection. Esposito stated that there were a lot of merchants who just paid to paid "to make sure they got a fair inspection." Tr. IV 248. If they didn't pay, those merchants would not receive a fair inspection. Others paid for "help," that is where a delivery was good but the merchant needed a delivery to appear to be in worse condition than it really was. Tr. IV 245. For those, Esposito would make the inspection reflect conditions which were worse than what really existed. Tr. IV 245. Such a "bump" in the numbers meant

an increase in the defects recorded of between 2 to 4 percentage points. Tr. IV 246. Significantly, Mr. Esposito stated he was careful not to increase the problems too much and make an unrealistic inspection. Tr. IV 246.

Regarding Mr. Spinale, Esposito affirmed that he knew him and that he did inspections at his places of business: G & T and Tray-Wrap. Tr. IV 249. Esposito stated Mr. Spinale was in the category of those merchants who paid and "just wanted to make sure he got a fair inspection." Tr. IV 250. Based on the Court's personal observation of Esposito's demeanor when testifying, the Court finds that Esposito was truthful in his characterization of the type of inspections performed for Mr. Spinale. That is to say, the Court accepts as credible Esposito's testimony that Mr. Spinale was paying only for a fair and accurate inspection. As with all the other witnesses who spoke to the subject, Esposito noted that Mr. Spinale knew his product. Tr. IV 250. As Esposito conceded, he learned from Mr. Spinale's expertise. Tr. IV 256. In fact, Esposito stated that he "learned a lot from [Mr. Spinale]." Tr. IV 250. One of the benefits of paying to get a timely inspection was that Esposito would go to Mr. Spinale's businesses after his normal work day was done and he was on overtime. This was the only way his superior, Wells, would allow an inspection to be done out of the order in which they were called. Tr IV 250. Specifically, Mr. Esposito denied that Mr. Spinale ever asked him to alter or to falsify an inspection. Tr. IV 251. Nor did he ever "downgrade" an inspection for Mr. Spinale, although he would give the merchant the "benefit of doubt on inspections." Tr. IV 251. Restated, although Mr. Spinale never asked him to do so, Esposito would rate an inspection that was borderline as being "out" of acceptable standards. Tr. IV 251. As noted, the Court finds these assertions of Esposito to be honest. He did this for a number of reasons. These included that Mr. Spinale paid, because he was a "nice guy," and because he finally stopped calling for appeals of his (Esposito's) inspections. Tr. IV 252. He related that, earlier, Mr. Spinale had appealed Esposito's inspection results "a lot" and even called for a formal review of him. Tr. IV 252. This occurred when Esposito first started and before Mr. Spinale started making cash payments to him. Tr. IV 253.

According to Esposito, the USDA office did not want inspectors failing inspected produce on account of grade.[100] He knew this because when he reported such a problem, his supervisors told him to keep running more samples. Tr. IV 261-262. The objective was, by running more samples, to have the inspection ultimately conclude that there was no failure on grade defects. Tr. IV 262. Also, to avoid this problem, inspectors would tell the merchant to just request a "condition inspection." Tr. IV 263. The upshot of this was that even if he found 8% grade defects, he would write it down as 5%. He would then be able to compensate for this underevaluation by increasing the problems regarding the "condition" defects with the produce. Tr. IV 264. For example, if he found 10% rot, he would list it as 13%. Tr. IV 265. Esposito also stated that there were times when the produce was in good condition and he would refuse to write an altered inspection and record that there were problems, because he was unwilling to "stick [his] neck out there too far." Tr. IV 265. This never happened with Mr. Spinale. Tr. IV 266. Mr. Spinale knew his product, and he "would never call in [for an inspection on] stuff that was going to pass." Tr. IV 266.

Esposito was shown RX 1 A, which is also CX 1- 5, relating to inspection certificate K 678086 - 0. He noted that it was "way out of grade," as it reflected 33% total defects and only 9% makes it fail.[101] Tr. IV 270. Because of this, Esposito said it would not be necessary to write down such a high percentage of defects (i.e. 33%) if they didn't exist. One would be asking for an appeal by the shipper if the

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[100]Esposito, as other witnesses had done, distinguished a grade defect from a condition problem, with the former referring to a problem that will not change such as a misshapen potato or one with "hollow heart." Tr. IV 257- 258. By his best recollection, he stated that for grade defects, 5% external or 5% internal, up to a maximum total of 8% defects were allowed. Tr. IV 259. Esposito stated that for Idaho potatoes if he found 8% grade defects he would have to call his office and report that finding, because such potatoes would have been inspected at the shipping point, in Idaho. Tr. IV 260.

[101]Regarding CX1-5, RX 1 A, K 678086, Esposito stated that it related to a truck load of tomatoes and that typically a load will have 1600 cartons. In this instance, 400 cartons were examined. Tr. V48. The temperature on this certificate reflects 54 to 56 degrees, with the normal temperature being between 50 to 60 degrees. Tr. V48.

defects were not really that bad. Tr. IV 271. A load with that percentage of problems was essentially "garbage" in Esposito's view. Tr. IV 270. Directed again to CX 1-5, Esposito stated it was a "condition" inspection, and added that the load description as "light red and red" meant that the whole load was over-ripe. Tr. IV 274. Esposito confirmed that the inspection was not for grade but that had that been part of the inspection, it would have resulted in lowering the percentage of the tomatoes that were considered U.S. number one. Tr. IV 275.

Mr. Esposito was then directed to CX 2 -5, inspection certificate number K 678091-0, RX 2A. He noted that the inspection reflected that the produce failed to meet grade, being about three times over the allowable limit for defects. Tr. IV 276. As with the previous inspection, Esposito stated he would not alter such an inspection because it already was clearly bad. Tr. IV 277. Thus, it was unnecessary to alter the inspection and doing so, if it were not accurate, would also provoke an appeal inspection. Tr. IV 277. Esposito also noted that no grade defects were listed for this inspection; that is it covered condition problems only. Tr. IV 278. Had grade defects been included, the inspection results would have been worse. Tr. IV 278. Directed to RX 3 A, inspection certificate number K 679811-0, Esposito, when asked the same questions posed with regard to CX 1 -5 and CX 2- 5, opined that it could possibly represent an altered inspection because it was barely out of grade.[102] Tr. IV 279-280. For CX 4 - 5, RX 4 A, inspection certificate K 765769-5, Esposito noted that it too failed as U.S. number one and was a little out, that is barely failing, on good delivery. Tr. IV 281. Because it was close, Esposito opined that this inspection could also

[102]This is indicative of Esposito's candor, as he expressed that this *could* have been an altered inspection because it was barely out of grade. However, as discussed earlier, the tomatoes associated with this load were *free*, a fact Mr. Esposito could not have known. As found by the Court, Mr. Spinale never *requested* an inspection on the load. Instead, Cashin had come by for another cash visit and Mr. Spinale felt obliged to pay him.

be an altered inspection.[103] Tr. IV 282. For CX 5 - 6, (RX 5 A), involving certificate number K 767032-6, Esposito stated it reflected produce that was far out of grade on all tolerances. Tr. IV 283. As with the others that were so far out of grade, Esposito stated he would not alter such an inspection, noting that with the degree of decay reflected, it "had to have been there." Tr. IV 284. As for CX 6 - 5, RX 6 A, involving inspection certificate K 767363-5, Esposito also described that load as being "way out on good delivery." Tr. IV 285. For the same reasons already stated, he would not alter such an inspection and accordingly he would consider such an inspection certificate as likely to be accurate. Tr. IV 285. For RX 7 M, involving inspection certificate 767365-0, and pertaining to a load of potatoes, Esposito stated that it too was "way out on good delivery" – by eight or nine percent. Tr. IV 287. As such, he would not alter an inspection reflecting that degree or problems "unless it was there." Tr. IV 288. As to RX 8 C, inspection certificate K 767366-8, dated June 23, 1999, Esposito noted that it was both out on grade and out on good delivery. As the problem was double the allowable limit for soft-rot for example, he concluded it too was likely an accurate inspection. Tr IV 291. Asked about RX 9 C, inspection certificate K767364, dated June 23, 1999, Esposito stated that it too was way out of tolerances and therefore was unlikely an altered inspection. Tr. IV 295. Esposito added that he would be more leery about altering an inspection of goods arriving by railcar, as the railroad has its own inspectors. Tr. IV 297-298.

The following day, October 29, 2004, Esposito, in a continuation of his testimony, was shown CX 7- 5, relating to railcar number BNFE 18602 and inspection certificate number K 768741-1, performed July 15, 1999. Tr. V6. Esposito said this inspection also reflected produce - potatoes - that were very much out of grade, at four or five times the allowable limit. Tr. V7. As with the other inspections he discussed that were far out of grade, Esposito said he would be taking a risk by writing such an inspection if in fact the load was not in such poor condition. Tr. V8. After some confusion,

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[103]Here too it needs to be emphasized that Mr. Spinale paid the *full* price for these tomatoes and *did not seek an allowance*.

Esposito acknowledged that the railroad would be likely to examine an inspection with such a poor evaluation. Tr. V 8-9. CX 8 - 6, RX 12 B, are the same, involving certificate number K 769381-5, and dealing with potatoes arriving on railcar number BNFE 18405 on July 26, 1999. Tr. V 10-11. Because of the symbol "LO" on the inspection certificate, Esposito informed it meant the railcar was loaded, that is the produce was still intact in the railcar. This load too was seriously out-of-grade, being out by 25 percent. Tr. V 10-11. For the same reason he gave numerous times, Esposito stated he would not risk writing such an inspection unless in fact it was in such poor condition. Tr. V 12. As before, he affirmed that the railroad would be likely to examine such a claim of poor condition as well, and this is another reason why an inspector would not risk falsifying an inspection. Tr. V 12.

Next, Esposito was shown CX 9-16, RX 13 C, dealing with inspection certificate number K 770380- 4, dated August 13, 1999. As with the railcar associated with CX 8- 6, this railcar, BNSF799582, was also loaded. Tr. V 13. Esposito noted that the potatoes in this load had been damaged by freezing. Tr. V 13- 14. He also observed that the load had been inspected earlier by another USDA inspector as stated on the certificate, which referenced inspection certificate number K 770182- 4, and was dated August 9, 1999. Tr. V 14. Esposito confirmed that RX 13 B was that earlier inspection to which he referred. In fact, Esposito noted that *he* was the inspector who inspected the load reflected in RX 13 B. Tr. V 15. In both instances, the certificates reflected that the railcar remained loaded with its goods. Tr. V 16. By the time of the second inspection of the load, four days had elapsed and the product had deteriorated further. Tr. V 17-18. Esposito stated firmly that his inspection, as reflected in RX 13, was not an altered inspection. He noted that he knew that the railroad would also be examining the load, as they do that whenever freezing is involved. Tr. V 19.

Esposito acknowledged that Mr. Spinale lent him money. He had been arrested and needed bail money. Tr. V 21. Mr. Spinale provided him with $17,000 so he could meet bail. Esposito stated that, for the most part, he repaid Mr. Spinale, but acknowledged that he might still owe him "a couple of hundred dollars." Tr. V 22. Esposito also stated

that while he often picked up money on behalf of other inspectors, that arrangement never existed with regard to G & T and Tray-Wrap. Tr. V 23. Esposito also stated that he knew that Cashin borrowed money from other merchants in the market, citing John Thomas of K & H. Thomas told Esposito about this loan. Tr. V 25. Thomas also told Esposito that Cashin never paid him back. The money was for his girlfriend/adult entertainer, i.e. "stripper," to have her breasts enlarged and then later to have the breasts reduced. Tr. V 25. Esposito also stated in response to questions from the Court that Cashin acknowledged to him that he got his girlfriend a "boob job." Tr. V 29. The information that Cashin later had to pay to have his friend's breasts reduced came from John Thomas of K & H, who told Esposito of the development, or under-development, as it were. Tr. V 29. Esposito said that Cashin got along with the other inspectors, although he characterized him as "strange," and in the last year or two of his employment, Cashin became "even more strange." Tr. V 26. This time period of "more strange[ness] involved 1997 through October 1999. Tr. V 27. Esposito also felt that Cash[i]n became embittered by being passed over for USDA promotions. Tr. V 28. Although Mr. Esposito also acknowledged that Mr. Spinale and G & T brought a lawsuit against him and that, to his knowledge, that suit is still pending, he stated that no promises were made to him in exchange for his testimony in this proceeding. Tr. V 31. Instead, Esposito explained that he was testifying because he knew that his actions while employed by USDA were wrong and because he recognized that Mr. Spinale had always been fair and nice to him. Tr. V 32.

On cross-examination Esposito acknowledged that one could alter other items in an inspection besides the condition, such as the number of boxes, the temperature listed on the certificate. Tr. V 34-35. Esposito explained that while the number of boxes listed might be less than recorded, the blame for this, in his view, was on USDA because of the delay in getting to requested inspections. Tr. V 35. Accordingly, he viewed it as understandable that some of the boxes of produce could be sold and accordingly the inspectors would give the merchants the benefit of the doubt as to the original numbers. Tr. V 35 *He added that this practice was done by all the inspectors, not just the ones who were corrupt.* Tr. V 36. USDA presented no rebuttal to this assertion either.

As noted, the Court finds the testimony of Mr. Esposito to be credible, particularly where it conflicted with assertions of Mr. Cashin, but also as it supported Mr. Spinale's contention that the payments he made to the inspectors were needed if one wanted rapid and fair inspections.[104]

Mr. Craig Bauer also testified on behalf of the Respondents. Directed to the summer of 1999 (i.e. June through September), Bauer was employed by Agri-Empire, in San Jancinto, California, where he was the sales manager, in charge of all red and white potatoes. Tr. V 60. At that time, Agri sold just reds and whites. Tr. V 62. Asked whether there were problems during the summer of 1999, Bauer stated there were always problems, but in particular at that time Agri had a field with acres of white potatoes which had stayed in the ground too long. He remembered seeing that these potatoes had problems, such as being misshapen and having lenticels and they were brown instead of white. Tr. V 63. Bauer, having directly observed the problems with these potatoes, told customers up front that the potatoes from these acres had problems. Tr. V 65. He remembered speaking to Ball Brokerage, i.e. Mr. Harris Cutler, and thought he might have spoken to Mr. Spinale as well. Tr. V 65. Because Agri had a policy that no

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[104]Were the stakes not so high, the USDA's characterization of Mr. Esposito as "an admittedly corrupt produce inspector who had never even seen the commodities in question" would be amusing. USDA Reply Brief at 6. In pointing to the "corrupt" Mr. Esposito, USDA seems to have forgotten that its star witness was none other than the "admittedly corrupt produce inspector" Cashin. It also sidesteps the fact that Cashin was a witness who could remember no details about the inspections which make up this administrative complaint and whose testimony was relegated to reciting, like a robot, from 302 reports for which he had no independent recollection of the underlying events and which he never even saw until years after they had been created. Further, USDA does not apprehend the purpose of Mr. Esposito's testimony. It was not offered to establish the accuracy of the particular inspections in the Complaint, rather, Esposito's testimony was presented to support the contention that the inspection certificates in issue were likely accurate, because the numbers of defects were so significantly above the acceptable level and the corrupt inspectors were careful not to make an inspection too far above such levels because it would invite a review. Esposito's testimony was also offered, and accepted as credible by the Court, to establish that Cashin's had a personal and expensive hobby with "female *entertainers*"and needed money far beyond what his USDA income provided, and that the inspectors were extorting merchants such as Mr. Spinale in return for a prompt and accurate inspection.

produce was to be shipped without a price, Bauer assured customers that the price would be adjusted. Tr. V 66. The potatoes were so bad that summer that, as Bauer put it, "I did a lot of begging that summer." Tr. V 66.

Referring Mr. Bauer to RX 10 E, he recognized it as the standard form used by Ball Brokerage and reflecting that Agri-Empire was the seller. Tr. V 68. Bauer agreed he was the one involved in this particular sale. Tr. V 68. RX 10 C was also identified by Bauer as Agri's invoice to G & T. Bauer agreed that Agri would have received a copy of RX 10 E from Ball. RX 10 F, also identified by Bauer as reflecting the results of the USDA inspection, showed, in Bauer's words, that "these potatoes were awful." Tr. V 69. The USDA inspection certificate involved here, as reflected in RX 10 B, is the same inspection certificate as reflected in CX 7 - 5. Bauer also identified RX 10 G as the Ball corrected memo reflecting that Agri agreed to settle on a price of $1.75 FOB, and he noted that his name, referenced as "Craig," appears on RX 10 G. Upon reviewing the documents within RX 10, Bauer agreed that they all related to the same shipment and the transactions involved with it. Tr. V 71-72. Bauer also agreed that the description of the load in RX 10- F was an accurate description of the problems with the potatoes. Tr. V 87. Not only was Agri satisfied with the settlement, as Bauer put it, "We loved it. That was more than I was expecting to get." Agri was trying to cover the freight, and so he was pleased because not only was the freight covered but G & T also paid $1.75. Tr. V 73.

Mr. Bauer was then referred to RX 11 A through G, and he first identified RX 11 P as the shipping ticket from Ball. While affirming that Agri's policy is for there to be a price on all that it ships, he noted that the word "open" appears on Ball's ticket. This meant that he had spoken with Ball and agreed that there would not be a price on the potatoes and Agri accepts that the merchant will do the best it can, and further that any written price, such as that reflected on the original invoice, had been "thrown out the window." Tr. V 74, 78. Bauer also confirmed that all of the exhibits within RX 11 related to the same load. Tr. V 75. Bauer agreed that while the date to be shipped, as reflected on RX 11 P, is July 13th, the document itself is dated August 9th. He speculated that could reflect that the potatoes had arrived and been rejected by G & T. Tr. V 76. Bauer also agreed that RX 11-O

related to the same load of potatoes and it too was dated July 26, 1999. Tr. V 76. This load, Bauer stated, had "serious problems." Tr. V 76. Bauer, speaking with particular importance to Mr. Spinale's reputation and credibility, explained that he was willing to accept an "open" price because he had been dealing with Mr. Spinale for *thirty* years, and he knew that he would be getting the best possible deal for Agri from Mr. Spinale. Thus, accepting as it does, the credibility of Mr. Bauer, the Court finds that it is totally at odds with Mr. Spinale's longstanding reputation that he would be a party to any scheme to have produce downgraded from its true condition in order to cheat producers.

Bauer reiterated, with reference to the load identified in RX 11, that Agri was very pleased that they received any money from this load because their chief concern was that the freight cost be covered. Tr. V 85. Bauer expressed that the description in RX 11- O was an accurate description of the poor condition of these potatoes. Tr. V 86. After all, he had personally observed serious problems with these potatoes *before* they began their 15 day rail journey. Tr. V 86. Discussing inspection certificate RX 11 B, which is the same inspection certificate for USDA's CX 8 - 7, Bauer noted that Agri did not file an appeal of the inspection certificate results, stating that "it was actually my decision" not to appeal because he knew "these potatoes were in trouble." Tr. V 89. Bauer said the same thing with regard to the RX 10 exhibits; he would not have taken an appeal on the inspection certificate because he knew those potatoes had problems. Tr. V 90.

When directed to the group of exhibits making up RX 12, Bauer identified the Agri-Empire invoice to G & T for 2400 sacks of number one size "A" potatoes, sold at $3.00 per bag, and dated July 13, 1999, and pertaining to railcar BNFE18405. Tr. V 91. RX 12 K, Bauer agreed, was a confirmation of invoice but with no price on it. As before, Bauer stated that he had to put a price on the invoice, but he was "going to hold [the merchant's] hand." Tr. V 92. The bottom line, from Agri-Empire's perspective in terms of this load, as reflected in the documents comprising RX 12, is that it agreed to a "price [at the] time of arrival" Tr. V 93. To Bauer, upon examining the RX 12 exhibits, it looked like G & T originally rejected the load from Agri. Tr. V 94. As with the previous group of exhibits, Bauer called the

potatoes with this load "ugly," having serious problems and noted that the problems added up to 42 percent. Tr. V 96. Bauer agreed that CX 8- 6, the USDA inspection certificate pertaining to this load, is the same certificate identified in RX 12 B. Tr. V 99. As noted in RX 12 N, Agri agreed to a renegotiated price of 25 cents FOB. Bauer noted his name appears on that exhibit with its reference to 'Craig.' Tr. V 102.

Next, Bauer was referred to the RX 13 documents, A through GG. The original invoice refers to 2400 sacks of potatoes at $3.25 per sack. All the documents in this group relate to the same load, which was on railcar BNSF 799582. Tr. V 103. As with the other exhibits, the Ball Brokerage ticket refers to "price after sale." RX 13 CC. Bauer confirmed, upon reviewing the temperature tape, RX 13 V, W, X, Y, Z, and RX 13AA, that it showed that the temperature in the railcar dropped down to between 30 and 35 degrees, which was far too cold for the potatoes. Tr. V 113. This was consistent, to Bauer, with the accuracy of the inspection certificate reflecting freezing of the potatoes. Tr. V 113. As stated earlier, the inspection certificate identified in RX 13 C is the same inspection certificate as CX 9 - 16.

Bauer was then directed to RX 10 H, another USDA inspection certificate, number K 662108-0, pertaining to an inspection carried out in Elba, New York. Tr. V 116. This exhibit clearly shows that, even in *other* inspection sites, the product coming from Agri-Empire during the same time period as the inspections forming the basis of USDA's Complaint, was also deemed to be bad. Tr. V 117. *As the Court noted*, *this information was clearly relevant.* Tr. V 117. Bauer noted that the applicant was Markey's Wholesale. RX 10 H. Tr. V 118. Bauer also identified Markey's as a customer of Ball's. Thus, Bauer confirmed that he made this sale through Ball to Markey's. Tr. V 119. Bauer then noted that the inspection of this load occurred approximately on July 11, 1999. Tr. V 120, RX 10 H. The inspection, with Bauer again noting that it was conducted out of Elba, New York, showed defects of 44 percent. Bauer reaffirmed that, unfortunately, such a poor product was typical for that period of time for Agri. Tr. V 121. Thus, the problems noted were consistent with the problems with the loads from Agri which were sent to G & T during that same time. Tr. V 121. The same observations were equally true for another Agri load sent to Markey's and inspected in

Elba, and bearing inspection certificate number K 662107- 2. Tr. V 122, RX 10 I. In that load 34 percent of the produce was out of grade. Tr. V 122. Notably, in stark contrast to G & T's actions, some other customers who received these poor potatoes during this time period paid nothing for the loads. Tr. V 123.

In fact, Bauer stated that for at least half of these problem shipments during this time period, Agri received *nothing* for them. Tr. V 123. Bauer stated he was aware of the arrests in connection with the Hunts Point matter, including Mr. Spinale's arrest. However, Bauer stated this did not alter his opinion of Mr. Spinale because he has known him for over thirty years. Bauer has held a high opinion of Mr. Spinale, an opinion that included his view that Mr. Spinale is an honest businessman. Tr. V 128, 132, 133. In fact, when he first learned about the Hunts Point matter, the rumor was that one inspector got caught and cut a deal with prosecutors. Tr. V 128. The arrest did not cause Bauer to stop doing business with Mr. Spinale, nor did the events alter his opinion "in the least bit." Tr. V 128, 133. Bauer described Mr. Spinale as one who "expects quality product for a quality price." Tr. V 129. Essentially, Bauer described Agri's PACA reparation against G & T and other Hunts Point merchants as a no-lose situation, as they only stood to gain by filing a complaint. Tr. V 130-131. Bauer did not know the outcome of the filing of that complaint by Agri. Tr. V 132. The Court observes that its conclusions regarding this case are well-supported apart from the testimony of Mr. Bauer, whose testimony the Court found to be credible. Thus Mr. Bauer's testimony only serves to augment the wealth of the evidence and the Court's conclusions. Though absolutely unnecessary for the Respondents to have done so, *as it was not their burden*, *but rather the government's to establish its claims by a preponderance of the evidence*, in fact the Respondents have proved their case at least by a preponderance of the evidence.

Paul Cutler also appeared as a witness for the Respondents. This occurred on November 1, 2004, the last day of the hearing. Mr. Cutler, who confirmed that he is unrelated to Harris Cutler, who had testified earlier in this proceeding, stated that he is currently unemployed and that his last job was as a USDA inspector at Hunts Point. Tr. VI 6. Mr. Cutler worked in that capacity from May 1991

until February 2000, when he resigned. He was arrested on October 27, 1999, charged with bribery and RICO violations. Tr. VI 6. Subsequently he pled guilty to one count of bribery, receiving a sentence of 15 months, followed by two years' probation. He actually served thirteen of those months in prison at Allenwood, Pennsylvania. Tr. VI 36. He also was required to forfeit some of the illegal money, approximately $70,000, into a fund. Tr. VI 37, 38. His duties involved inspection of fresh produce at Hunts Point Market and other stores in the New York area. Tr. VI 9. Cashin was the training officer when Cutler arrived at the USDA. Mr. Cutler admitted that he first started receiving cash from merchants for doing inspections around 1992 or 1993. Tr. VI 14. The first time this occurred, as best as he could recall, was at "Fierman's" [ph] which is a merchant or wholesale store at Hunts Point. Fierman expressed to Cutler that he was aware that he could not get prompt inspections from USDA and Fierman also believed that the inspections were not fair. Cutler agreed with these characterizations, stating that the inspectors were pressured to get a lot of inspections done. Tr. VI 15. As a result, according to Mr. Cutler, Fierman offered to pay in order to get a timely and fair inspection. Tr. VI 15-16. In Cutler's view the inspections were not in fact fair because the merchants would be upset and angry with the delays and when they took out that anger out on the inspectors, the inspectors would not be in a frame of mind to do a fair inspection. Tr. VI 16-17. Accordingly, when an inspection was borderline, and because there is a subjective element to an inspection, Cutler was then inclined *not* to give the merchant the benefit in close calls about the condition of the produce. Tr. VI 17 - 18. Cutler stated that "[b]y the book" they were supposed to sample 1% of the load but because of the pressure to get more done this could not be done, particularly on larger loads, which he defined as including loads with a thousand boxes. Tr. VI 20, 22. In contrast he identified smaller loads as those with 50 to 200 boxes. Tr. VI 23. By this description, the typical load of tomatoes would be classified as a large load, as it would have a thousand or more boxes. Tr. VI 23. Cutler defined the inspector's "note sheet" as the working paper listing the defects and numbers before the inspector would actually write up the inspection certificate. Tr.VI 20. However, on the note sheet he would not always write

down the number of samples he inspected and the number recorded on the sheet might be exaggerated. Tr. VI 21.

Mr. Cutler believed that nine or ten inspectors worked at Hunts Point Market in 1999. This number did not include the supervisors. Tr. VI 27. Cutler stated that there were times when he could not get to all the requested inspections but his supervisor would still urge him to try and get them done. Tr. VI 28. He stated he was not instructed to do the inspections in any particular order, but that it "was generally understood that [they were] to take care of the ones who paid." Tr. VI 28. Cutler stated that he knew there were other inspectors who took cash from the Hunts Point merchants. Although he was not part of the "group" that took cash, he was nevertheless aware of what they were doing and he would overhear their conversations in the lunchroom, confirming his knowledge. Tr. VI 31, 32. He also observed these inspectors pass cash among themselves. Tr. VI 33. Cutler elaborated that a number of merchants complained that they could not get timely inspections. Tr. VI 39-40. For one of the paying merchants, a Mr. Uribe [ph], Cutler stated that there were times when he would add a few percentage points to the number of defects found in a load, although the merchant did not request that to be done. Tr. VI 40. Though not prompted to increase the number of defects, Cutler stated that he was sympathetic to the merchants' situation where inspections were delayed and since the product is perishable. Tr. VI 41. Cutler conceded that he put pressure on the merchants to pay him. Tr. VI 43. When confronted with a merchant who was angry over the delay, he would tell them "if you want me to do it, pay me." Tr. VI 44. He also conceded that he would list an increased number of boxes above the number that he actually inspected and that a number of his fellow inspectors engaged in this practice. Tr. VI 45.

Cutler also stated that, if faced with a merchant would not pay, and a load that was borderline in terms of passing for allowable defects, he would rate the load as passing. Tr. VI 46. On the other hand, for a paying merchant, when faced with the same borderline situation, he would add two or three percentage points to the defects. Tr. VI 47. Cutler also contended that it was an implicit USDA policy in his office that the inspectors were to increase the number of containers listed as present at the time of the inspection in order to compensate for the

delay in getting the inspection done. Tr. VI 51. He learned about this "policy" from his fellow inspectors. Tr. VI 52. In fact, Cutler maintained that supervisor Mary Ann Stranch, as well as Cashin, told him to increase the numbers. Tr. VI 52. Cutler also stated, as did Esposito, that if an inspection had grade defects above the allowable limit, he was instructed to call the USDA office. Tr. VI 54. The inspectors were told to try and get the inspection changed to a "condition" inspection. Tr, VI 55-56. If the merchant refused to go along, the inspectors were told to have the inspection result in a passing grade for condition. Tr. V 56. Cutler also maintained that both supervisor Mike Wells and Washington USDA official Don Paradis [ph] both knew about the cash payments. Tr. VI 59- 60. Cutler never did inspections at G & T or at Tray-Wrap. Tr. VI 63-64. Unlike Cashin and Esposito, Cutler saved his cash payments, putting them in the stock market. Tr. VI 64. Cutler believed that he had power over the Hunts Point merchants because the inspectors could force them to pay to get a correct inspection. Tr. VI 67. Cutler also acknowledged that Mr. Spinale had filed a lawsuit against him, but stated there were no promises made to him as a consequence of his appearance as a witness in this procedure. Tr. VI 67. Mr. Cutler also conceded that he had commenced a lawsuit against Mr. Spinale but that it had been dismissed. Tr. VI 67. The Court found Paul Cutler to be a credible witness who, having served his time, had nothing to gain by testifying on behalf of the Respondents. His testimony, while cumulative, serves to underscore and affirm the testimony of others as further demonstrates that, at least for some of the merchants, the corrupt inspectors were extracting a fee for carrying out a fair and prompt inspection. Cutler's testimony also provides additional uncontradicted testimony that inspectors were encouraged to do more inspections than they could legitimately accomplish, and to that end, to cut corners in performing such inspections. Further, the uncontradicted testimony is that the USDA management did not want inspections to conclude that a load produce failed to meet grade.

Following the presentation of the Respondents' defense, USDA, on the last day of the hearing called Mr. John Koller as its sanction witness. Koller is employed by USDA in the Perishable Agricultural Commodities Act branch, otherwise known as PACA. Tr. VI 182. As noted, PACA regulates fair trade and good business practices

throughout the perishable fruit and vegetable industry. Tr. VI 183. Koller's role in this case was to review the case file and the evidence and to participate in the development of the sanction recommendation.[105] Tr. VI 185. Interestingly, Mr. Koller conceded during his direct exam about the importance of a prompt inspection: "Well, you know, since we're dealing with a perishable commodity, fruits and vegetables, the pace there is very hectic, and that is because there's always an interest on the wholesalers located on the market to unload the trucks that arrive, because they want to get the product and make it available to the market and for resale to any of its customers that come into the market...." Tr. VI 190-191. Yet, the evidence of record supports the conclusion that the USDA did not have an adequate number of inspectors. This shortage contributed to an environment which allowed the corrupt inspectors to demand payments.

As background, Koller explained that a USDA inspection of produce is an unbiased third-party review of a particular lot of produce that's been made available to an inspector - - a USDA inspector. The inspection is performed by the Fresh Products branch of the Department of Agriculture. Typically such inspections are requested by the receivers and wholesalers of produce. Inspections are requested if there are questions about the quality and condition of the product. In such cases the USDA is called to inspect the produce and if there are condition defects found that substantiate a breach of contract, the inspection report may be used to show the extent of the problems to the shipper and, ultimately to renegotiate terms on that particular transaction. Tr. VI 194-195. However, as applied to the facts in this case, the Court notes that although the USDA tried later on to create other reasons for a wholesaler to want to bribe an inspector, clearly the reason initially expressed by Mr. Koller was to have an inspector rate a load as worse than its actual condition and thereby allow the wholesaler to negotiate a lower price. The expanded reasons, in the Court's view, came about when USDA realized that it

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[105]Currently, Koller's position is a senior marketing specialist in Washington DC. Tr. VI 183. His duties include reviewing disciplinary investigations brought under PACA.

would be unable to show for any of the counts in this proceeding that Mr. Spinale illegitimately brought about an inspection that falsely represented the product to be worse than its actual condition.[106] As explained in this decision, the Court finds that as to the specific dates alleged in the Complaint, the produce really was as poor as the inspection certificate reflected and, in any event, Mr. Spinale did not improperly benefit financially from those transactions. Another problem with USDA's case is its fundamental premise. As Mr. Koller put it, citing Section 24 of the PACA: "[The Complainant's position is] that by the Respondents making bribery payments to a USDA inspector, it constitutes willful, repeated and flagrant ... violations of the PACA." (emphasis added) Tr.VI 195. Thus, the duty under PACA Section 24 that it is alleged that the Respondents failed to perform was: "... by Respondents making bribery payments to obtain false information on the inspection, or to affect the transaction, that this is not in keeping with the fair trade requirements of the act and it corrupts the integrity of the inspection process." Tr. VI 196. Koller added: "when you have a bribery payment made to a produce inspector, that affects the credibility of the inspection ..." Tr.VI 196. Thus the Court notes that a central determination in this case is whether in fact Mr. Spinale *was* bribing the inspectors or whether he was the victim of, as Mr. Spinale expressed it, "soft extortion."

As noted, Koller participated in the sanction recommendation that the Respondents' PACA licenses be revoked. Tr. VI 204. The first factor which led to his recommendation was "that bribery payments to a produce inspector is (sic) one of the most serious violations of the PACA." Tr. VI 204. Yet, although 'bribery' is the central claim here, Koller struggled to define what the term meant. As Mr. Koller put it:

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[106]Koller, after asserting that under Section 16 of PACA an act of an agent, etc. is the act of the licensee, which in this case are the Respondents, G & T and Tray-Wrap, then stated that a wholesaler could use a "bribed inspection" to "seek a price adjustment downward" from the shipper or to use it to file a carrier claim with the freight company. Having had the benefit of observing the Respondents evidence in its defense, he added that another 'use' could be to notify a shipper that a product doesn't look good but then go ahead and sell the product and create the impression that a 'great favor' was done by selling mediocre product. Tr. VI 197-200. As noted above, not only was this a created fallback argument, but it must also be emphasized that there is absolutely no evidence in this record to show that the 'great favor' approach was used for *any* of the Counts.

Well, bribery is where something is offered in exchange for - - whether it be for something immediate or anything in the future, anything that would be of use to the person who's interested in affecting someone else's thoughts and processes in what they do. Tr. VI 205.

The Court then asked Koller, "So, if that's your definition of bribery, if hypothetically money was given to a USDA inspector and the purpose was to get that inspector to make a prompt, timely inspection and an accurate inspection, does that fit within the definition you just stated or not?" Mr. Koller stated: "Yes, it does." The Court pressed Mr. Koller to explain how that hypothetical fit within his definition of bribery. Mr. Koller eventually responded directly stating: Again, it's - - with the action itself is an action that's affecting the - - that would be affecting an inspector, and it's objectivity of its role as - - that person has a role in the service and the process, and that if there's an impression that you will be able to in the future provide assistance to a wholesaler by providing an inspection sooner, than that in itself is cause and effect. You know, they've gotten money and they understand that, you know, hey, if I can provide an inspection for this person who shouldn't be getting it in terms of being queued up for an inspection, that would be an effect. Tr. VI 207.

The Court still wanted to know from Mr. Koller whether his answer had changed in terms of bribery if he "assumed that all this begins with the inspector initiating the requirement for money? What if the impetus comes from the inspectors? Do you still see that as no different in terms of your understanding of the term bribery?" Mr. Koller answered: "I would say it's no different." Tr. VI 207. This Court does not agree. While Mr. Koller discerned no difference, this Court does see one, and believes that if the corrupt inspectors were extorting Mr. Spinale, at a minimum such a determination must inform any sanction imposed. The First Circuit considers such a determination to be relevant as well.[107] In *Columbia Packing Company*, *Inc. v. USDA*, 563 F. 2d 495 (1st Cir. 1977), that court

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[107]*See* also, *United States v. Alfisi*, 308 F.3d 144, (2nd Cir. 2002), which also recognized this distinction. The *Alfisi* decision is discussed herein.

noted, in the context of a FOIA request, that the packing company, which as with the Respondents here were at risk of losing the federal inspection service, had a right to see the personnel records of the former USDA meat inspectors who had been convicted of bribery, *in order to show that the company was a victim of extortion*. The court added that if those records supported the contention that the company was being extorted, that would present "a posture 'tending to mitigate its conduct." *Id.* at 498. *Further*, *the court expressed that if the inspectors were engaged in extortion, the packing company should prevail*. *Id.* at 501.

Mr. Koller then continued with his view of the factors which warranted revocation of the Respondents' PACA licenses. His second factor was the "role that the inspection plays in the industry in terms of being able to quickly resolve any disputes that have transpired in produce transaction... it's important ... that this inspection be accurate and impartial and that it is objective ... in regard to the quality and condition of the product that has been inspected at that time. When you have any suspicion that an inspection has been tainted because of a bribery payment made to a produce inspector to affect the outcome of the inspection certificate, ... including the quality and condition of the product and also in terms of its accuracy, that this undermines the credibility of the inspection process ...and it could result in tens of thousands of dollars in unjustified adjustments to any produce transactions." Koller added their were other "factors," citing the "competitive factor." By this he meant "a wholesaler who is paying bribes to get adjustments to an invoice. They could use this adjustment to sell a product for a lesser value than what may be called for in the market. ... an example ...would be ... a wholesaler ... who has received a particular commodity and they've bribed and received adjustments on the invoice, and they turn around and sell the product at a lower price compared to other competitors on the market...["] . Tr. VI 209-211. Koller also stated there was a deterrent factor ...bribery payments are a serious violation and ... a serious revocation sanction needs to be imposed ... . Tr. VI 211. Koller then added, as another factor, the "aggravating" factor, as "Mr. Spinale has said that

he had been paying bribes to Mr. Cashin as far back as 1991"[108]. Tr. VI 211. The problem with Koller's (and USDA's) analysis is that it collapses if the Court does not find bribery.[109] For the many reasons set forth in this decision this Court finds that bribery has not been established, that the USDA did not present a prima facie case, and, assuming arguendo that those were established, the Respondent's unrebutted evidence established that Mr. Spinale was a victim of soft extortion from the cabal of convicted USDA inspectors.

When USDA counsel asked if it would change his sanction recommendation if Mr. Spinale "made bribe payments to an inspector in order to obtain a fair inspection," Koller said "no" because what "we have is that the bribery payment took place, this is an illegal payment, and that is something that Mr. Spinale elected to do.[110] And by making these bribery payments, is not in keeping with the fair trading requirements of the act in terms of the Respondents not upholding that responsibility. An[d] also, it's, you know, unfair to the -- his fellow wholesalers on the Hunts Point Market in terms of paying these bribes to affect the inspection process overall." Tr. VI 212. Nor did Koller see the fact that Cashin, as a USDA employee, was receiving the payments as a basis for impacting his penalty recommendation because "bribery ... is one the most serious violations of the PACA .. ." Tr. VI 215. For the same reason, bribery, Koller

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[108]Of course, as has been pointed out several times, Mr. Spinale said no such thing.

[109]It is indeed unfortunate that the USDA continually, in its testimony and its briefs mischaracterized the evidence. As but one example, Mr. Koller's statement that Mr. Spinale admitted paying *bribes* as far back as 1991 is flat out incorrect. Whether USDA has ignorantly confused the important distinction between bribery and extortion, or intentionally done so, neither is acceptable in a legal proceeding.

[110]This assertion belied the claim of USDA that it had to wait until the Respondents had put on their case before the sanction witness testified. One of the reasons, in addition to the claim that this was the customary practice, was that it was possible that the sanction witness might change his/her view upon hearing a respondent's evidence. The Court found no basis in the procedural rules for this claim that the sanction testimony should await the conclusion of a respondent's case and it seems obvious that this is simply a strategic move to allow the sanction witness to make any necessary adjustments before expressing the sanction testimony.

did not feel it would be sufficient to impose a civil penalty in lieu of a license revocation. Tr. VI 215. Not surprisingly, Koller would not alter his view when asked to assume that the payments were involuntary because, from his perspective, Mr. Spinale "had a choice of not making the payments - - the *bribery* payments ... ." Tr. VI 216. Obviously, Koller could not, even for purposes of a hypothetical, put aside his presumption that bribery occurred. However, while Mr. Koller could not conceive of a penalty short of license revocation, he conceded that the Court has the authority to recommend a sanction short of a license revocation. Tr. VI 249, 251. Koller expressed the view that a reprimand or a warning letter were not options that he was aware of, however he did believe that a license suspension was available as a sanction. Tr. 251-252. Although he knew of no minimum suspension, he believed that the maximum suspension was 90 days. Tr. VI 252. Koller stated he knew of no other available sanctions. Tr. VI 252.

III. Discussion with Additional Findings

As part of the analysis of this case, it is important to step back for an overview of the government's evidence. When the USDA rested, its case only had two theoretical legs left standing in support of its claim: the testimony of Cashin and the Mr. Spinale's guilty plea to a single count of bribery. Both of these legs, in terms of establishing the USDA's claims and the sanction it seeks, have serious and irreparable flaws. First, regarding Cashin, the Court finds that in all aspects where his testimony conflicted with Mr. Spinale's testimony, Mr.Spinale's testimony was credible and Cashin's was not.[111] The

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[111]It is well established that reviewing courts do not generally usurp a trial court's determinations regarding credibility of witnesses. *United States v. Turner*, 995 F.2d 1357, 1362 (6th Cir.), *cert. denied*, 510 U.S. 904, (1993). Thus, an administrative law judge's "credibility determination will not be disturbed unless it is patently wrong." *Cannon v. Apfel*, 213 F.3d 970, 977. The reasons for this are obvious. The trial judge, when also serving as the trier of fact, "has the best 'opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses ... their facial expressions, attitudes, tone of voice, eye contact, posture and body movements' as well as confused or nervous speech patterns in contrast with merely

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Court paid particular attention to the demeanor, tone, and other indicia of believability during the testimony of these witnesses and concludes that where their testimony conflicted, Cashin did not tell the truth and that Mr. Spinale was truthful. Of course, the Court's credibility determination did not rest entirely on those assessments. Other witnesses, from Mr. Harris Cutler to Mr. Craig Bauer to Edmund Esposito and to Paul Cutler, all provided substantial support for this Court to conclude that Cashin's operation was nothing more than a "holdup" of Mr. Spinale, with Cashin only missing the formality of wearing a mask.

Thus, regarding Cashin, the Court finds that he was extracting a personal "fee" for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits in the critical ways that USDA asserts.[112] That is to say, in no instance

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looking at the cold pages of an appellate record." *United States v. Tolson* 988 F.2d 1494 at 1497. (7th Cir. 1993). Thus, the judge, listening to the testimony, is in the best position to observe, weigh, and evaluate a witness' verbal as well as nonverbal behavior. *Knight v. Chater*, 55 F.3d 309 (7th Cir. 1995). Accordingly it is well settled that a reviewing court should not reweigh the evidence or reconsider credibility determinations made by an ALJ. *Prince v. Sullivan*, 993 F.2d 598, 601-602 (7th Cir. 1991). In sum, the administrative law judge's determinations regarding credibility are entitled to great deference. *Chen v. General Accounting Office*, 821 F.2d 732, 738 (D.C. Cir 1987), *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

[112]As mentioned above, the Court has found it troubling that the USDA in its post-hearing briefs uses the terms "bribes" and "illegal payments" interchangeably. As one example, among many, USDA states that the Respondent admitted that it *bribed* inspectors on many earlier occasions. USDA Reply Brief at 3, 4. As another example, USDA states that "Respondents in the instant case are relying on the accuracy of the inspection certificates *that they admit were the result of bribery*." USDA Reply Brief at 6 (emphasis added). As a third example, USDA states "Mr. Spinale admitted he had been regularly paying bribes to William Cashin for seven years prior to 1998." USDA Reply Brief at 9. Of course, the Respondents never admitted in this proceeding that payments made by Mr. Spinale were *bribe* payments. Rather, Respondents have contended that they were the victims of "soft extortion" by inspectors like Cashin. It is unfortunate that USDA has mischaracterized the Respondents' position. Regrettably,
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among the dates cited in the Complaint[113] did Mr. Spinale seek or obtain from Cashin an inspection report which downgraded a load of produce from its actual condition. Mr. Spinale, like at least some other merchants at Hunts Point, was paying Cashin in order to receive a prompt and accurate inspection. As USDA recognized, both through witnesses and in its statements through counsel, these inspections involve produce and as such, if they are to be useful, it is critical that inspections be carried out promptly. Because of that fact, Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel.[114] The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise. In a real sense, in addition to the Court's observations of Mr. Spinale and Cashin and the other witnesses who supported Mr. Spinale at the hearing, the credibility determination can also be viewed as a choice

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mischaracterizations by USDA were not limited to their description of the Respondents' statements. For example, citing Tr. I, 87, 104, USDA states that "Mr. Cashin testified that he altered the inspection certificate" regarding a March 24, 1999 tomato inspection, but as the transcript clearly shows, the fact is that Cashin had no ability to state, other than in generalities about his conduct, that the particular inspection was altered. It is one thing to make arguments, it is another to concoct facts to support arguments. As still another example, in addressing the April 23, 1999 tomato inspection for which the USDA was not able to rebut the Respondents' assertion that it did not request an inspection for that load, USDA leaves the evidentiary realm and engages in rank speculation asserting "it is *plausible* that Mr. Spinale showed this inspection certificate to ... brokers, sales managers, etc." to obtain a benefit. USDA Reply Brief at 12. (emphasis added). Conjecture is not the equivalent of evidence.

[113]No inference should be made that this Court has a different view about inspections conducted prior to those cited in the Complaint. Rather, unlike the USDA, the Court remains focused on the issues before it which are circumscribed by the instances and dates cited in the Complaint.

[114]The Court does not need to reach the Respondent's contention that Cashin, disappointed that Mr. Spinale would not "loan" him money had a motive to try and entrap him. This should not be construed as a rejection of that claim but simply that Cashin's motives regarding Mr. Spinale in collaborating with the FBI were not significant to the Court's determinations in this case.

between, on one hand, an acknowledged crook, who was able to 'cash-in' on a merchant who dealt with a fragile and time-sensitive commodity, a man who acknowledged spending *nineteen years* taking payments from merchants at Hunts Point, a man who had a compelling need to engage in his extortion of merchants like Mr. Spinale to support the great demands for cash required by the strippers he was addicted to, and, on the other hand, a man who, after serving his country in the Korean War, spent thirty-two years in the produce business, and had a spotless reputation and a respected expertise in tomatoes and potatoes. Viewing the evidence in its entirety this is not a hard determination to make.

Further, the contention advanced by USDA, that Mr. Spinale should have stood up to the corrupt cabal of inspectors, shows a remarkable disconnect from the real world by those have not had to deal with it, except as regulators. It borders on the outrageous to suggest that Mr. Spinale should have taken a more courageous stance in dealing with a corrupt group of federal inspectors, especially not knowing the extent and depth of corruption that he was facing. First, he had already learned that the bureaucracy was much more potent than him. Though many witnesses acknowledged that he is an expert where tomatoes and potatoes are concerned, Mr. Spinale's unrebutted testimony established that he could never win when he appealed the results of an inspection. Losing against the bureaucracy is not exactly a new story. Further, when he voiced other complaints to the USDA, his concerns were brushed aside. As the Court observed, USDA's position is akin to the idea that a motorist, pulled over by a corrupt state trooper for speeding when no violation had occurred, and subtly presented with the option to make a 'payment' or face the bureaucratic machinery by appealing, and though knowing full well that defeat would be a near certainty, the motorist should nevertheless stand one's ground. With good reason, few take on such a challenge. It should also be pointed out that this was not a case of a rogue inspector, acting alone. The breadth of the indictments and convictions demonstrates that the Hunts Point USDA office was contaminated with corruption and that other problems with inspections existed such as faking the number of items inspected and rigging the outcome when grade defects are alleged. Under these egregious conditions, it takes some

chutzpah for the USDA to seek to drive a merchant like Mr. Spinale out of the fruit and vegetable business. However, because such payments under any circumstances are still wrong, Mr. Spinale should not have caved in to the corrupt demands. The Court notes that Mr. Spinale recognizes this and observes that this 73-year-old man has already paid a significant price for that, by virtue of the ordeal of the criminal indictment, the plea to a single count, the associated legal representation fees, the significant fine of $30,000 that he paid, and the ignominy of home confinement with a monitoring device, along with five years' probation.[115]

Regarding the other "leg" upon which USDA supports its case, Mr. Spinale's guilty plea to *a single* count of the nine count indictment, the Court has already spoken to this in its oral ruling on the USDA's motion for summary judgment. Perhaps foreshadowing a recognized weakness with its own case, USDA attempted to avoid entirely the burden of proving violations by Mr. Spinale by bootstrapping the single plea and converting it into its entire case. Any analysis of Mr. Spinale's plea would be disingenuous in the extreme if it began and ended with the initial words spoken by Mr Spinale. While it is true that when before the Honorable Ronald J. Ellis, Magistrate, on January 26, 2001, Mr. Spinale stated: "On August 13, 1999 I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report." Upon finishing his plea, and without interruption nor prompting by any question, Mr. Spinale *immediately* added: "Your honor, I would like to state I never intended to defraud the shippers who had sent me the produce." Indictment Tr. at 10 -11.

Although there are cases standing for the principle that a plea operates to bind one to its terms, every case analyzing the effect of a plea must be evaluated on its own attendant facts. In addition,

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[115]No one should confuse these observations as suggestive that this Court's determinations were based on anything other than its evaluation of the evidence of record and the Court's credibility determinations. Still, the observations are worth noting if for no other purpose than to contrast the price Mr. Spinale has already paid with the treatment received by the USDA's William Cashin for the nineteen years of corrupt activity by the government's own inspector.

USDA's blindness to the fact that people enter guilty pleas for reasons other than being guilty in fact, is another example of its inability to take into account real world decisions. Factors such as: one's age, especially if one is of advanced years; the correct assumption that, even where one is in fact innocent, a jury's decision is unpredictable; and the enormous cost associated with defending oneself, are all real world considerations that enter the equation for anyone facing criminal charges. When those real world considerations are juxtaposed against the option of pleading to a single count and the elimination of any jail time, it would not be irrational for one to "choose" to plead guilty. Indeed, it can be credibly asserted that it would be an irrational decision for an innocent person to refuse such a plea arrangement.

The court's views regarding Mr. Spinale's guilty plea were addressed at the outset of this PACA hearing. At that time the Court issued its ruling from the bench regarding the Complainant's Motion for a Decision Without a Hearing.[116] Excerpts (with corrections) from those remarks from transcript pages Tr. I 5 - 20, along with additional comments, follow: [T]he Motion before the Court rests upon the transcripts of the guilty plea made by Anthony Spinale and the related sentencing hearing in Southern District of New York Criminal Action 99-CR-1093. The Motion is also based on statements made in the civil action brought by Mr. Spinale and G&T, docket number 03-CV-01704. That civil action alleged that the United States Department of Agriculture, acting through its inspectors, *extorted* money from the Plaintiffs in violation of Section 1962(c) of the Racketeer-Influenced and Corrupt Organizations Act, better known as RICO.

While the Complaint references ten alleged instances of illegal payments, Mr. Spinale pled guilty [in the criminal indictment] to *one* count of Bribery of a Public Official. The Department of Agriculture now states that because Mr. Spinale pled guilty to count nine of the

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[116]The motion was titled "Order Regarding Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice." Although the Court stated its intention to issue a formal order on the motion, it later decided that, having denied the motion and as the hearing thereafter proceeded with both sides fully presenting their case, it was unnecessary to do so.

indictment and because he asserted in his civil action that illegal payments were made to agriculture inspectors, which illegal payments include the same illegal payments identified in this complaint, that Mr. Spinale should now be estopped from claiming that no illegal payment took place in this administrative proceeding. Thus, the Department of Agriculture is contending that the guilty plea, when coupled with the statements in Mr. Spinale's civil action, remove any issues of dispute as to material facts, and, as a consequence, a decision without a hearing is warranted.

[I]n brief, the complaint in this case charges that the Respondents G&T and Tray-Wrap, both licensed under the Perishable Agricultural Commodities Act ...[violated that Act in that] that those two companies made illegal payments to a United States Department of Agriculture inspector in connection with federal inspections of perishable commodities. In particular, the Complaint cites four instances of such alleged illegal payments made by G&T during July and August of 1999 and six instances of illegal payments made by Tray-Wrap from March through June of 1999. On the basis of these ten alleged illegal payments, the Department of Agriculture asserts that the Respondents' acts were willful, flagrant, and repeated violations of Section 2.4 of the PACA "by failing, without reasonable cause," and this is a quote from that particular section, "to perform any specification or duty, expressed or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate of foreign commerce." [The Court] would love to meet the draftsman of that particular provision.

With that aside, the Court notes that on January 9, 2004, Magistrate James C. Francis IV issued his report and recommendation regarding a motion to dismiss the aforementioned RICO action brought by Respondents. That recommendation urging dismissal of the action was based on several grounds, including the determination that the United States is not a person under RICO. While the magistrate noted that a criminal conviction, including one arrived at through a plea, constitutes estoppel in a subsequent civil proceeding, *such estoppel is limited to those matters determined by the judgment in the criminal case*. From the Court's perspective, it is significant that the magistrate also stated that it is possible to read the RICO action as alleging that

Mr. Spinale's guilty plea does not bar his claim, because the bribes he paid were extorted from him by the inspector defendants. While the magistrate also determined that Mr. Spinale's guilty plea waived all non-jurisdictional defenses and thereby eliminated an extortion defense, that court added, "*It may be that the Plaintiffs are also claiming damage on the theory that they received inaccurate inspections when they refused to bribe the inspector defendants, implying that the inspector defendants deliberately misgraded their produce in order to coerce them into paying the bribes*." (emphasis added). The magistrate stated that if that is the Plaintiffs' assertion, they should be allowed to assert such a claim and that such a claim should be allowed to be re-pled. Of course, this is exactly the defense that the Respondents ably presented in this hearing.

In adopting the magistrate's recommendation, Judge Wood held that judicial estoppel did apply with the Respondents' RICO action, not because of Mr. Spinale's guilty plea, "but rather because of the facts he asserted in connection with that Plea." Judge Wood's Order, at pages 9 and 10. However, bearing in mind that the issues in this administrative Complaint are whether G&T and Tray-Wrap willfully, flagrantly, and repeatedly violated Section 2.4 of the PACA by making illegal payments on the ten dates cited in the complaint and further whether, on consideration of the attendant facts, revocation of the Respondents' licenses is warranted, it is apparent to this Court that the facts asserted in connection with the plea were, at best, equivocal. As agriculture itself concedes, the charges against Mr. Spinale for the alleged Tray-Wrap bribes were dropped. With that state of affairs, Agriculture is left to assert that the Tray-Wrap claims were revived for purposes of its Motion for a Decision Without a Hearing on the basis of the Respondents' RICO complaint.

When before Magistrate Ellis on January 26, 2001, and asked what he did, Mr. Spinale stated in what was obviously a prepared statement: "On August 13, I paid money to Bill Cashin ... for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report. On the other dates in the indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report."

From the Court's perspective, it is noteworthy that Mr. Spinale, in making that statement, did not state that he sought a report that would overstate the extent of defects in the produce being inspected, only that he paid Mr. Cashin to "influence the outcome of the reports". It is the Respondents' contention in this proceeding, just as it was in connection with their ultimately dismissed RICO action against the USDA named inspectors, that the inspectors were extorting them, and that they only way that they could obtain a fair and accurate assessment of the condition of the produce for which inspections had been requested was to pay off those inspectors. And that is the heart of the matter in this case. Obviously, it is going to be critical for [the Court] to make credibility assessments in this case. [The Court will] have to determine which version is more credible, and that will depend upon my assessment of all of the factors that a judge [and] a jury would need to consider. In this instance, the Court acts as both the fact finder and the determiner of law. In terms of assessing credibility, [the Court will] have to assess the demeanor and believability of the witnesses, including their responses upon cross-examination, and make [its] best effort to determine where the truth lies.

Now [the Court] just referred to Mr. Spinale's statement at the time he made his plea. The plea, however, can not be read in isolation, as Mr. Spinale's statement at sentencing augments his plea. When before a Judge Casey for sentencing on August 21, 2001, Mr. Spinale stated: I accepted full responsibility for what I did. I also said I never intended to defraud the shipment of semi-produce.[117]

The Court notes that Agriculture looks for support to the Decision in *Post & Taback,* PACA Docket number D-01-0026, issued December 16, 2003, and in which decision it was referenced that Post and Taback's employee, Alfisi, had been convicted of *bribing* an

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[117]The Court noted that Mr. Spinale then added: "If you would like me to expand on that or explain it, I would be more than happy to." This Court noted that Mr. Spinale's remarks after that seemed to be somewhat disjointed, as he then added: "The last thing I want to say, Your Honor, is that I am a hardworking guy, and I never did anything bad in my life, and I think I deserve a break. That is all I have to say." One can only speculate why more was not stated but there is a risk that saying too much can unravel a guilty plea. Whatever may have been the reason, it does not detract from the critical and consistent statement by Mr. Spinale, both in his plea and at sentencing, that he was not admitting to defrauding anyone.

agriculture inspector in connection with produce inspections. [The Court] note[s] that [case] involved the very same inspector who has been subpoenaed for this proceeding and who is at the heart of this matter in terms of the Government's case, at least, seems to be one of the critical witnesses. That's Mr. William Cashin. The same Mr. Cashin was involved in the *Post & Taback* decision.

A few additional comments beyond those made in the Court's ruling on Complainant's Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice are in order. *In re: Post & Taback, Inc.*,[118] PACA Docket No. D-01-0026, December 16, 2003, 2003 WL 22965185 (U.S.D.A.), Decision of the Judicial Officer, William G. Jenson, it was noted that Post & Taback's employee, Alfisi, *bribed*[119] a USDA inspector and used the fraudulent information generated through that bribe to "make false and misleading statements to produce sellers." As noted, Alfisi was paying the same William Cashin involved in this proceeding. One of the distinctions between *Post & Taback* and this case, is that Cashin testified his inspections for Alfisi would go over the good delivery marks. Cashin offered no such testimony regarding the inspections of G & T and Tray-Wrap. Although the Judicial Officer held that USDA did not have to introduce independent evidence of bribery in the administrative proceeding where there had been a trial and a finding of bribery on Alfisi's part, it must be noted that in Mr. Spinale's case there was no trial but rather a plea to a single count involving one of the Respondents – G & T.[120] The Judicial Officer also noted that in

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[118]A significant part of the decision in *Post & Taback* dealt with the Respondent's failure to make full and prompt payments, an aspect that has no relevance to this case.

[119]See also, on the subject of bribery under this section, *JSG Trading v. USDA*, 176 F.3d 536 (D.C. Cir. 1999), *In re Tipco, Inc.*, 50 *Agric. Dec.* 871, 1991 WL 295153 (1991), and *In re Sid Goodman & Co.*, 49 *Agric. Dec.* 1169, 1990 WL 320442 (1990).

[120]As noted, as a consequence of the plea, all charges against Tray-Wrap were dropped.

Alfisi's case[121] there was no evidence of extortion, and this is another distinction between the cases. Another difference between *Post & Taback* and this case is that the administrative law judge in *Post & Taback* "did not make a finding with respect to [the] unlawful gratuities and did not explain his failure to find that Mark Alfisi paid these unlawful gratuities .... [and accordingly] [b]ased on the record before [the Judicial Officer it was determined that] ... Alfisi paid unlawful gratuities ... ." *Id.* at * 15 (emphasis added). Still another distinction between the cases is that in *Post & Taback* the violations were repeated because, as the Judicial Officer noted, "repeated means more than one." *Id.* at *18. In this case, *at most*,[122] there is evidence to support only one violation: the single count pled by Mr. Spinale.

In terms of the appropriate sanction, the Judicial Officer noted that the sanction should take into account "all relevant circumstances." *Id.* at * 19. This Court also considers it noteworthy that as the Respondent did not have a PACA license, the appropriate sanction

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[121]After his trial, which took six days and for which the jury deliberated for four days, Alfisi appealed his conviction. The Second Circuit noted in that appeal that to support a bribery charge, a "corrupt" intent must be shown and that this means a "specific intent to give ...something of value *in exchange* for an official act." Thus, it distinguished bribery from an unlawful gratuity, as the latter lacks the *quid pro quo*. The court, recognizing the key difference, held that the jury instructions were "sufficiently specific" to "spell out the difference" between the two. *United States v. Alfisi*, 308 F. 3d 144, (2nd Cir. 2002) (emphasis in original). The point is that the jury could have found that Alfisi's payments were unlawful gratuities made for or because of an official act, namely to have Cashin perform his job faithfully but, after four days of deliberation, determined that bribery occurred. As the fact finder here, this Court has found that Mr. Spinale was not *bribing* Cashin but that unlawful gratuities were made. These unlawful gratuities, as should be abundantly clear in this decision by now, were made because the corrupt inspector, Cashin, was demanding payments each time he made a *visit* to the Respondents' place of business, if the Respondents wanted a fair, accurate and timely inspection.

[122]For the reasons already set forth in this decision this Court believes it is appropriate to look at Mr. Spinale's plea in its full context and that when that is done the plea should not be used to establish even one violation of the PACA in this proceeding. However, even if an approach is taken that ignores the context of the full plea, it is noted that there was no trial evidence, as in Alfisi's case, and that, a single violation, as noted by the Judicial Officer, can not establish repeated violations. In *Post & Taback*, the USDA's sanction witness based his recommendation in part on "the number of violations." *Id.* at * 19.

was "the publication of the facts and circumstances of Respondent's violations."[123] *Id.* at * 19.

The Court also notes that the Judicial officer, while speaking about the responsibility of wholesalers and other produce merchants, has spoken to the importance of honest inspectors. In the case of *Greenville Packing Company* at 59 Agricultural Decisions 194 (2000), it was stated that "[b]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. ... If inspectors accept bribes ... it compromises their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection."[124] 59 *Agric. Dec.* at 208. Obviously, the compromise to the integrity of the inspectors and the inspection system is greater where the initiation of demands for money originates from the inspectors themselves.

It is also worth noting that, although Alphesy had been convicted of bribery, this did not operate to deny Post and Taback from an administrative hearing on its license revocation proceeding. While Mr. Spinale's plea to count nine and the statements in the RICO complaint filed by G&T and by Mr. Spinale, collectively concede that illegal payments took place, these hardly constitute sufficient cause to warrant revocation of the licenses of G&T and Tray-Wrap when the central contention of the Respondents is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one.

In the ruling from the bench at the outset of the hearing in this case, the Court also noted the USDA's position that even if the Respondents' contentions that they were being extorted to obtain an accurate inspection are true, then these individuals had a duty to stand

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[123]For the reasons expressed, this Court believes, based on the record, that dismissal is the appropriate result here but that at most any sanction should be limited to a publication of the facts and circumstances derived from the record.

[124]The principle of an honest inspectorate takes on additional gravitas when it is determined as here that soft extortion, not bribery, was at work.

up against the extorting inspectors. Thus, it is accurate to state that Agriculture contends, from the Court's understanding of its argument, that the *Respondents had a duty to regulate the regulators*.

Where the issue is the appropriateness of revoking PACA licenses and given that the statutory provisions provide that a license may be revoked where there are such violations, it is incumbent upon this Court to fully appreciate the circumstances surrounding the illegal payments. Indeed, as noted in *S. S. Farms Linn County, Inc*. at 50 Agricultural Decisions 473, 476, it was stated that the sanction in each case is to be determined by examining the nature of the violations in relation to the remedial purpose of the regulatory statute involved along with all relevant circumstances always giving appropriate weight, of course, to the recommendations of the administrative officials charged with responsibility for achieving the Congressional purpose.

In its ruling from the bench this Court noted that the issue of the effect of the guilty plea is a complex matter. Commentators also have recognized that the preclusive effect of a guilty plea is such a complex matter. For example, an extensive article at 70 Iowa Law Review 27, October 1984, makes that observation. This is equally true when the issue involves the effect of guilty pleas when dealing with subsequent administrative hearings. It has also been observed by these commentators that the existence of a factual basis for a guilty plea does not mean that the individual agrees that he or she committed the crime. Rather, it represents an acknowledgment that there is sufficient evidence to conclude that the defendant has acted as charged. Courts and commentators have recognized that the reality is that defendants enter guilty pleas for a variety of reasons, not the least of which is the incentive to obtain a lighter sentence when facing the possibility of a more significant one. Thus, while a guilty plea serves as an admission, many jurisdictions do not regard it as conclusive in subsequent civil proceedings. The Court also noted a brief article on this subject at 22 Colorado Lawyer 1889, September 1993.

In researching this matter, the Court also determined that the effect of a guilty plea is largely determined upon the particular state where the proceedings is occurring. And so in this case, one could look to the State of New York. As a matter of state law, New York takes the position that a guilty plea may have a preclusive effect in a subsequent

civil action, but that the party asserting such effect must demonstrate that the issue is *identical to* and *necessarily decided* at the prior proceeding, and further that the party seeking to be precluded from re-litigating the issue had a full and fair opportunity to contest it in the prior proceeding. In this administrative litigation, seeking as it does the revocation of G&T's and Tray-Wrap's PACA license, the most basic observation is that the criminal plea relied upon by Agriculture was made by Mr. Spinale, not by the Respondent corporations cited here. Accordingly the Court makes the observation that neither G&T, nor Tray-Wrap, the Respondents in this proceeding, were part of the criminal proceeding. Accordingly, it is without merit to assert that the Respondents had a full and fair opportunity to contest the prior Determination.

As the foregoing discussion and findings amply demonstrate, the sanction sought by the USDA must fail as it has not been shown that the Respondents committed willful, flagrant and repeated violations of Section 2(4) of the PACA, 7 U.S.C. § 499(b)(4) and because revocation or suspension is not warranted in any event. Accordingly, the following Order is issued.

Order

The case brought by the United States Department of Agriculture in the above captioned matter is hereby DISMISSED. Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after the date of service upon Respondents as provided by Section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142 unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days as provided in Section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

In re: MARIO J. GREGORI.
PACA-APP Docket No. 02-0004.
De cision and Order.
Filed: April 8, 2005.

PACA – Responsibly connected – Criminal plea bargain by one corporate owner not necessarily binding on another owner –Reparation award unpaid.

Andrew Y. Stanton, for Complainant.
Mark R. Walling, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] I decide that Petitioner Mario J. Gregori, who was previously mistakenly identified as Mario J. Gregori, Jr.,[1] was responsibly connected as defined by 7 U.S.C. § 499a(b)(9) during 2001 and 2002, with Marky's and Sons, Inc. My decision is based upon Petitioner Mario J. Gregori's ownership, during 2001 and 2002, of 25% of the shares in Marky's and Sons, Inc. Such ownership under the circumstances here cannot be considered "nominal." I mention five reasons: (1) Mario J. Gregori truly owned and controlled his one-fourth interest; he was not holding that interest "in name only" for the benefit of another; (2) one-fourth ownership of a company is substantial; (3) no other shareholder owned a larger share; each shareholder owned the same portion, 25%; (4) the other shareholders were his brothers; they were family, not strangers, in this company that their father originated; and (5) he had been an "insider" who chose to quit being an officer and a director; he had until 1999 been the President and a Director. Consequently, by being a 25% shareholder in Marky's and Sons, Inc., who was not a nominal shareholder, Petitioner Mario J. Gregori was responsibly connected to Marky's and Sons, Inc. when it violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b, by failing to pay reparation awards.

Procedural History

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[1] Mario J. Gregori, Jr. is Petitioner's son, who, at the time of the hearing, was a 20-year old college student and is not alleged to have been responsibly connected with Marky's and Sons, Inc.

[2] Petitioner Mario J. Gregori filed his petition for review on February 25, 2002. The agency record was "late filed"on March 21, 2002, over Petitioner's objection, as authorized by U. S. Administrative Law Judge Dorothea A. Baker by Order dated April 12, 2002.

[3] Confusion arose regarding Petitioner's true name, but clarity came from the hearing. Petitioner's true name is Mario J. Gregori, without the "Jr."[2] The case caption was amended during the hearing to "Mario J. Gregori, Petitioner." Tr. 17.

[4] Petitioner Mario J. Gregori (hereinafter frequently referred to as Mario J. Gregori) has been represented throughout the proceeding by Watson, Bennett, Colligan, Johnson & Schechter, LLP, of Buffalo, New York; by James W. Bennett, Esq., by Christopher B. Reich, Esq., and by Mark R. Walling, Esq.

[5] Respondent Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA (hereinafter frequently referred to as "PACA") has been represented throughout the proceeding by Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture.

[6] Judge Baker scheduled a hearing for March 12, 2003, in Buffalo, New York. On October 16, 2002, the case was reassigned to me, in view of Judge Baker's pending retirement. I held the hearing as scheduled. Witnesses testified and exhibits were admitted into evidence. Post-hearing, additional exhibits were admitted into

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[2]Petitioner's counsel (prior to Mr. Walling's involvement) filed the Petition using Mario J. Gregori, Jr. when referring to Petitioner Mario J. Gregori, because the PACA notification of the responsibly connected determination included Jr. The Jr. apparently crept into PACA's correspondence through the two affidavits (CARX 6) that Petitioner's counsel had submitted to PACA and which are also part of the Petition (Exhibit E). Petitioner Mario J. Gregory signed his own affidavit without correcting it, adding to the confusion. Petitioner Mario J. Gregori has a son who was born in or about 1982, whose name truly IS Mario J. Gregori, Jr. Petitioner Mario J. Gregori, full name Mario James Gregori, born in 1955 (Tr. 11), the son of the originator of the company, Mario Gregori (deceased), was called Junior at work, but he is Mario J. Gregori the first, as his father did not have the middle name James. Tr. 10-16.

evidence. The parties filed proposed transcript corrections, on June 4, 2003 and on June 18, 2003, which are hereby accepted.

[7] Mario J. Gregori's exhibits admitted into evidence are PX A, B, C, D, E, F & G (all attached to his Petition); and PX 1- PX 7. Several of these exhibits are filed within the case file instead of a separate exhibit file.

[8] PACA's exhibits admitted into evidence include the Certified Agency Record, which contains the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, dated January 17, 2002 (CARX); and CARX 1-9; and RX 10 through RX 13. Some of these exhibits are filed within the case file instead of a separate exhibit file.

[9] Mario J. Gregori's Proposed Findings of Fact and Conclusions of Law with opening brief were timely filed on July 31, 2003; his reply brief was timely filed September 16, 2003.

[10] PACA's Proposed Findings of Fact, Conclusions, and Order with supporting response brief were timely filed August 22, 2003.

Findings of Fact

[11] Mario J. Gregori is an individual who was born in 1955 and whose mailing address at the time of hearing was 1287 Tanglewood Drive, North Tonawanda, New York 14120. Tr. 11-12.

[12] Marky's and Sons, Inc. (hereinafter frequently referred to as Marky's) was incorporated in approximately 1991. Tr. 89.

[13] Mario J. Gregori was a 1/3 owner of the shares of Marky's, originally, as were two of his brothers, Dominic and Peter, each being a 1/3 owner of the shares. Tr. 89.

[14] Mario J. Gregori, and his brothers Dominic and Peter, each became an equal shareholder with their brother John in 1998, each being a 1/4 owner of the shares. Tr. 90.

[15] Marky's had paid, by the date of the hearing, the $13,400 Reparation Award,[3] plus interest and handling fee, that had been

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[3]The award was $13,400, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-

entered against Marky's by the Judicial Officer on March 13, 2001, in favor of Everkrisp Vegetables, Inc. CARX 2. Tr. 222.

[16] Marky's failed to pay the $6,023.50 Reparation Award,[4] plus interest and handling fee, that had been entered against Marky's by the Judicial Officer on March 13, 2001, in favor of Gold Ribbon Potato Co. CARX 2. Tr. 227.

[17] Marky's failed to pay the $13,557 Reparation Award,[5] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on April 12, 2001, in favor of K.F. Thiel & Son's Produce. CARX 2. Tr. 228.

[18] In addition to the reparation awards identified in paragraphs [15], [16], and [17], which were identified in PACA's responsibly connected notification letter, four additional reparation awards were entered against Marky's during 2001 and 2002, as identified in paragraphs [19], [20], [21], and [22].

[19] Marky's failed to pay the $4,775 Reparation Award,[6] plus interest and handling fee, that had been entered against Marky's by the Judicial Officer on July 9, 2001, in favor of Tri Campbell Farms. RX 11. Tr. 228.

[20] Marky's failed to pay the $11,106 Reparation Award,[7] plus interest and handling fee, that had been entered against Marky's by the

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(...continued)

[4]The award was 6,023.50, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-135. CARX 2.

[5]The award was 13,557, with interest thereon at the rate of 10 per centum per annum from September 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-140. CARX 2.

[6]The award was $4,775, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-204. RX 11.

[7]The award was 11,106, with interest thereon at the rate of 10 per centum per annum from September 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-204. RX 11.

Judicial Officer on July 31, 2001, in favor of Sharyland L.P., d/b/a Plantation Produce Company. RX 11. Tr. 228.

[21] Marky's failed to pay the $50,656.87 Reparation Award,[8] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on August 29, 2001, in favor of Agri-Empire. RX 11. [22] Marky's failed to pay the $17,537.50 Reparation Award,[9] plus interest and handling fee, that had been entered against Marky's, by the Judicial Officer on January 2, 2002, in favor of Hatco Packing. RX 11. Tr. 228.

[23] When the seven Reparation Awards identified in paragraphs [15], [16], [17], [19], [20], [21] and [22] were entered, Mario J. Gregori was a 25% shareholder in Marky's, and he remained a 25% shareholder through at least March 12, 2003, the date of the hearing.

[24] When the reparation awards were entered, Mario J. Gregori had not been an employee of Marky's for eight months or longer, and he had not been an officer or director of Marky's for nearly twenty months or longer.

[25] Until July 19, 1999, Mario J. Gregori was the President and a Director of Marky's. Tr. 91-94; 177. PX 1.

[26] Beginning about three weeks after July 19, 1999, and lasting for approximately one year, into July 2000, Mario J. Gregori continued to work as a buyer for Marky's, but as an employee only. Tr. 94-96; 177-80. PX 2.

[27] While employed by Marky's, Mario J. Gregori was the buyer of the potatoes from Everkrisp Vegetables, Inc. referenced in paragraph [15] and from Gold Ribbon Potato Co. referenced in paragraph [16]. Tr. 182-85, 238-39. CARX 3-4.

[28] Mario J. Gregori's last pay stub as an employee of Marky's was for the pay period ending July 2, 2000. Tr. 95-96; 179-80.

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[8]The award was 50,656.87, with interest thereon at the rate of 10 per centum per annum from July 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-01-251. RX 11.

[9]The award was 17,537.50, with interest thereon at the rate of 10 per centum per annum from November 1, 2000, until paid, plus the amount of $300. PACA Docket No. RD-02-044. RX 11.

[29] As of March 10, 2003, two days before the hearing, six of the seven reparation awards remained unpaid, those identified at paragraphs [16], [17], [19], [20], [21] and [22]. Tr. 222, 227-28.
[30] Mario J. Gregori was not served with copies of, and was unaware of (until notified in connection with PACA's consideration of his being responsibly connected), six of the seven reparation awards entered against Marky's. Tr. 155-57. He was aware, at least by May 2001 (Tr. 228-231, PX B), of the Everkrisp Vegetables, Inc. Reparation Award, which had been paid by the time of the hearing.

Discussion

[31] By being a 25% shareholder in Marky's and Sons, Inc., who was not a nominal shareholder, Mario J. Gregori was responsibly connected to Marky's and Sons, Inc. when it violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b. [32] This Discussion, paragraphs [31] through [44], focuses on (1) why I determine that Mario J. Gregori was not actively involved in Marky's failures to pay reparation awards; and (2) why I determine that Mario J. Gregori was not a nominal shareholder and thus must nevertheless be determined to be responsibly connected to Marky's during its PACA violations.
[33] The standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 *Agric. Dec.* 604 (1999) (Decision and Order on Remand), as follows:

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

> the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 *Agric. Dec.* at 610-11.

[34] Mario J. Gregori meets the first prong of the responsibly connected test; he was ***not actively involved***: he did not exercise judgment, discretion, or control ***with respect to the activities that resulted in a violation of the PACA, that is, failure to pay reparation awards***.

[35] The time period involved here is the time period in which Marky's violated the PACA by failing to pay reparation awards. The reparation awards were entered beginning in 2001. Marky's failure to pay them began in 2001 and continued into 2002. Consequently, whether Mario J. Gregori was actively involved in Marky's activities prior to 2001 is irrelevant to my decision.

[36] Based on the credible testimony of Mario J. Gregori and of each witness he called, and supporting documentation, I find that Mario J. Gregori did not participate in the activities of or decisions made by Marky's and Sons, Inc. that led to its failures to pay the reparation awards. Such activities of and decisions made by Marky's would have occurred in 2001 or 2002. Mario J. Gregori had previously ceased being an officer and a director, in mid-1999; and he no longer worked for Marky's and Sons, Inc., having last been an employee in mid-2000.

[37] PACA argues that Mario J. Gregori was Marky's buyer who purchased some of the perishable agricultural commodities that Marky's failed to pay for, those purchased from Everkrisp Vegetables, Inc. and Gold Ribbon Potato Co. I determine that such occurrences would have been ***prior*** to the time during which the responsibly connected determination must be made here, 2001 and 2002. Mario J. Gregori last worked for Marky's in July 2000. Tr. 94-96. PX 2.

[38] PACA argues that Mario J. Gregori still worked for Marky's in 2001, based on the $5,466 in wages from Marky's shown on his 2001 income tax return (PX 6). At the hearing it became clear that it was error to attribute that income to Marky's. I determine that the $5,466 in 2001 income was paid by Big M Services, Inc., the new corporation which Mario J. Gregori formed on September 22, 2000. PX 5, PX 6,

first page (Mario J. Gregori's 2001 W-2 form); PX 7 (2001 income tax return, Schedule E); PX F; Tr. 111-51.

[39] PACA argues that Mario J. Gregori was noted as a person to contact in the April 2000 Blue Book, the September 2000 Red Book, and the August 9, 2001 electronic Blue Book. I determine that the obsolete, inaccurate Blue Book and Red Book listings, which Marky's apparently had failed to update, do not render Mario J. Gregori actively involved beginning in 2001. Tr. 158-60; 164-69.

[40] PACA argues that Mario J. Gregori can be considered actively involved because of his failure to exercise the authority he held as a 25% shareholder to obviate the violations by Marky's, citing *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988), and also the Judicial Officer's decision in *In re Anthony L. Thomas*, 59 *Agric. Dec.* 367, 386 (2000). Although those cases provide persuasive authority, the evidence here does not persuade me that Mario J. Gregori contributed to Marky's failure to pay the reparation orders; or that Mario J. Gregori could have, by virtue of his status as a 25% shareholder of Marky's, done anything to prevent Marky's from failing to pay the reparation orders. Consequently, I decline to find Mario J. Gregori to have been actively involved beginning in 2001 based upon his 25% ownership.

[41] Nevertheless, Mario J. Gregori was unable to establish both of the two prongs required to avoid being found responsibly connected. He did establish one of the two prongs: he proved by a preponderance of the evidence that during 2001 and 2002, he was not actively involved in Marky's and Sons, Inc.'s failures to pay for the perishable agricultural commodities that are evidenced by the unpaid reparation awards. But he cannot prove that he is a nominal shareholder.

[42] Cross-examination on March 12, 2003, by Andrew Stanton (Tr. 193-96), solidly established Mario J. Gregori's ongoing status as a 25% shareholder in control of his shares:

By Mr. Stanton:

Q. Now, you still have 25 percent stock interest in Marky's and Sons, isn't that right?

By Mario J. Gregori:

A. Yes, sir.

By Mr. Stanton:

Q. And you never gave that up, you still have it today, correct? You never gave it up?
By Mario J. Gregori:
A. Right, I still have it today.
By Mr. Stanton:
Q. All right. Now there's no reason why you just couldn't have written a letter to John Gregori, the president, and say, I hereby give up my stock interest, isn't that true? You could have done that?
By Mario J. Gregori:
A. Well, in my mind, who would buy my stock from - - from a family business? I would . . .
By Mr. Stanton:
Q. Well, you could have just given it up to Mr. - - to your brother. You could have just said, I hereby turn in my stock, and that's it, isn't that true?
By Mr. Walling:
Your Honor, I object.
By Mario J. Gregori:
A. But that never came to mind.
By Mr. Walling:
That . . .
By Administrative Law Judge:
Just a moment.
By Mario J. Gregori:
A. I mean the stock part . . .
By Administrative Law Judge:
Just a moment. Let me hear your lawyer's objection. Mr. Walling.
By Mr. Walling:
It's really - - it's really asking for a legal opinion, whether he could just give up his stock by writing a letter. It's really a legal issue. It's not a fact issue.
By Administrative Law Judge:
Objection is noted but overruled. The witness may answer. Now, do you remember his question?
By Mario J. Gregori:
A. Yeah, about the stock.
By Mr. Stanton:

Q. You could have written a letter to your brother, John Gregori, the President of Marky's and Sons, and just said, I hereby give up my stock. You could have done that, isn't that true?
By Mario J. Gregori:
A. Yeah.
By Mr. Stanton:
Q. But you chose not to do it?
By Mario J. Gregori:
A. Right. And I . . .
By Mr. Stanton:
Q. That would have meant - - that would have meant, of course, not getting money for your stock, right?
By Mario J. Gregori:
A. That's correct.
By Mr. Stanton:
Q. And you didn't want that?
By Mario J. Gregori:
A. Well, I'd like to get what I had coming to me. That's . . .
By Mr. Stanton:
Q. Right.
By Mario J. Gregori:
A. . . . I only had 25 percent of the company. I'd like to get my share.
By Mr. Stanton:
Q. So you were hoping to get something in return for your 25 percent?
By Mario J. Gregori:
A. Yes, sir.
By Mr. Stanton:
Q. And you're still hoping to get that now, right?
By Mario J. Gregori:
A. Whatever. If I do, I do. If I don't, I don't. I mean, yeah, still hoping to get it, yes, sir.
By Mr. Stanton:
Q. Isn't that the reason you just didn't abandon your stock, just didn't give it up?
By Mario J. Gregori:
A. Yes, sir, that is the reason why I didn't abandon it, yes.

Tr. 193 - 96.

[43] During April 12, 2001 through February 2, 2002, Mario J. Gregori owned 25% of Marky's, as he had since 1998. (Before that, he owned an even larger percentage, 33-1/3%.) An owner need not control a company to be found responsibly connected. Every holder of more than 10% of the outstanding stock of a corporation is held to be responsibly connected, unless he can prove that he should be excepted (under the two prong test). The prong that Mario J. Gregori cannot prove is being a nominal shareholder; for the reasons stated in paragraph [44], I hold that he was not.

[44] First, Mario J. Gregori truly owned and controlled his one-fourth interest; he was not holding that interest "in name only" for the benefit of another. Second, one-fourth ownership of a company is substantial. Third, no other shareholder owned a larger share; each shareholder owned the same portion, 25%. Fourth, the other shareholders were his brothers; they were family, not strangers, in this company that their father originated. And last, he had been an "insider" who chose to quit being an officer and a director; he had until 1999 been the President and a Director. Such a shareholder cannot be considered nominal. Thus, even though he was not actively involved during 2001 and 2002, Mario J. Gregori was responsibly connected. He cannot prove the second prong of the *Norinsberg* exception.

Conclusion

[45] By being more than a 10% shareholder, in fact a 25% shareholder, in Marky's and Sons, Inc., Mario J. Gregori, who was not a nominal shareholder, was responsibly connected to Marky's as defined by 7 U.S.C. § 499a(b)(9), during 2001 and 2002, when Marky's violated section 2 of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b) by failing to pay reparation orders.

Order

[46] This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing

Service, USDA, contained in his letter dated January 17, 2002 (see CARX), that Mario J. Gregori was responsibly connected with Marky's and Sons, Inc. during the time of Marky's failure to pay reparation awards in violation of the PACA, which I find to have been during 2001 and 2002. [47] Accordingly, Mario J. Gregori is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

[48] This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A). Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

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

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

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral

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

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

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

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

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

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial

review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

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

7 C.F.R. § 1.145

In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Decision and Order.
Filed April 8, 2005.

PACA – Responsibly connected – Partial payment – *Scamcorp* rule.

David Richman, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Baiardi Chain Food Corp. (Baiardi) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities.

Procedural History

On August 1, 2001, a complaint was issued by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint charged respondent with failure to make full payment promptly to 67 sellers in the amount of over $830,000 for 343 lots of perishable agricultural commodities. Respondent filed an answer, denying the violations, on October 15, 2001. On May 31,

2002, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be issued. In its July 17, 2002 Opposition to the motion, Respondent contended that it was entitled to a hearing because there were contested issues of fact, and because it had "made payment" and because written agreements took the dispute "outside the jurisdiction of the PACA." Former Chief Judge James Hunt denied the Motion and the matter was set for hearing.

After several postponements and the eventual reassignment of the case to the undersigned judge, a hearing was conducted on February 2, 2004, in New York City. Complainant was represented by David Richman, and Respondent was represented by Paul Gentile. The hearing was completed on May 25, 2004.[1] Both parties subsequently filed briefs.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948 until its license terminated when it failed to pay the annual renewal fee on June 8, 2001. David Axelrod owned respondent from at least 1998 until the license terminated. CX 1. Complainant received a number of reparation complaints, generated by Baiardi's alleged nonpayment for produce, between October 2000 and January 2001, and so began an investigation of Baiardi in early January 2001. Carolyn Shelby, a marketing specialist with Complainant, personally conducted the investigation and met with Mr. Axelrod on January 8, 2001. Tr. 38. At her request, he produced an "entire sack of unpaid invoices," Tr. 41, and confirmed that each was a "past due and unpaid produce transaction." *Id.* These unpaid invoices involved 67 different companies and 343 separate transactions. CX 5-71, and totaled over $830,000. Axelrod also printed out for Ms. Shelby a copy of Baiardi's accounts payable aging. CX 72. After Ms. Shelby copied the records and returned the

[1] At the hearing, Complainant presented the testimony of four witnesses. Respondent called no witnesses. Complainant's exhibits (CX) 1-3, 5-72, 74-76, and 78 were admitted. Respondent's exhibits (RX) 1-50, 150-154 were also admitted.

originals to Mr. Axelrod, he confirmed that Respondent's unpaid invoice records were accurate. Tr. 41-42.

Ms. Shelby conducted two brief follow-up investigations in March 2002 and November 2003, where she contacted several of Respondent's creditor companies to determine whether Respondent still owed them money. Tr. 64, CX 74, 77. She was told by employees or agents of nine companies in March 2002 that Respondent still owed them over $342,000, and in November 2003 was told by employees or agents of seven companies that Respondent still owed them over $166,000 in unpaid produce transactions. Tr. 65, CX 74, 77.

Many of the creditor companies eventually received partial payment. Thus, while at the time of the initial investigation by Ms. Shelby, Agrexco (USA), Ltd. was owed over $21,000, a portion of the debt, $11, 791.45, was paid to Agrexco in 2002. Tr. 14-15, 24-25. This amount was paid by Summit Business Capital Corp., which apparently had the rights to Respondent's receivables, and was involved in using Respondent's remaining assets to pay off part of Respondent's debt now that Respondent was no longer engaged in the produce business. Tr. 14-15. The remainder of the debt has never been paid.

Ira Nathel testified that his company, Wishnatski & Nathel, agreed on January 17, 2001, to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. He testified that this settlement was appropriate because he knew that Respondent was having financial difficulties and that if he did not accept foregoing half the debt he thought he would not get paid anything by respondent. Tr. 121-26, CX 78. The agreement between the two companies stated that "Baiardi is closing its doors for business." CX 78. The amount owed was approximately $30,000, of which just under $15,000 was paid in accord with this agreement.

At the hearing, Respondent chose to call no witnesses, but rather essentially presented its case through cross-examination of Complainant's witnesses. All of Respondent's exhibits were likewise admitted through cross-examination, so I did not have the benefit of any direct Respondent testimony as to the preparation and meaning of these documents. Most of the documents I admitted were similar to CX 78, in that they were a final settlement of claims against

Respondent based on Respondent's representation that it was going out of business, and constituted settlements in the general range of 50 cents for each dollar owed by Respondent to each creditor with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to my admitting these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents) I have no basis to doubt that they do constitute agreements with numerous creditors to settle claims for a reduced amount in recognition that that was the best deal they could get from Respondent under the circumstances.[2]

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in 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

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[2] Interestingly, representatives from several of the creditors told Ms. Shelby that the original amount listed in the complaint were still due, even though in at least several of the cases, the matter had been compromised and presumably paid off (at 50 cents on the dollar) long before the disciplinary case was even filed by PACA.

> 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.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b of this title"

> the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

> (aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
> . . .
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
> . . .
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in

> their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

Findings of Fact

1. Baiardi Chain Food Corp. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 114748 from June 8, 1948 until the license terminated on June 8, 2001, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Ms. Carolyn Shelby, a marketing specialist for Complainant, went to Respondent's place of business on January 8, 2001 and requested copies of various of Respondent's business records. David Axelrod, president of Respondent, provided the requested records to Ms. Shelby on January 11, 2001.

3. The records, which Axelrod represented were accurate, demonstrated that between the period March 2000 and January 2001 Respondent had received and not paid for 343 lots of perishable agricultural commodities from 67 produce sellers, and that the amount owed was over $830,000.

4. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers by paying 50 cents for each dollar owed. At least two other accounts were settled through court dispositions. There is no evidence that any sellers were paid, either in a timely fashion or otherwise, the original amounts owed at the time of the purchase of the perishable agricultural commodities.

Discussion

Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 67 sellers of produce listed in the complaint. Respondent's contentions that the agreements to settle claims for a reduced amount are the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the statute and the clear, long-standing case law that governs these matters. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

Respondent failed to timely pay any of the 67 sellers the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 67 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Each of the 67 sellers was identified by Mr. Axelrod as having unpaid invoices at the time of Ms. Shelby's investigation. Respondent has demonstrated that six of the 67 creditors signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims, and that at least two other creditors were resolved by other court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other companies to which it owed payment for produce, under similar terms. Respondent contends that these agreements to accept reduced payments on a delayed basis, made after it had been delinquent in its produce payments and in the face of its decision to close the business, take these transactions out of the scope of the PACA. Resp. Br. at 4-5.

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp,* 57 *Agric. Dec.* 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases, where generally only civil penalties would be

assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. *Id.*, at 548-9.

Actions to change the terms and conditions of payment subsequent to the initial transaction do not negate the PACA's prompt payment provisions. While Respondent contends that the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce*, 52 *Agric. Dec.* 608, 619 (1993), " . . . it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to settling within ten days of the transaction, the regulations specify that such terms must be negotiated prior to the transaction, and be in writing. 7 C.F.R. § 46.2 (aa)(11). Respondent's contention that a creditor's choice to accept half-payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action is not consistent with either the PACA or its underlying regulations, nor is it consistent with the case law. Indeed, the type of situation faced by Respondent's creditors—accepting half payment or nothing—is just the type of situation that the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that because Agrexco and Ocean Mist may have received partial payment of the debt owed them by Respondent as a result of litigation of these claims due to their non-payment, that the prompt payment provisions of the PACA cease to apply to those transactions.

The unpaid balance is substantial. The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original

amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over $830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over $570,000 of the $830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around $30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re. Frank Tambone, Inc.*, 53 *Agric. Dec.* 703 (714-15)(1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA,"*Id.*, and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc.*, 55 *Agric. Dec.* 581 (1995), *Scamcorp, supra*. Both *Pugatch* and *Scamcorp*, as well as the other cases cited by Complainant in its opening brief at page 15, involved fewer transactions with fewer sellers for a lesser amount of money than is involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the

violations is exacerbated by the 10-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 343 occurrences.

Given the nature and number of the violations, a significant penalty is warranted. Normally, under the *Scamcorp* rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Baiardi Food Chain Corp. has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

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.

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order.
Filed April 19, 2005.

PACA – Bribery – Respondent superior doctrine under PACA.

Christopher Young-Morales and Ann K. Parnes, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1]Respondent KOAM Produce, Inc. (hereinafter frequently "KOAM") committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with 42 illegal cash payments made by its employee Marvin Friedman to United States Department of Agriculture (hereinafter frequently "USDA") produce inspector William Cashin in connection with federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from 11 sellers. KOAM is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently "the PACA") for the conduct of its employee Marvin Friedman, who, in the scope of his employment, paid the unlawful bribes or gratuities to the USDA produce inspector, notwithstanding any ignorance of the employee's actions. Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA.

Procedural History

[2]The Complainant is the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently referred to herein as "AMS"). On May 3, 2002, AMS filed its Motion to Amend Complaint, together with the proposed Amended Complaint.

[3]KOAM opposed the Motion to Amend Complaint, in its Opposition filed June 18, 2002. By Order dated June 21, 2002, I granted the Motion to Amend Complaint. On July 29, 2002, KOAM filed its Answer to Amended Complaint.

[4]The hearing was held before me in New York, New York, on March 25, 2003, and on November 17 and 18, 2003. AMS was represented by Andrew Y. Stanton, Esq., Ann K. Parnes, Esq., and Christopher Young-Morales, Esq., each with the Trade Practices

Division, Office of the General Counsel, United States Department of Agriculture. KOAM was represented by Paul T. Gentile, Esq., of the law firm of Gentile & Dickler, New York, New York.
[5]AMS called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. KOAM called one witness and submitted 4 exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. The transcript is referred to as Tr.

Findings Of Fact

[6]KOAM Produce, Inc. is a New York corporation, incorporated on or about June 18, 1996, holding PACA license no. 961890, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474. CX1.
[7]KOAM Produce, Inc. was owned in equal shares (50% each) by Jung Yong "C.J." Park (frequently herein "Mr. Park") and his wife, Kimberly S. Park (frequently herein "Mrs. Park") at all times material herein and particularly in 1999. CX 1, Tr. 269, 283-84.
[8]KOAM's Vice-President and Secretary were Mr. Park, KOAM's President and Treasurer were Mrs. Park, and KOAM's only two Directors were Mr. and Mrs. Park, at all times material herein and particularly in 1999. CX1, Tr. 269, 283-84.
[9]KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[10]KOAM hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Tr. 270. Marvin Friedman became a produce buyer in October 1998. Tr. 270-71, 274. Marvin Friedman continued to work for KOAM at all times material herein, and particularly in 1999.
[11]Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[12]On February 25, 2000, Marvin Friedman pled guilty to and was convicted of each count of the 10-count indictment in Case No. 99 Crim. 1095, in the United States District Court for the Southern District of New York. CX 3, CX 18.

[13]On September 20, 2000, Marvin Steven Friedman was found to have paid $29,550[3] in bribes to USDA produce inspectors at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus one day on each of the 10 counts, to run concurrently; followed by supervised release of 2 years on each count, to run concurrently; plus a $300 fine on each counts, for a total of $3,000; plus a $100 special assessment on each count, for a total of $1,000. CX 19, CX 4.

[14]The 10 counts of "Bribery of a Public Official" from April 6, 1999 through July 1, 1999, of which Marvin Friedman was convicted (CX 4), were based on the undercover work of William Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes or gratuities from many produce workers.

[15]William Cashin agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 133-34, CX 16.

[16]In response to William Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. *See* CX 17. The portions of the FD-302s which correlate to the unlawful bribes or gratuities Cashin received from Marvin (Friedman) are organized for each count of the Indictment, together with applicable inspection certificates, which

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[3] The $29,550 in bribes paid by Marvin Steven Friedman was determined through the sentencing process (CX 19 p.20; CX 4 p. 9); the bribes specified in the Indictment totaled $2,100. CX 3.

show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[17]Marvin Friedman was acting within the scope of his employment as a produce salesman or buyer for KOAM each time he paid an unlawful bribe or gratuity to William Cashin as reported in CX 6 through CX 16, and as reflected in each of the 10 counts of which he was convicted, regardless of whether anyone at KOAM directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments.

[18]After careful consideration of all the evidence before me, I accept as credible the testimony of William J. Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park.

Discussion

[19]Here, there is no question whether KOAM's employee Marvin Friedman paid unlawful bribes or gratuities to USDA produce inspector William Cashin during April 6, 1999 through July 1, 1999, in connection with produce inspections requested by KOAM. He did. Unquestionably. The only question is whether what Marvin Friedman did, causes his employer KOAM to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[20]KOAM argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman's criminal activity here cannot have been within the scope of his employment and cannot become KOAM's violation of the PACA.

[21]The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or

> broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

Both the D.C. Circuit[4] and the 6th Circuit[5] have affirmed the PACA's use of its principal-agency provision under circumstances like those here. Marvin Friedman did pay the unlawful bribes and gratuities within the scope of his employment as KOAM's produce buyer or salesman. Tr. 307.

[22]Even if Marvin Friedman was not authorized or directed by KOAM to do so, and even if KOAM was unaware of his doing so, KOAM is indeed responsible under the PACA for the unlawful bribes and gratuities Marvin Friedman paid in connection with the produce inspections ordered by KOAM. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication[6] in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003). Thus, whether Marvin Friedman was directed by his employer KOAM to

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[4]*Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466.

[5]*H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

[6]Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

pay the unlawful bribes and gratuities does not affect the outcome here.

[23]After careful review of the evidence as a whole, I am unable to determine whether anyone at KOAM besides Marvin Friedman was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience AMS has had with KOAM since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with KOAM and KOAM's principals.

[24]It is difficult to believe that Marvin Friedman paid the unlawful bribes and gratuities out of his own pocket, even if he was the most highly compensated employee at KOAM, at about $50,000 per year. CX 5. He apparently received no bonuses in addition. Tr. 274-75. The evidence fails to prove whether the money Marvin Friedman gave unlawfully to USDA inspectors was his own money, KOAM's money, Mr. or Mrs. Park's money, or money from some other source.

[25]Mr. Park testified that neither he, nor Mrs. Park to his knowledge, at any time, authorized, directed, or had knowledge that Marvin Friedman was paying money to inspectors. Tr. 286. Mr. Park testified that he had not known that Marvin Friedman was giving money to the USDA produce inspectors until after Mr. Friedman was arrested; that he was not present on June 28, 1999 when Marvin Friedman paid William Cashin, despite a notation to the contrary in the FBI form FD-302 (*see* CX 14); and that he was unaware that Marvin Friedman's attorney represented to the Court during sentencing, that Marvin Friedman's letter to the Court said that his employer directed him to pay bribes. Tr. 271-72, 278-79, 283. The letter is not in evidence, as access to it is apparently restricted. Tr. 339. Perhaps, as KOAM argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the Court that there was no

factual support in the record that the employer directed this scheme. Tr. 329. CX 19 pp. 15-16.

[26]Marvin Friedman was not a witness before me. Neither KOAM nor I had the opportunity to see Marvin Friedman confronted or cross-examined. The hearsay evidence suggesting that someone at KOAM besides Marvin Friedman may have involved in paying the unlawful bribes and gratuities is not sufficiently reliable. The evidence fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors. The most valuable information on this topic, in my opinion, was the prosecutor's statement at Marvin Friedman's sentencing on September 20, 2000, which includes, in part, the following: THE COURT: I will listen to you for anything the government would like to tell me in connection with sentence.

MR. BARR: Thank you, your Honor, and I will be brief because most of my arguments have been set forth in some detail already in our memorandum.

With respect to the minor role issue, your Honor, essentially Mr. Krantz's argument hinges on the way that he is framing the issue and the people involved. The government views it differently. This is really a two-person crime. There is a briber, mainly (sic) the businessman wholesaler, and a bribee, namely the produce inspector.

The inclusion of Mr. Friedman's employer in the context here I think is inappropriate based on the record before your Honor. While Mr. Krantz has asserted it to the court there is no factual support in the record that the employer directed this scheme. Mr. Friedman did not provide the government or probation with any details on that allegation. So I think that is not really properly before the court. There is no factual foundation for it.

It may be true but it is not something that has ever been set forth. And so we find ourselves at a loss to be able to reply to something like that.

With respect to the relative culpability of the remaining players, namely, the inspector and the wholesaler, while it is certainly true that the public official has abused his or her trust when he or she commits bribery, that is an inherent component of the offense and under Mr. Krantz's logic essentially every bribe payer would be entitled to the inference of being less culpable than every bribe recipient. And I don't think that is the law and I don't think that it's even a fair inference.

In this case the inspectors got $50 per inspection. The wholesaler got, we believe based on our efforts, something more than $50. Putting our finger on the exact amount, as we told probation and the court, is difficult, but it is surely in a magnitude far greater than $50.

While it is true, as Mr. Krantz points out, that the primary beneficiary is the company that Mr. Friedman works for, it is quite clear to us that the individual salesman who helps the company make money looks better in the company's eyes and in a competitive atmosphere such as the Hunt Point Market that is a significant advantage for any salesman. CX 19, pp. 15-17.

Conclusions

[27]Marvin Friedman, an employee of Respondent KOAM Produce, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture (USDA) inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[28]Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [27]. 7 U.S.C. § 499p.

[29]Marvin Friedman's willful violations of the PACA are deemed to be KOAM's willful violations of the PACA. *In re: H.C. MacClaren,*

Inc., 60 *Agric. Dec.* 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[30]KOAM Produce, Inc., through its employee and agent Marvin Friedman, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities from 11 sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[31]KOAM is responsible under the PACA for the conduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections, notwithstanding any ignorance of the employee's actions. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 120 Fed. Appx. ---- (D.C. Cir. 2005), 2005 WL 348466, *See* Appendix A.

[32]KOAM willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[33]KOAM's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 *Agric. Dec.* 763, 780-781 (2003).

[34]Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-12.

[35]Any lesser remedy than revocation would not be commensurate with the seriousness of KOAM's violations, even though many of KOAM's competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities

were arguably more culpable than those that paid them. Tr. 309-12.

Order

[36]Respondent KOAM Produce, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[37]Respondent KOAM Produce, Inc.'s PACA license shall be revoked. [38]This Order shall take effect on the 11th day after this Decision becomes final.

Finality

[39]This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.
Decision and Order.
Filed April 20, 2005.

PACA – License terminated – Prompt payment, failure to make.

Andrew Stanton, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Hunts Point Tomato Co., Inc. (Hunts Point) committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (PACA), by its failure to fully and promptly pay its suppliers of perishable agricultural commodities. By way of sanction, I order that the facts and circumstances of the violations be published.

Procedural History

On March 21, 2003, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service of the U. S. Department of Agriculture issued a complaint against Respondent, alleging that Respondent had committed multiple violations of section 2(4) of the PACA. In particular, the complaint alleged that during the period September 2001 through June 2002 Respondent failed to make full payment promptly to 33 sellers in the amount of over $795,000 for 118 lots of perishable agricultural commodities, and that such failure constituted the commission of willful, flagrant and repeated violations of the PACA. Respondent filed an answer, denying the commission of any violations, on July 29, 2003.

A hearing was conducted on August 10, 2004 in New York City. Andrew Stanton represented Complainant and Paul Gentile represented Respondent. At the start of the hearing, Respondent moved that the hearing be postponed so that Respondent could attempt to fully pay all of the creditors cited in the complaint. Complainant objected to a postponement at such a late date, and contended that it was entitled to prove its case at the scheduled hearing. I denied the motion to postpone the proceedings.

Complainant called two witnesses and introduced 36 exhibits into evidence (CX 1-CX 36). Respondent called no witnesses and introduced two exhibits into evidence (RX 1-2).

Factual Background

Respondent is a corporation that was licensed under the PACA from July 25, 1979 until its license automatically terminated for failure to pay the required license renewal fee on July 25, 2002. CX 1. Anthony Guerra was Respondent's president, sole director, and sole stockholder since July 2000. CX 1, pp. 7-8. Complainant received at least 10 reparation complaints against Respondent and, in June 2002, initiated an investigation of Respondent's alleged failures to pay, fully and promptly, for perishable agricultural commodities. Tr. 23-24. Wayne Shelby and Timothy Swainhart were assigned to conduct the investigation. *Id.* After sending Respondent a letter notifying it of the initiation of an investigation of these claims, Shelby and Swainhart visited Respondent's place of business on July 24, 2002. Tr. 31. Lenny Guerra, Respondent's office manager, met with Shelby and Swainhart. Guerra identified Respondent's accounts payable files, each of which was in a separate jacket, which the investigators removed from the premises, copied, and returned. Tr. 33-35. The investigators conducted an exit conference with Frederick,

Anthony and Lenny Guerra on August 7, 2002, at Respondent's place of business, at which time they handed a Notice of Investigation to Anthony Guerra. Tr. 35-36. (Lenny Guerra had refused to accept the Notice on July 24, Tr. 35.)

The accounts payable files indicated that between September 2001 and June 2002, Respondent had unpaid invoices for over $795,000 for118 lots of perishable agricultural commodities purchased from 33 sellers in the course of interstate commerce. CX 3-35, Tr. 37-49. Anthony Guerra admitted that over a million dollars in produce had not been paid for by Respondent, Tr. 46, but in the absence of evidence that several transactions were in the course of interstate commerce, Complainant excluded those apparently intra-state transactions from the complaint, resulting in the $795,000 amount actually alleged to be in violation. Tr. 47. Anthony Guerra said that the business had been having difficulties since September 11, 2001. Tr. 46-47.

Shortly before the hearing, Josephine Jenkins, a PACA Branch marketing specialist, made follow-up telephone calls to attempt to determine whether the largest creditors of Respondent had been paid. Tr. 73. She determined, by speaking with Lawrence Meuers, an attorney representing a number of creditors in a PACA trust action, that eight of the creditors, who the complaint alleged were owed over $321,000, had been paid over $275,000, and were still owed over $45,000. She also contacted two of the other creditors listed in the complaint and determined that they had not been paid any of the over $68,000 they were owed. CX 36, Tr. 77.

On May 31, 2002, months after the commencement of Complainant's investigation but nearly 10 months before the filing of the instant complaint, a PACA Trust complaint was filed against Respondent in the United States District Court for the Southern District in New York pursuant to 7 U.S.C. § 499e (c). On that day, Judge Casey issued a temporary restraining order "enjoining and restraining" Respondent "from dissipating, paying, transferring

assigning any and all assets." RX-2. On October 2, 2002, Judge McKenna issued a Preliminary Injunction and Order, superseding Judge Casey's TRO, on behalf of 16 plaintiff companies. RX 1. The Order recognized that Respondent was in possession of 100% of the assets at issue, and set up a PACA Trust Account into which all of Respondents assets would be deposited, and appointed an Escrow Agent, and set up a procedure for establishing and paying claims.

On August 6, 2004, the Friday before the hearing, Counsel for Respondent suggested to Counsel for Complainant that the hearing should be postponed so that Respondent could fully pay all its creditors. At the hearing, Respondent suggested that the hearing be postponed so that the creditors could be paid. Tr. 5-7. No evidence was introduced suggesting that Respondent had petitioned the Southern District to unfreeze Respondent's assets so that any of the creditors could be paid, and no one testified as to how long the process would take, or why the suggestion was made on the eve of the hearing.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in 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.

7 U.S.C. § 499a(b) 4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b of this title" the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

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

> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> . . .
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

7 U.S.C. § 499e (c) allows unpaid sellers of perishable commodities to seek the establishment of a 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."

Findings of Fact

1. Hunts Point Tomato Co., Inc. (Respondent) is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the complaint. Complaint, paragraph 2, Answer, paragraph 2. Respondent held PACA license 791770 from July 25, 1979 until the license terminated on July 25, 2002, for failure to pay the required PACA renewal fee.

2. Complainant conducted an investigation of Respondent after it received at least 10 complaints that Respondent was not paying for shipments of perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist, and Timothy

Swainhart, Assistant Regional Director of Complainant's North Brunswick office, went to Respondent's place of business on July 24, 2002. They met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files.

3. The files provided Complainant indicated that, between September 2001 and June 2002, Respondent had purchased and not paid for 118 lots of perishable agricultural commodities from 33 sellers in the course of interstate or foreign commerce, for a total of over $795,000.

4. At an exit conference on August 7, 2002, Respondent's president and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than a million dollars for produce purchased and received, some of which was not in interstate or foreign commerce.

5. On May 31, 2002 a PACA Trust proceeding under 7 U.S.C. § 499e (c) was instituted against Respondent. On that day, a temporary restraining order was issued against Respondent, superseded on September 30, 2002 by a preliminary injunction and order, requiring Respondent to put all its assets into a PACA Trust, and preventing it from otherwise distributing any of its assets. The injunction and order were still in effect at the time of the instant hearing.

Discussion and Conclusions of Law

1. Respondent has violated the PACA willfully, repeatedly and flagrantly by failing to make full payment, promptly, to the 33 sellers of produce listed in the complaint. Respondent's failure to pay the 33 sellers listed in the complaint fully and in a timely manner is essentially undisputed. The 11th hour offer of Respondent to pay the 33 sellers in full does not change the nature of this case to a slow-pay situation. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's license, Respondent's license has already been terminated for failure to pay its renewal fee. Thus, a finding that Respondent has committed willful, flagrant and repeated violations, and the publication of the facts and circumstances of these violations, is the only appropriate remedy.

2. Respondent failed to timely pay any of the 33 sellers listed in the complaint the initial agreed upon purchase price for perishable agricultural commodities. There is no legitimate dispute that Respondent failed to pay 33 sellers of perishable agricultural commodities the amount that it had originally agreed to pay. Respondent's own payable files, which were inspected and copied by Complainant's representatives, indicated that at the time of the inspection, Respondent had purchased, and not paid for, 118 lots of perishable agricultural commodities from 33 sellers, in the course of interstate or foreign commerce, and in the amount of over $795,000.

Subsequent to the initial investigation, approximately 16 of Respondent's creditors joined in a PACA trust action filed under 7 U.S.C. § 499e (c) (3). In a preliminary injunction and order issuing out of that action, the Escrow Agent appointed by the court was directed to pay off the undisputed valid PACA claims against

Respondent at 95 cents on the dollar, subject to availability of funds. No evidence was submitted as to how many creditors were actually paid. Complainant submitted, through the testimony of Josephine Jenkins, evidence that of the ten creditors she had contacted either directly or through their counsel, approximately a week before the hearing, none of them had been paid either in full or on time. In particular, she was notified that of eight creditors represented by Lawrence Meuers, all had been partially compensated by the PACA trust. These eight creditors had been paid $275,338 out of the $321,082 owed to them, which represents a payout of approximately 85.7%, significantly under the 95% authorized in the PACA trust action. Two other companies contacted by Ms. Jenkins indicated that they had not been paid any of the $68,302 owed to them.

There is no evidence in this record that any of the 33 creditors listed in the complaint have been paid in full.

3. The court order in the PACA Trust case does not excuse Respondent's failure to pay. While Judge McKenna enjoined Respondent from disbursing any of its assets other than through the actions of the court-appointed escrow agent operating the PACA Trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA Trust action arose directly from Respondent's failure to pay its creditors in the first place, to allow it to act as a protection against no-pay sanctions would be counter to the clear purposes of the Act. While Respondent protests that it has the assets to pay all creditors fully, the record clearly indicates that as of the hearing date creditors were only being paid off at 85 cents on the dollar, rather than the 95 cents on the dollar authorized in the PACA Trust action. This is hardly consistent with Respondent's contention that it has sufficient assets to pay all creditors in full. Postponing a hearing based on Respondent's contention that it could now pay all creditors in full, where there is no evidence that Respondent petitioned

Judge McKenna to allow such payment, and there is no affirmative evidence that such financial capability actually exists, is unwarranted.

Oddly, Respondent implies in its brief (p. 5) that *Complainant* had some sort of an obligation to "attempt to have Judge McKenna modify his order." I see no basis for this suggestion. Clearly, if Respondent had the funds to fully pay all creditors, such funds would have been required to be deposited in the PACA Trust account established in the federal district court case. Presumably, if the funds existed, all creditors would have been paid—a circumstance that undisputedly has not occurred here.

4. Respondent's failure to pay creditors renders this matter a "no-pay" case. The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp,* 57 *Agric. Dec.* 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases, where generally only civil penalties would be assessed, from "no-pay" cases where in the case of flagrant or repeated violators license revocation would be the appropriate remedy. In the cases of failure to achieve "full compliance" with the PACA within 120 days of service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case. *Id.*, at 548-9.

Although Respondent has "offered" to settle this case by paying all creditors in full, the court order issued by Judge McKenna, which Respondent has not sought to lift, indicates that Respondent's offer was made without any legitimate basis and is quite speculative, to say the least. While it is unusual to even hear the discussion of settlement offers in open court, Complainant was under no obligation to accept Respondent's offer, particularly when there is no indication that the offer could even be honored, given Judge McKenna's preliminary injunction. Given the uncertainty as to whether Respondent's offer to

pay in full could even be effectuated, Respondent's contention in its brief (p. 6) that the failure of Complainant to accept its offer was "arbitrary, capricious and an abuse of discretion" has no basis.

Further, rescheduling a hearing to allow a settlement of a PACA case is inconsistent with the Agency's case law. In *Scamcorp*, the Judicial Officer held:

> Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

Scamcorp, supra, at 548.

5. Respondent's Violations are Willful, Flagrant and Repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re. Frank Tambone, Inc.*, 53 *Agric. Dec.* 703, 714-15 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, from September 2001 through June 2002, putting numerous growers and sellers at risk, it was "clearly operat[ing] in disregard of the payment requirements of the PACA,"*Id.*, and has committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc.*, 55 *Agric. Dec.* 581 (1995), *Scamcorp, supra*. The number of sellers and transactions involved in *Pugatch* and *Scamcorp* were similar to those involved in the instant case, and in each of those cases the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 9-month period of time over which the violations occurred. And the repeated nature of the violation is established by the 118 occurrences.

6. Given the nature and number of the violations, a significant penalty is warranted. Normally, under the *Scamcorp* rule, license revocation would be one aspect of the remedy. Here, with Respondent already out of business and the license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent, Hunts Point Tomato Co, Inc., has committed willful, flagrant and repeated violations of section 2 (4) of the PACA.

The facts and circumstances of the violations shall be published.

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.

In re: M. TROMBETTA & SONS, INC.
PACA Docket No. D-02-0025.
Decision and Order.
Filed: May 12, 2005.

PACA – Bribes - Respondent superior under PACA.

Andrew Y. Stanton, for Complainant.
Mark C.H. Mandell, for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1]Respondent M. Trombetta & Sons, Inc. (hereinafter frequently "Trombetta, Inc.") committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with seven illegal cash payments made by its employee Joseph ("Joe Joe") Auricchio to United States Department of Agriculture (hereinafter frequently "USDA") produce inspector William J. Cashin in connection with seven federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from six sellers. Trombetta, Inc. is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently "the PACA"), notwithstanding any ignorance of the employee's actions, for the conduct of its employee Joseph ("Joe Joe") Auricchio, who, in the scope of his employment, paid the unlawful bribes and gratuities to the USDA produce inspector. Here, the acts of the employee are deemed to be the acts of the employer. Making illegal payments to a USDA produce inspector was an egregious failure by Trombetta, Inc. to perform its duty under the PACA to maintain fair trade practices. The remedy of revocation of Trombetta, Inc.'s license is commensurate with the seriousness of Trombetta, Inc.'s violations of the PACA.

Procedural History

[2]The Complainant is the Administrator, Fruit and Vegetable Programs,[1]Agricultural Marketing Service, United States Department of Agriculture (hereinafter frequently "AMS").

[3]On August 16, 2002, AMS filed the Complaint, alleging, among other things, that Trombetta, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[4]Trombetta, Inc. timely filed its Answer on October 4, 2002. The Answer, among other things, denies the material allegations of the Complaint, raises five affirmative defenses, and requests an award of attorney's fees and costs.

[5]The nine-day hearing was held before me in New York, New York, on July 14-18, July 21-23, and August 21, 2003. AMS has been represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. Trombetta, Inc. has been represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey. The case was very ably presented, by both AMS and Trombetta, Inc., throughout the entire proceeding.

[6]AMS called three witnesses (Joan Marie Colson, Tr. 25-127; William J. Cashin, Tr. 127-160, 172-358; and John Aloysius Koller, Tr. 359-371, 378-495, 1441-1532, 1546-1596, 1683-1725), and submitted the Certified Agency Record exhibits which are known as CARX, and 13 additional exhibits, CX 1 through CX 10; AX 1, AX 2, and AX 3.

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[1]Specifically, the PACA Branch of the Fruit and Vegetable Programs, is responsible for this case.

[7]Trombetta, Inc. called 11 witnesses (Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (born in 1949), Tr. 498-551; 574-851, 996-1163, 1338-1381, 1390-1408, 1535-1545; Peter Silverstein, Tr. 872-924; Max Montalvo Tr. 932-974; Frank J. Falletta, Tr. 1199-1221; Matthew John ("Matt") Andras, Tr. 1221-1265; Harlow E. ("H.E.") Woodward III, Tr. 1266-1300; Stephen Trombetta, Tr. 1311-1336, Martin A. ("Marty") Shankman, Tr. 1412-1423; Patricia Baptiste, Tr. 1424-1433; Philip Harry Lucks, Tr. 1616-1638; and Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta (born in 1924), Tr. 1651-1681), and submitted 22 exhibits, RX A through RX U, and RX V, a DVD submitted post-hearing, which I hereby admit into evidence. [8]All of the parties' exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence. The transcript is referred to as Tr.

[9]The three responsibly connected cases (PACA-APP Docket No. 03-0007, PACA-APP Docket No. 03-0008, and PACA-APP 03-0012) were consolidated with this disciplinary action for the hearing, and all the evidence is available for each of the four cases. The three responsibly connected cases will be briefed and decided at a later time.

[10]AMS's proposed transcript corrections, filed April 5, 2004, are hereby accepted. Trombetta, Inc's proposed transcript corrections, filed April 12, 2004, are hereby accepted. On my own motion, I change Jo-Jo to Joe Joe in the transcript excerpts included in this Decision.

[11]AMS's Proposed Findings of Fact, Conclusions and Order with opening brief were timely filed on February 6, 2004; AMS's Reply brief was timely filed April 30, 2004.

[12]Trombetta, Inc.'s Proposed Findings of Fact, Conclusions, and Order with supporting response brief were timely filed April 12, 2004.

Findings of Fact

[13]M. Trombetta & Sons, Inc. is a New York corporation, holding PACA license no. 021070, with an address of Units 100-105, Row A, Hunts Point Terminal Market, Bronx, New York, New York 10474. CX 1.

[14]The "company" (the beginning of Trombetta, Inc.) was started in the 1890s, and the fifth generation of the family is now in the business. Tr. 500. The current managers are Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (at the Hunts Point Terminal Market), and Stephen ("Steve") Trombetta (at the Bronx Terminal Market). Tr. 1677. [15]Trombetta, Inc. was owned 60% by Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta, and 40% by Stephen ("Steve") Trombetta, at all times material herein and particularly in 1999. Tr. 1676-1677.

[16]Trombetta, Inc.'s President and Treasurer were Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta; Trombetta, Inc.'s Vice-President was Stephen ("Steve") Trombetta; and Trombetta, Inc.'s Secretary was Philip James ("Phil") Margiotta, also known as Philip J. Margiotta, at all times material herein and particularly in 1999. Tr. 1662, 1679.

[17]Trombetta, Inc. began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, when Hunts Point opened, in about 1967 or 1968. Tr. 502.

[18]Trombetta, Inc. hired Joseph ("Joe Joe") Auricchio in about 1994 to do various jobs at the company. Tr. 504-05.

[19]Joseph ("Joe Joe") Auricchio continued to work for Trombetta, Inc. at all times material herein, and particularly in 1999, when he worked as a salesperson. Tr. 508, 1158.

[20]In 1999, Joseph ("Joe Joe") Auricchio was earning between $800 and $900 per week as a salesperson for Trombetta, Inc. Tr. 1131. Mr. Auricchio did not earn any commissions as part of his salary; he would receive bonuses equivalent to one or two weeks pay at Christmas. Tr. 1131.

[21]On March 14, 2000, Joseph ("Joe Joe") Auricchio pled guilty to one count of the 4-count indictment in criminal Case No. 99 CR 1088, in the United States District Court for the Southern District of New York, United States v. Joseph Auricchio. CX 4, RX N.

[22]The elements of the offense, bribery of a public official, to which Joseph ("Joe Joe") Auricchio pled guilty, are that he gave a thing of value to a person who is a public official with the corrupt intent to influence an official act by that public official. RX N at 11-12.

[23]In connection with his guilty plea, Joseph ("Joe Joe") Auricchio told the Judge under oath that on July 7 (1999) he offered a government official $100 to inspect a load of vegetables in the Hunts Point Terminal Market in the Bronx, New York; that he knew what he was doing was wrong; that he did it willfully and knowingly; that the government official was a U.S. government inspector; that he wanted the inspector to lower the grade; so that "we could sell it cheaper." RX N at 12-14. [24]On June 21, 2000, Joseph Auricchio was found to have paid approximately $29,100 in cash bribes[2] to USDA produce inspectors at the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruit and vegetables at M. Trombetta & Sons, Inc., and was sentenced on Count 4 to the custody of the Bureau of Prisons for one year and a day; followed by supervised release of 2 years; plus a $5,000 fine; plus a $100 special assessment. The other three counts of the 4-count indictment were dismissed. ALJX 1, CX 4.

[25]The one count of "Bribery of a Public Official", on July 7, 1999, of which Joseph Auricchio was convicted (CX 4), was based on the

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[2] The $29,100 in cash bribes paid by Joseph (Joe Joe) Auricchio was determined by agreement of the parties for sentencing purposes (ALJX 1, p. 2; *See* A. Offense Level, including footnote); the bribe associated with the one count to which he pled guilty was $50.

undercover work of William J. Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes and gratuities from many produce workers.

[26]From July 1979 until August 1999, William J. Cashin was employed as a produce inspector for the United States Department of Agriculture at the Hunts Point, New York office of the Department's Fresh Products Branch. Tr. 128-29.

[27]William J. Cashin first inspected produce at Trombetta, Inc. when Mr. Cashin started working for the Inspection Service, in 1979. Tr. 134. [28]William J. Cashin was not paid a bribe at Trombetta, Inc. until Joseph ("Joe Joe") Auricchio at Trombetta, Inc. began paying him bribes, in 1997. Tr. 137, 142.

[29]William J. Cashin had already begun a bribe-taking relationship with Joseph ("Joe Joe") Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. Tr. 139.

[30]William J. Cashin agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 143, CX 6 - CX 9.

[31]In response to William J. Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. *See* CX 5. The portions of the FD-302s which correlate to the unlawful bribes and gratuities Mr. Cashin received from Joseph ("Joe Joe") Auricchio are organized for each count of the Indictment, together with applicable inspection certificates, which show Trombetta, Inc. as having applied for the inspections. CX 6 through CX 9.

[32]Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc. when he paid the unlawful bribes and gratuities. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer Trombetta,

Inc.; the unlawful payments could have benefited Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. Tr. 363-65.

[33] Joseph ("Joe Joe") Auricchio was acting within the scope of his employment as a produce salesman for Trombetta, Inc. each time he paid an unlawful bribe or gratuity to William J. Cashin as reported in CX 6 through CX 9, and as reflected in the one count of which he was convicted, regardless of whether anyone at Trombetta, Inc. directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments. Tr. 363-64.

[34]After careful consideration of all the evidence before me, I accept as credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Philip James ("Phil") Margiotta, also known as Philip J. Margiotta; Peter Silverstein; Max Montalvo; Frank J. Falletta; Matthew John ("Matt") Andras; Harlow E. ("H.E.") Woodward III; Stephen Trombetta; Martin A. ("Marty") Shankman; Patricia Baptiste; Philip Harry Lucks; and Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta.

Discussion

[35]Here, there is no question whether Trombetta, Inc.'s employee Joseph ("Joe Joe") Auricchio paid unlawful bribes and gratuities to USDA produce inspector William Cashin during April 20, 1999 through July 7, 1999, in connection with produce inspections requested by Trombetta, Inc.. He did. Unquestionably. The only question is whether what Joseph ("Joe Joe") Auricchio did, causes his employer Trombetta, Inc. to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[36]Trombetta, Inc. argues that the seven inspection certificates may not have contained any false information. Trombetta, Inc. suggests that what William J. Cashin recorded was true; that in actuality, he gave no "help". I do not discuss the evidence that Trombetta, Inc cites in support of its argument (*see* Trombetta, Inc.'s Brief), because the outcome here remains the same even if the inspection certificates were accurate. The unlawful payments to William J. Cashin were egregious even if Trombetta, Inc. got nothing in return. *See JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001), which held that there is no requirement that there be a *quid pro quo* arrangement between the payer and payee in bribery cases under the PACA.

[37]Trombetta, Inc. argues that AMS's entire case is founded upon the allegation that the inspections in issue contained false information. *See* Trombetta Inc.'s Brief at page 21. I disagree. Making the unlawful payments to the USDA produce inspector is the unfair trade practice, regardless of the produce inspector's response. *See* AMS's Reply Brief at pages 15-16.

[38]Trombetta, Inc. argues that the recorded conversations between Joseph ("Joe Joe") Auricchio and USDA Produce Inspector William J. Cashin, while Mr. Cashin was working undercover, impeach Mr. Cashin's credibility when Mr. Cashin testified that he "gave help" by reporting the produce he inspected to be in worse condition than it actually was. RX V I disagree. To me, the recorded conversations that Trombetta, Inc. relies upon, reveal caution on the part of both Mr. Auricchio and Mr. Cashin, regarding the extent to which the produce should be misrepresented, if at all, but I find Mr. Cashin's testimony to be credible. The daily reporting to the F.B.I. while Mr. Cashin was working undercover provides reliable verification of Joseph ("Joe Joe") Auricchio's unlawful payments on behalf of Trombetta, Inc. to a USDA produce inspector. CX 6 - CX 9.

[39]USDA Produce Inspector William J. Cashin testified, in part, as follows:

Mr. Richman: Was there any basic understanding between you and Mr. Auricchio about what you would be doing with regard to your inspections for Respondent?
Mr. Cashin: Yes.
Mr. Richman: What was that understanding?
Mr. Cashin: He was looking for help on the various loads of produce.
Mr. Richman: And how did that understanding come about between you and Mr. Auricchio?
Mr. Cashin: At M. Trombetta I don't remember the exact how it came about there, but I knew "Joe Joe" from another location in the market before he started working at Trombetta.
Mr. Richman: And you had that understanding from that time as well?
Mr. Cashin: Yes.
Mr. Richman: How did Mr. Auricchio let you know that he wanted help on a particular load?
Mr. Cashin: Usually I would in fact every time he was there, when I was sent to Trombetta, I would always talk to him. And he and I would discuss the load and he would tell me he needed help on the load.
Mr. Richman: And what was your understanding of the meaning of the phrase help, when it was requested in connection with the produce inspection?
Mr. Cashin: Help came in any one of three ways, and they weren't always done at the same time. The first one was he was asking me to write the condition defects on the certificate in such a way that they were over the delivery marks.
Mr. Richman: Can you explain that actually what is good delivery?
Mr. Cashin: Okay, in the USDA Standards there are tolerances for certain defects. The delivery standards are a parallel set of standards set forth either by the PACA or within the industry

itself and these standards were set a little bit higher than the USDA Standards. And for example if the USDA allowed three percent decay in a certain defect, the good delivery standard would be five percent. So one of the ways of help was that "Joe Joe" would want me to write the product up in such a way that it was over the good delivery standard, because he didn't want the product to fail USDA, but still make good delivery.

Mr. Richman: Okay and you mentioned there are three ways in which you would give help?

Mr. Cashin: Yes, the second way was the number of containers. He sometimes would need or want the number of containers reported on the certificate to closely match to the manifest of what was originally sent when loaded.

Mr. Richman: Why would you do that?

Mr. Cashin: It was my understanding it would make the certificate more legitimate, and also they would get more money back from the shippers.

Mr. Richman: And what is the third way that you would give help?

Mr. Cashin: The third help was temperature. You would need the temperature reported on the certificate to closely match the accepted levels of shipment. So again it would lend legitimacy to the inspection certificate.

Mr. Richman: Were the figures that you put down on the inspection certificate when you gave help, an accurate reflection of the produce you were inspecting?

Mr. Cashin: No.

Mr. Richman: When you gave help with respect to the condition of the produce, how would the figure that you put down on the certificate for the condition of the produce help the Respondent?

> Mr. Cashin: Again, it was my understanding that they would be able to get more money back from the shippers or renegotiate their deals.
> Mr. Richman: And when you gave help with respect to the quantity of the produce, I think you just answered this, but just to clarify. When you gave help with respect to the quantity of the produce inspected, how would the figures you put down for the quantity of the produce inspected help the Respondent?
> Mr. Cashin: Again, it was my understanding that it would lend legitimacy to the certificate and they were able to get more money back.
> Mr. Richman: And when you gave help with respect to the temperature of the produce, how would the figures that you put down for the temperature of the produce help the Respondent?
> Mr. Cashin: It again was my understanding it would lend legitimacy to the whole inspection package.
> Mr. Richman: On what percentage of the loads that you inspected of Respondent would you give help?
> Mr. Cashin: When "Joe Joe" was there, about 100 percent.
> Mr. Richman: **And when did you first start receiving these payments at Trombetta?** (emphasis added)
> Mr. Cashin: **In 1997**. (emphasis added)

Tr. 139-42.

[40]Trombetta, Inc. argues that what Joseph Auricchio did, may not have been "in connection with a produce transaction". *See* Trombetta Inc.'s Brief at page 22. Trombetta, Inc.'s argument is strained (AMS's Reply Brief calls it absurd, at page 17), in light of all the evidence that the money Auricchio gave Mr. Cashin was in connection with a produce transaction. But this is how Trombetta, Inc. summarizes it:

> Without an active Auricchio connection to the purchasing of the produce shipments and/or negotiations with suppliers, or Respondent's actual knowledge (with active or tacit approval) of

> Auricchio's alleged illegal activities down in the sales booth, the vital link between the actions alleged by (Trombetta, Inc.) and the produce transactions it seeks to protect is broken, and (AMS) cannot establish the violations of Section 2(4) that it has alleged. Since (AMS) has failed to make that connection, the Complaint must be dismissed.

Trombetta Inc.'s Brief at page 23.

I disagree. Mr. Auricchio worked for Trombetta, Inc. Even though Phil Margiotta, the buyer/broker for much of the produce, may have had no idea that Mr. Auricchio was arranging for incoming produce to be reported by the USDA produce inspector to be in worse condition than it actually was, the unlawful payments were nonetheless made in connection with produce transactions. Further, even though Trombetta, Inc.'s negotiations of the prices to be paid for the incoming produce may have been honest and trustworthy, the unlawful payments were nonetheless made in connection with produce transactions.

[41]Trombetta, Inc. argues that it provided proper supervision for Mr. Auricchio. Brief at page 22-23. Actually, Trombetta, Inc. did very little, in 1999 and before, to surveil its own employees Tr. 1140-1155. During the time since Mr. Auricchio's criminal activity was exposed, Trombetta, Inc. has taken commendable precautions. Tr. 1161-63.

[42]Trombetta, Inc. argues that USDA inspectors may have committed extortion; that Joseph Auricchio may have been the victim of extortion. RX O. Trombetta Inc.'s Response Brief at page 27. There is no evidence that Joseph ("Joe Joe") Auricchio was the victim of extortion. ALJX 1. Tr. 1129.

[43]The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

> In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or

> broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

Both the D.C. Circuit[3] and the 6th Circuit[4] have affirmed the PACA's use of its principal-agency provision under circumstances like those here.

[44]Trombetta, Inc. argues that Section 16 of the Act is inapplicable to this case. Trombetta, Inc. argues that Auricchio's illegal payments to USDA produce inspector William J. Cashin were beyond the scope of his employment; that Joseph ("Joe Joe") Auricchio's criminal activity here cannot have been within the scope of his employment and cannot become Trombetta, Inc.'s violation of the PACA. I find to the contrary, that Joseph ("Joe Joe") Auricchio was working within the scope of his employment when he paid the unlawful bribes and gratuities.

[45]Joseph ("Joe Joe") Auricchio did pay the unlawful bribes and gratuities within the scope of his employment as Trombetta, Inc.'s produce salesman. During Joseph ("Joe Joe") Auricchio's working hours, at his employer Trombetta, Inc.'s location, as part of his job as a salesman for Trombetta, Inc., Joseph ("Joe Joe") Auricchio met with USDA produce inspectors to give them the information needed regarding the produce inspections. *See* Findings of Fact paragraph

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[3]*Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475.

[4]*H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

[32]. Making illegal payments to the USDA produce inspectors in connection with the produce inspections, even if he did that on his own, unknown to others, did not remove Joseph ("Joe Joe") Auricchio from the scope of his employment.

[46]Even if Joseph ("Joe Joe") Auricchio was not authorized or directed by Trombetta, Inc. to pay unlawful bribes and gratuities to USDA inspectors, and even if Trombetta, Inc. was unaware of his doing so, Trombetta, Inc. is indeed responsible under the PACA for the payment of unlawful bribes and gratuities that Joseph ("Joe Joe") Auricchio paid in connection with the produce inspections ordered by Trombetta, Inc. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication[5] in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003). [47]Regarding payment of the unlawful bribes and gratuities, there may not have been unity between employee and employer factually, but the principal-agent legal principle imposes unity between employee and employer. Consequently, whether Joseph ("Joe Joe") Auricchio was authorized or directed by his employer Trombetta, Inc. to pay the unlawful bribes and gratuities does not affect the outcome here.

[48]After careful review of the evidence as a whole, I am unable to determine whether anyone at Trombetta, Inc. besides Joseph ("Joe Joe") Auricchio was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience

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[5]Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

AMS has had with Trombetta, Inc. since the unlawful payments were made in 1999, may impact the future course of AMS's interaction with Trombetta, Inc. and Trombetta, Inc.'s principals.

[49]It is difficult to believe that Joseph ("Joe Joe") Auricchio paid the unlawful bribes and gratuities out of his own pocket *(see* Finding of Fact paragraph [20]). The evidence fails to prove whether the money Joseph ("Joe Joe") Auricchio gave unlawfully to the USDA inspector was his own money, or Trombetta, Inc.'s money, or money from some other source.

[50]Joseph ("Joe Joe") Auricchio was not a witness before me. Neither the parties nor I had the opportunity to see Joseph ("Joe Joe") Auricchio confronted or cross-examined. From the evidence before me, including particularly the plea agreement letter (ALJX 1), and the transcript of Mr. Auricchio's guilty plea (RX N), there is no evidence suggesting that anyone at Trombetta, Inc. besides Joseph ("Joe Joe") Auricchio may have involved in paying the unlawful bribes and gratuities. Joseph ("Joe Joe") Auricchio did not implicate his employer. The evidence does not prove that anyone else at Trombetta, Inc. knew Joseph ("Joe Joe") Auricchio was illegally giving money to USDA inspectors.

[51]John A. Koller, a USDA employee (Senior Marketing Specialist, PACA Branch, Fruit and Vegetable Programs, AMS), testified that the bribery of the USDA produce inspector was such a serious violation of the PACA that a strong sanction is necessary as a deterrent, and that USDA recommends license revocation as the only adequate option. I agree. I find that Joseph ("Joe Joe") Auricchio's actions within the scope of his employment are deemed to be the actions of Trombetta, Inc., and that those actions were so egregious that nothing less than license revocation is an adequate remedy. Mr. Koller explained USDA's recommendation for license revocation as follows: Mr. Richman: Are you aware of the sanction Complainant recommends in this case?

Mr. Koller: Yes, I am.

Mr. Richman: How are you aware of the sanction?
Mr. Koller: I participated in the development of the sanction recommendation.
Mr. Richman: And what is the sanction recommendation in this case? Mr. Koller: A license revocation.
Mr. Richman: And what is the basis for Complainant's sanction recommendation?
Mr. Koller: Well, the basis of Complainant's recommendation for a license revocation is based on several factors. The evidence clearly shows that Respondent (Trombetta, Inc.) paid bribes to a produce inspector. The FBI has documented that over a two-and-a-half month period of time, bribery payments were made that affected seven inspections. Further aggravating the situation, Mr. Cashin has testified that he had been accepting bribes from Respondent (Trombetta, Inc.) since 1997. And bribery payments to a produce inspector has an effect on the trade as a whole. And these - - what will happen is thousands of dollars in adjustments could arise or will arise from these false inspections. Another factor is the industry relies on the produce - - on the inspection certificate to quickly resolve disputes. And approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it is important that these inspections are accurate. If there is any suspicion that these inspections have been tainted due to bribery payments being made to the produce inspector to change the outcome of the results, change the outcome of the inspection, this is something that affects the industry as a whole. Because as the sellers become aware of this bribery situation coming along, then it affects the credibility of the inspection certificate itself and the inspection process. It provides a problem for the industry. The trades rely on the results of that inspection to be impartial and accurate. Another

concern is the concern of when you have got a wholesaler that is paying bribes to a produce inspector, other wholesalers on the market may very well feel - - may very well pay bribes as well to the produce inspector. For example, when you have got a wholesaler in the Hunts Point Market who is paying bribes to a produce inspector to affect the outcome of the inspection and be in a position to get price adjustments on a particular commodity, then they will be able to sell the produce for less. And when other wholesalers become aware of this, they will feel that they are in a position to have to pay the bribes as well in order to compete with the wholesalers that are paying these bribes. And, again, with this is consideration, the effects that this causes on the inspection process and the effect on the Hunts Point Market itself is that whether there is a wholesaler paying bribes or not, it casts a concern to the industry as to who they can rely on in the market there at the market - - the wholesalers on the market. Excuse me. And finally, the Department strongly believes that a strong sanction not only on the Respondent will also - - will not only be a deterrent to Respondent, but will also be a deterrent to other members of the trade who are contemplating making bribery payments to a produce inspector.

* * *

Mr. Richman: Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: Bribery payments being made to a produce inspector is a serious violation of the PACA. Whether it is to a produce inspector or to any member of the trade, and in the situation where a produce inspector has taken bribes on an

inspection, does not excuse the PACA licensee from those actions of committing the bribery itself.

Mr. Richman: Does Complainant recommend a civil penalty in this case as an alternative to license revocation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: The Department feels that - - or it believes that this type of violation is a most serious violation under the Act. And as, you know, the effects of bribery payments, you know, first off, it is bribery payments of the produce inspector. You have got that. The bribery payments have been taking place over a period of time, they are repeated. The bribery payments affect the credibility of the inspection certificate, and then that consequently affects the reliability and credibility of that inspection to the industry to quickly resolve disputes. The other concern, again, is the competitive nature, the competitive aspect of the industry on the Hunts Point Market or any other market. If you have got firms paying bribes that are giving - - that are getting an advantage with price adjustments, there again, causes a problem with competition. Those firms that are not in the same situation, they are not able to compete in that situation. Also, the aspect of Department - - in order to deter this type of action, this violation, from occurring, a strong sanction of a license revocation to deal with one of these most serious violations of the Act would be the appropriate thing. And the Department has also consistently recommended that a revocation of a license be the recommendation for sanction where a serious violation of the PACA by committing a bribe has taken place.

Mr. Richman: Is that the policy of the Department?

Mr. Koller: That is the policy of the Department.

Tr. 367-371.

Conclusions

[52]Joseph ("Joe Joe") Auricchio, an employee of Respondent M. Trombetta & Sons, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[53]Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc., when he did what is described in paragraph [52], even if what he did was unauthorized. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer Trombetta, Inc.; the unlawful payments could have benefitted Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. 7 U.S.C. § 499p.

[54]Joseph ("Joe Joe") Auricchio was acting as Trombetta, Inc.'s agent, when he did what is described in paragraph [52]. 7 U.S.C. § 499p.

[55]Joseph ("Joe Joe") Auricchio's willful violations of the PACA are deemed to be Trombetta, Inc.'s willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 *Agric. Dec.* 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[56]M. Trombetta & Sons, Inc., through its employee and agent, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[57]Trombetta, Inc. is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, *See*Appendix A.*

[58]M. Trombetta & Sons, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[59]The duty that Trombetta, Inc. failed to perform is the duty to maintain fair trade practices required by the PACA. Paying the unlawful bribes and gratuities to the USDA produce inspector is the unfair trade practice and failure to maintain fair trade practices. Regardless of the produce inspector's response - - even if the produce inspector had not falsified his inspection reports - - and even if the wholesaler gained no unfair economic advantage and made no attempt to gain any unfair economic advantage - - making the unlawful payments to the USDA produce inspector is the unfair trade practice. The unlawful payments to the USDA produce inspector were egregious even if Trombetta, Inc. got nothing in return. *JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001).

[60]Trombetta, Inc.'s violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 *Agric. Dec.* 763, 780-781 (2003).

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*Appendix A not included herein– Editor

Although suspension was the chosen remedy in *Heimos*, which concerned Heimos' employees altering inspection certificates, suspension would not be adequate to respond to the seriousness of Trombetta, Inc.'s failures here.

[61]Trombetta, Inc.'s failures here threatened the integrity of the USDA inspection process, casting suspicion on inspection results and tending to taint the marketplace.

[62]This case, and a similar case I recently decided, *In re KOAM Produce, Inc.*, PACA Docket No. D-01-0032, April 18, 2005, ____ *Agric. Dec.* _____, illustrate how difficult it is to determine and prove where the money came from that was used to pay the unlawful bribes and gratuities to the USDA inspector. Responsibility under principal-agent law is indispensable under the PACA.

[63]Considering all of the evidence, Trombetta, Inc., but for the actions of Joseph ("Joe Joe") Auricchio, appears to have been trustworthy and honest and fair dealing. For the purpose of this Decision, I find no culpability on the part of anyone within Trombetta, Inc. other than Joseph ("Joe Joe") Auricchio. Of particular significance is the fact that USDA Produce Inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years, and had been inspecting at Trombetta, Inc. for about 20 years, collected no bribes at Trombetta, Inc. until Joseph ("Joe Joe") Auricchio started to work as a salesman there, in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph ("Joe Joe") Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. *See*Findings of Fact paragraphs [27], [28], and [29]. Nevertheless, I hold Trombetta, Inc. responsible for the actions of Joseph ("Joe Joe") Auricchio, just as if Trombetta, Inc. itself had performed each of Mr. Auricchio's acts.

[64]USDA is charged with overseeing the integrity of the USDA inspection process and must take appropriate action against a licensee committing a unfair trade practice, even where there is evidence of

only one employee of the licensee committing the unfair trade practice, and whether or not such employee is a manager, supervisor, officer, director, or shareholder of licensee.

[65]Revocation of Trombetta, Inc.'s license is commensurate with the seriousness of Trombetta, Inc.'s violations of the PACA. Tr. 367-71.

[66]Any lesser remedy than revocation would not be commensurate with the seriousness of Trombetta, Inc.'s PACA violations, even though many of Trombetta, Inc.'s competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 367-71.

Order

[67]Respondent Trombetta, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[68]Respondent Trombetta, Inc.'s PACA license shall be revoked.

[69]This Order shall take effect on the 11th day after this Decision becomes final.

Finality

[70]This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

OMEGA PRODUCE COMPANY, INC. v. BOSTON TOMATO & PACKING, LLC, d/b/a BOSTON TOMATO.
PACA Docket No. R-05-033.
Decision and Order.
Filed February 15, 2005.

PACA - Tomato Suspension Agreement – Exclusion of Implied Warranties.

Where tomatoes were purchased by Respondent from Complainant pursuant to the December 4, 2002 Suspension Agreement on Fresh Tomatoes Imported from Mexico, Respondent's claim that the tomatoes were not merchantable due primarily to the quality defects disclosed by a USDA inspection cannot be considered because the Suspension Agreement permits adjustments to the sales price for the condition defects listed in the Agreement and for *no other defects.* The language used in the Suspension Agreement is sufficiently explicit to bring the exclusion of warranties to the buyer's attention and make plain that there are no implied warranties.

Daniel Deutsch, for Complainant.
Kimberly A. Howard, for Respondent.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed with the Department within nine months from the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $11,365.20 in connection with one trucklot of tomatoes shipped in the course of interstate and foreign commerce.

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

Since the amount claimed in the formal complaint does not exceed

$30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, Omega Produce Company, Inc., is a company whose post office address is P.O. Box 277, Nogales, Arizona, 85628.

2. Respondent, Boston Tomato & Packaging, LLC, doing business as Boston Tomato, is a limited liability company whose post office address is 117-118 New England Produce Ctr., Chelsea, Massachusetts, 02150-1721. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about January 21, 2004, Complainant, by oral contract, sold to Respondent one trucklot of tomatoes comprised of 72-25 lb. cartons of extra large, 90-110 count, Roma tomatoes at $14.35 per carton, or $1,033.20, and 720-25 lb. cartons of large, 110-130 count, Roma tomatoes at $14.35 per carton, or $10,332.00, for a total f.o.b. contract price of $11,365.20.

4. The sale of the tomatoes mentioned in Finding of Fact 3 was negotiated by a broker, Agri-Sales Limited, Inc. (hereafter "Agri-Sales"), who acted in negotiating the sale as an agent for Respondent.

5. On February 3, 2004, the tomatoes were shipped from loading point in the state of Arizona, to Respondent in Chelsea, Massachusetts, in a truck operated by Central Coast Transport, Inc. (hereafter "Central Coast"), of Nogales, Arizona.

6. On February 10, 2004, Mr. Dino Robles of Central Coast sent a fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the truck been [sic] up in

Boston since 5 AM EST. Feb. 9, 04 Monday. I need this trk. off by 2:00 PM EST. or we are going to sell the tomato for some one [sic] acct. or put in a cold storage. Please get back to me.

Later that same day, Central Coast moved the tomatoes to Stea Brothers, Inc., in Philadelphia, Pennsylvania, to be handled for their account.

7. On February 11, 2004, Mr. W. Winston Lopez of Agri-Sales sent a fax message to Central Coast's Mr. Dino Robles stating:

> As per our conversation yesterday after, in order to clearify [sic] that you and I did speak on this matter. I did receive your call advising me of this fax, which I reviewed upon my return to the office.
>
> 1. I am in accord of said action on your part of which you stated that Boston Tomato had said to you they would not unload without a confirmation of adjustment of price.
>
> 2. A confirmation was sent to them once it was approve [sic] by the shipper. Although the time frame did not allow for the shipment to be unload [sic] yesterday afternoon Boston did state that it be [sic] done this morning upon open [sic] his place of business.
>
> 3. You and I did discuss this matter, and agreed the truck to be present [sic] this morning for that purpose.
>
> 4. Presently there was no confirmation from the trucker or your office that truck attempted to get unloaded this morning other than you mentioning that the driver was present at 2:00am.
>
> I am going to speak with Boston in order to advise of the present position of this matter. Please contact me if you have any questions regarding this matter.

8. Also on February 11, 2004, at 9:18 a.m., the tomatoes were subjected to a USDA inspection at the place of business of Stea Brothers, Inc., in Philadelphia, Pennsylvania, the report of which disclosed 67% average defects, including 57% quality (puffiness, scars) and 10% sunken discolored areas, in the 720 cartons of large Roma tomatoes, and 66% average defects, including 60% quality (puffiness, scars) and 6% sunken discolored areas, in the 72 cartons of extra large Roma tomatoes. Pulp temperatures at the time of the inspection ranged from 50 to 52 degrees Fahrenheit.

9. Following the inspection, Mr. Dino Robles of Central Coast sent

a second fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the tomato are [sic] placed at Stea Bros. in Phila, PA 215-336-2170 will work for my acct. on freight and remit balance to shipper. Also here's copy [sic] of inspection.

10. Stea Brothers, Inc. accounted to Central Coast for the tomatoes as follows:

Sales:

23 @	$10.00 =	230.00	80 @	$ 3.00 =	240.00
1 @	8.00 =	8.00	232 @	2.00 =	464.00
18 @	6.00 =	108.00	77 @	1.00 =	77.00
111 @	4.00 =	444.00	250 @	0.00 =	0.00

Total Packages sold 792
Average 1.98 per package

Total Sales $ 1571.00

Less:

15% Commission	$ 235.65
Handling 792pkgs @ .25	198.00
Inspection	144.00
Dump Charge 250pkgs @ 1.00	250.00
Total Net Due:	$ 743.35

11. Stea Brothers, Inc. paid Central Coast $743.35 for the tomatoes with check number 52331, dated February 27, 2004.

12. Respondent did not receive any of the proceeds from the sale of the tomatoes from Central Coast, nor has Respondent remitted any sums to Complainant toward the agreed purchase price of the tomatoes.

13. The informal complaint was filed on March 3, 2004, which is within nine months from the accrual of the cause of action.

Discussion

Complainant brings this action to recover the agreed purchase price for one trucklot of Roma tomatoes sold and shipped to Respondent. Complainant states Respondent accepted the tomatoes in compliance with the contract of sale, but that it has since failed, neglected and refused to pay the negotiated contract price of $11,365.20. As evidence in support of this allegation, Complainant attached to the formal complaint a copy of its invoice billing Respondent for the tomatoes in the amount stated, as well as a copy of the bill of lading signed by the trucker, which lists the destination for the tomatoes as Respondent's place of business in Chelsea, Massachusetts.[1]

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it raises several issues in defense of its failure to pay Complainant the amount claimed. Respondent maintains first that the broker, Agri-Sales, confirmed that Complainant granted protection for market decline for the subject load of tomatoes. According to Respondent, the market for Roma tomatoes was continuously dropping while the tomatoes were in transit. As a result, Respondent states that in each of three conversations with Agri-Sales, and between Agri-Sales and Complainant, the sales price of the tomatoes was adjusted downward by $2.00 per carton, thereby ultimately reducing the price from $14.35 to $8.35 per carton. Respondent states Complainant confirmed this by faxing a revised invoice to Respondent reflecting the new price of $8.35 per carton. To substantiate this contention, Respondent attached to the Answer a copy of Complainant's invoice for the tomatoes whereon the original sales price of $14.35 per carton is crossed through and $8.35 is handwritten in beside it.[2]

Upon review, we note first that the Report of Investigation prepared by the Department includes a copy of a February 12, 2004 letter addressed to Respondent from Complainant's attorney, wherein counsel advises Respondent, in pertinent part, as follows:

In the interest of resolving this matter and for settlement purposes only, Omega Produce Company is willing to grant a credit of $6.00 per

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[1] Formal Complaint Exhibits 1A and 3A.

[2] Answer Exhibit A.

package leaving a total of $6,613.20 payable, if such amount is paid within twenty-one (21) days from shipment of the load. If Boston Tomato Company, Inc. fails to pay $6,613.20 by such period of time, we will proceed with a PACA complaint for $11,365.20, the full balance owed. [3]

Also included in the Report of Investigation is a May 27, 2004 statement issued by Complainant to Respondent showing the amount due for the invoice in question as $6,613.20.[4] It is therefore apparent that in spite of Respondent's failure to pay Complainant $6,613.20 within the time period stated in the February 12, 2004 correspondence prepared by Complainant's attorney, Complainant still considered the amount due for the shipment to be $6,613.20 several months later, when the statement just mentioned was prepared. On this basis, we find that the preponderance of the evidence supports Respondent's contention that the contract price of the tomatoes was reduced to $8.35 per carton, or a total of $6,613.20.

Respondent also maintains that when the truck arrived to deliver the tomatoes on February 9, 2004, Respondent discovered that there were 72 cartons of extra large and 720 cartons of large Roma tomatoes, and that the tomatoes were green in color, which was not in conformance with the purchase order. Respondent states it notified Agri-Sales of the non-conforming color and size of the tomatoes, after which it received instructions on February 10, 2004 to have the tomatoes inspected. At that time, the truck was reportedly requested to return to Respondent's place of business so that the tomatoes could be inspected; however, Respondent states the truck did not return by 2:00 p.m. on February 10, 2004, the time by which the trucker insisted the tomatoes should be unloaded. As a result, Respondent states the tomatoes were delivered on February 11, 2004 to Stea Brothers, Inc., in Philadelphia, Pennsylvania, where a USDA inspection was performed. Respondent states that based on the USDA inspection results, which showed that the tomatoes contained 67% defects, including 57% "puffy" and "scars," and substantial amounts of sunken or discolored areas, the tomatoes were not

[3] Report of Investigation Exhibit No. 9F, ¶2.

[4] Report of Investigation Exhibit No. 12C.

merchantable for consumption. Respondent adds that due to the poor condition and quality, the tomatoes generated only $743.35 when sold by Stea Brothers, Inc. for the account of the trucker, and points out that the return from Stea Brothers, Inc. shows that more than 94% of the tomatoes were either dumped or sold at a price not even meeting the floor price.

Although Respondent claims that the tomatoes were not merchantable, there is no indication that Respondent ever notified Complainant that it was rejecting the tomatoes. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). We conclude, on this basis, that Respondent accepted the tomatoes.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.,* 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.,* 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.,* 46 Agric. Dec. 1681 (1987). As we mentioned, Respondent contends that the tomatoes in question were not merchantable and cites the USDA inspection results and the account of sales prepared by Stea Brothers, Inc. as proof in support of this contention.

On the issue of merchantability, the Uniform Commercial Code (UCC), section 2-314, states that "[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." It is well-established that Complainant is a dealer of fresh tomatoes. Thus, any sale by Complainant of fresh tomatoes would normally include an implied warranty of merchantability in accordance UCC § 2-314. Moreover, the substantial quality defects disclosed by the USDA inspection of the tomatoes in question would certainly be sufficient to establish a breach by Complainant of this warranty. We note, however, that in reference to the account of sales, Respondent mentions a "floor price."[5] Respondent's mention of a "floor price" is an implicit acknowledgement on the part of Respondent that the tomatoes in question were sold subject to the December 4, 2002

[5] Answer, pg. 3, ¶6.

Suspension Agreement for Fresh Tomatoes from Mexico[6] ("Suspension Agreement"), which provides that such tomatoes must be sold at or above an established reference price. In addition, Complainant's invoice to Respondent for the tomatoes bears a statement that reads:

The tomatoes sold pursuant to this invoice are subject to that Suspension Agreement dated December 4, 2002 between the U.S. Department of Trade and certain tomato growers, the Clarification thereof, and to (a) certain letter agreement(s) between yourselves and ourselves regarding the same, each of which is incorporated by this reference as if set forth in full. Said agreements will be mailed to you upon request.

We conclude, therefore, that the tomatoes at issue herein were sold subject to the Suspension Agreement.

Appendix D, subsection (A)(5) of the Suspension Agreement states:

Under this Agreement, adjustments to the sales price of signatory tomatoes will be permitted only for the condition defects identified in the table below and for no other defects.

Condition Defects

(1) Sunken & Discolored Areas
(2) Sunburn
(3) Internal Discoloration
(4) Freezing Injury
(5) Chilling Injury
(6) Alternaria Rot
(7) Gray Mold Rot
(8) Bacterial Soft Rot
(9) Soft/Decay

As we mentioned, the implied warranty of merchantability is applicable in the contract for the sale of goods if the seller is a merchant with respect to the type of goods, *unless excluded or modified*. In this regard, subsection 3(a) of UCC § 2-316, Exclusion or Modification of Warranties, states "unless the circumstances indicate otherwise, all

[6] See 67 FR 77044, dated December 16, 2002, "Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico," issued by the Department of Commerce, International Trade Administration, Import Administration.

implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." The language used in Appendix D, subsection (A)(5), of the Suspension Agreement expressly limits the seller's responsibility for the defective nature of the tomatoes to the defects listed therein. In so doing, we find that the Suspension Agreement specifically excludes any other implied warranties that would normally apply.

We should also note that even if the implied warranty of merchantability was in effect for the shipment in question, the Suspension Agreement would nevertheless limit the remedies available to Respondent for the recovery of damages resulting from a breach. UCC section 2-719(1), Contractual Modification or Limitation of Remedy, states "(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this article... and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy" Official Comment 2 to UCC § 2-719(1)(b) states this section "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive," and that "[i]f the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." In this regard, the Suspension Agreement in question provides a specific procedure for making adjustments to the sales price for tomatoes sold under the Agreement and expressly limits the conditions under which such adjustments will be permitted.

Pursuant to the Suspension Agreement, Respondent's claim for damages is deficient in several respects. First, the Suspension Agreement requires that a USDA inspection be called for no more than six hours from the time of arrival at the destination specified by the receiver, and that the inspection be performed in a timely fashion thereafter. (Appendix D, subsection (A)(4)¶1). As the record reflects, this was not accomplished by Respondent. In addition, subsection (A)(4)¶3 of the Suspension Agreement states, "no adjustments will be granted for a USDA inspection at a destination that is different from the destination specified by the first receiver of the product." In the instant case, the destination specified by

Complainant for the tomatoes was Respondent's place of business in Chelsea, Massachusetts. However, as we mentioned, the USDA inspection was performed at Stea Brothers, Inc., in Philadelphia, Pennsylvania. Finally, as we already mentioned, Appendix D, subsection (A)(5) of the Suspension Agreement states specifically that, "adjustments to the sales price of signatory tomatoes will be permitted *only* for the condition defects identified in the table below *and for no other defects*." (emphasis supplied). While the condition defects listed in the table include sunken discolored areas, subsection (A)(2) of Appendix D establishes a threshold for any one condition defect of 15%, and subsection (A)(3) of Appendix D provides that no adjustments will be granted unless the percentage of defects disclosed by the USDA inspection exceeds this threshold. Therefore, since the USDA inspection in question disclosed no more than 10% sunken discolored areas in either of the lots of tomatoes inspected, no adjustment for the condition defects disclosed by the USDA inspection are permitted under the Suspension Agreement. Moreover, Respondent's claims regarding the quality, size and color of the tomatoes cannot be considered because, as we mentioned, the Suspension Agreement specifically provides that adjustments will be granted for condition defects only, and for no other defects.

Therefore, having failed to establish that it is entitled to any adjustments pursuant to the Suspension Agreement under which the tomatoes were purchased, Respondent is liable to Complainant for the tomatoes it accepted at the adjusted contract price of $6,613.20. Respondent's failure to pay Complainant $6,613.20 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.,* 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.,* 29 Agric. Dec. 978 (1970); *John W.*

Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.,* 22 Agric. Dec. 66 (1963).

Complainant in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $6,613.20, with interest thereon at the rate of 10% per annum from March 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

In re: THE NUNES COMPANY, INC. v. WEST COAST DISTRIBUTING, INC.
PACA Docket No. R-04-107.
Decision and Order.
Filed March 7, 2005.

PACA - Evidence, best – Good Delivery Standard.

Where a shipment of 630 cartons of lettuce were shipped, and 620 cartons were inspected indicating that the product met the Good Delivery Standard for iceberg lettuce, the receiver called for and obtained an appeal inspection two hours later, covering only 420 cartons of the shipment. The appeal inspection, although it did not nullify the first inspection, was considered to represent the best evidence of the condition of the lettuce. In determining whether the appeal inspection revealed a breach of the Good Delivery Standard, the missing 210 cartons were considered to have contained no defects.

Mark C.H. Mandell, for Complainant.
Thomas R. Oliveri, for Respondent.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $14,809.00 in connection with a transaction in interstate commerce involving a truckload of lettuce. Complainant subsequently adjusted the amount being sought in this proceeding to $3,845.10.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent, which filed an Answer thereto denying liability to Complainant. Respondent's Answer also included a counterclaim in the amount of $7,484.40, for damages which it alleges arise out of the same transaction as that in the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of verified statements. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. The parties were also given the opportunity to file Briefs. Both parties filed Briefs.

Findings of Fact

1. Complainant, The Nunes Company, Inc., is a corporation whose post office address is P.O. Box 80006, Salinas, California. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, West Coast Distributing, Inc., is a corporation whose post office address is 350 Main Street, Suite 15, Malden, Massachusetts. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about June 27, 2003, under invoice 1455840, Complainant sold and shipped from a loading point in the State of California to Respondent in Boston, Massachusetts, 630 cartons of "Tubby" brand

lettuce and 210 cartons of "Foxy" brand lettuce at $17.60 per carton, for a total f.o.b. invoice price of $14,809.00, which includes $25.00 for a temperature recorder.

4. On or about July 2, 2003, the invoice price was subsequently adjusted to $12.75 per carton for the "Tubby" brand lettuce and $13.50 per carton for the "Foxy" brand lettuce, making the total adjusted invoice price of $10,985.50.

5. On or about July 3, 2003 at 6:05 a.m., 620 cartons of "Tubby" brand lettuce were federally inspected at Respondent's customer, W.H. Lailer & Co., Inc., in Chelsea, Massachusetts. Inspection certificate T-577432-8 disclosed the following, in relevant part:

TEMPERATURES	PRODUCT	BRAND MARKINGS	ORIGIN	LOT ID	NO.of CONTAINERS
39 TO 41°F	Iceberg Lettuce	"Tubby" 24 Heads	CA	Hakey 01-1034 178-1034 178-1???	620 cartons

AVERAGE DEFECTS	**including SER DAM**	**OFFSIZE/DEFECTS**	**OTHER**
00%	00%	Quality	Decay early stages
08%	01%	Tipburn (0 to 21%)	
01%	00%	Discoloration following bruising	
01%	01%	Upper leaf decay	
04%	04%	Head leaf decay (0 to 8%)	
14%	**06%**	**CHECKSUM**	

GRADE: Fails to Grade U.S. No. 1. only account of condition
REMARKS: Lot made accessible for inspection by applicant.

6. On or about July 3, 2003, at 8:05 a.m., an appeal inspection was conducted on 420 cartons of "Tubby" brand lettuce. The appeal inspection was also conducted at Respondent's customer, W.H. Lailer & Co., Inc., in Chelsea, Massachusetts. Inspection certificate T-577324-7 disclosed the following, in relevant part:

TEMPERATURES	**PRODUCT**	**BRAND MARKINGS**	**ORIGIN**	**LOT ID**	**NO. of CONTAINERS**
37 TO 39°F	Iceberg Lettuce	"Tubby" 24 Heads	CA	Liner	420 cartons

AVERAGE DEFECTS	**including SER DAM**	**OFFSIZE/DEFECTS**	**OTHER**
00%	00%	Quality	Decay early stages, affecting head leaves and butts.
10%	00%	Tipburn (0 to 21%)	
10%	10%	Decay (4 to 13%)	

20% 10% CHECKSUM
This certificate covers an appeal inspection on certificate #T577432-8 and is revised as to condition.
GRADE: Fails to Grade U.S. No. 1. only account of condition
REMARKS: cartons stickered 0223 178 1034, 0223 011 034

7. On or about November 14, 2003, with check 80908, Respondent paid Complainant $3,942.30 for the load shipped under invoice 1455840.
8. On or about December 26, 2003, with check 82489, Respondent paid Complainant an additional $3,108.10 for the load.
9. An informal complaint was filed on September 22, 2003, which is within nine months from when the cause of action accrued.

Conclusions

Complainant brings this action to recover the invoice price for a truckload of iceberg lettuce sold to Respondent. Both parties acknowledge that while the original contract price for the lettuce was $17.60 per carton, the parties orally agreed to adjust the prices to $12.75 f.o.b. for the "Tubby" label and $13.50 f.o.b. for the "Foxy" label, for a total adjusted invoice price of $10,895.50.[1] Complainant asserts that the load was received and accepted by Respondent's customer, but Respondent has only paid $7,050.40, and has since refused and failed to pay the remainder of the invoice price of $3,845.10. As proponent of this claim, Complainant has the burden of proving its allegations by a preponderance of the evidence.[2] In this regard, Complainant submitted into evidence copies of its invoice, bill of lading, and inspection certificates T-577432-8 and T-577324-7.[3]

In response to the formal complaint, Respondent filed a sworn Answer and a sworn Counterclaim. In its Answer, Respondent acknowledges that it agreed to purchase and its customer received and accepted, the load of lettuce which is the subject of this proceeding.

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[1] See Respondent's Answer and Complainant's Opening Statement.

[2] *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

[3] See Formal Complaint, Exhibits 1-4.

Respondent, however, asserts that the "Tubby" label lettuce was not in suitable shipping condition and it suffered damages in the amount of $7,484.40 for which it has filed a counterclaim.

In response to Respondent's Answer, as its Opening Statement, Complainant filed a sworn affidavit from its Sales Associate, Doug Classen. In his affidavit, Mr. Classen states that, on behalf of Complainant, he negotiated the transaction which is the subject of this proceeding. Mr. Classen states that after the load arrived, on or about July 2, 2003, Respondent's Mr. Keegan contacted him seeking a market adjustment on the iceberg lettuce. Mr. Classen states that the parties agreed to reduce the price of the liner iceberg lettuce to $12.75 per carton and the wrapped lettuce to $13.50 per carton, for a total adjustment to the invoice price of $3,916.50.

Mr. Classen states that he told Mr. Keegan that no further adjustments would be granted as the federal inspection accurately reflects the quality and condition of the lot upon arrival and showed that the iceberg lettuce met good delivery standards upon arrival in Chelsea, Massachusetts. Mr. Classen maintains that the appeal inspection should not be given any consideration, as it was performed on only a portion of the lot of iceberg lettuce and the lot had lost its identity and character. Mr. Classen states that considering the amount that Respondent has paid and the adjustment which was granted, the amount due and owing Complainant from Respondent is $3,845.10.

In response to Respondent's counterclaim, Complainant filed a sworn Response in which it denies that it failed to ship lettuce in good shipping condition. As a result, Complainant maintains that Respondent has not suffered any damages.

In response to Mr. Classen's sworn affidavit, as its Answering Statement, Respondent filed a sworn affidavit from Steve Keegan. Mr. Keegan acknowledges that the parties reached an agreement to adjust the prices to $12.75 per carton for the "Tubby" brand lettuce and $13.60 per carton for the "Foxy" brand lettuce. Mr. Keegan, however, states that upon arrival he received an immediate protest from his customer concerning the condition of the "Tubby" lettuce. Mr. Keegan states that his customer called for an appeal inspection because the amount of decay and tipburn was higher than the amount indicated on the original inspection. Mr. Keegan notes that due to the holiday and falling market prices, its customer sold a portion of the product to preserve its value

while awaiting the appeal inspection.

Mr. Keegan states that since the appeal inspection showed that the lot failed to meet good delivery standards, he agreed with his customer that the lot be handled for Complainant's account. Mr. Keegan maintains that, as evidenced by his customer's account of sale, it suffered damages in the amount of $7,482.80.[4] Furthermore, Mr. Keegan maintains that the adjusted invoice for the load was $10,983.50, and after considering the amount of Respondent's damages, $7,482.80, and the amount which Respondent has already paid Complainant, $7,050.40, Complainant has been overpaid in the amount of $3,640.70.

In response to Mr. Keegan's sworn affidavit, as its Statement in Reply, Complainant filed another sworn affidavit from Doug Classen. Mr. Classen states that contrary to Mr. Keegan's sworn statements, he never discussed the appeal inspection, nor did he agree to the consignment handling of the lettuce. In addition, Mr. Classen reiterates that the first inspection conducted on the lettuce shows that the load met contract specifications upon arrival.

Both parties filed Briefs in which they reiterated their respective arguments.

We first turn to Respondent's allegation that its customer was authorized to handle the load on a consignment basis. As previously stated, Respondent, as the party alleging a modification in the contract terms from a sale to a consignment, has the burden of proving this allegation by a preponderance of the evidence.[5] In this regard, we note that Respondent has offered no evidence to support the contention that Complainant agreed to have the load handled on a consignment basis. In fact, Respondent does not specifically assert that Complainant agreed to the consignment handling, only that Respondent agreed with its customer that the load be handled for Complainant's account.[6] Complainant, on the other hand, maintains that after the price was adjusted to reflect the market, it informed Complainant that there would

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[4] See Respondent's Answering Statement, Exhibits B and C.

[5] *Regency Packing Co. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F.H. Hogue Produce Co .v. Singer's Sons*, 33 Agric. Dec. 451 (1974).

[6] Respondent's Answering Statement – Sworn Affidavit of Steve Keegan.

be no further adjustments and full payment was anticipated. Based upon a review of the evidence, we find that Respondent has failed to satisfy its burden of proof to show that the parties agreed to modify the terms of the agreement from a sale to a consignment.

We conclude that Respondent accepted the load, and it is, therefore, liable to Complainant for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant.[7] Therefore, the burden of proof to show both a breach and damages rests upon Respondent. In this regard, Respondent asserts that the load failed to arrive in good condition.[8]

The lettuce in this shipment was sold f.o.b., which means that the warranty of suitable shipping condition is applicable. That warranty provides, "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."[9] For lettuce

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

[8] See Respondent's Answer.

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

(continued...)

what constitutes delivery without abnormal deterioration, or what is elsewhere called "good delivery," is set forth in section 46.44 of the Regulations, which reads, in relevant part, as follows:

> (a) Lettuce. (1) If the contract specifies a U.S. grade, the lettuce many contain an average of not more than 3 percent condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerances provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides a 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7 percent of the tolerance can be applied to damage by condition factors. The additional 3 percent Good Delivery tolerance would then allow a total of 10 percent damage by condition factors in this shipment at destination.
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> (2) If the contract does not specify a U.S. grade or percentage of condition defects, the lettuce at destination may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves. Sales made on a percentage of a U.S. grade, without specifying the percentage of condition defects separately from the permanent defects, fall under this provision, and the lettuce may not contain more than a total of 15 percent condition defects at destination.

The load was shipped on June 27, 2003 and consisted of 630 cartons of "Tubby" brand lettuce and 210 cartons of "Foxy" brand lettuce. On or about July 3, 2003 at 6:05 a.m., 620 cartons of "Tubby" brand lettuce were federally inspected in Chelsea, Massachusetts. Inspection certificate T-577432-8 disclosed that the lot had average condition defects of 14%, including 4% head leaf decay, 1% wrapper leaf decay,

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

1% discoloration following bruising, and 8% tipburn. We find that these results normally would establish that the lettuce made good delivery. In this case, however, we must consider an appeal inspection which was conducted approximately two hours after the initial federal inspection. As a general rule, we accept the results of a timely federal appeal inspection, and rely on these results in preference to the results of the original inspection. The Regulations, in fact, state that:[10]

After an appeal inspection has been completed, an appeal inspection certificate shall be issued showing the results of such appeal inspection; and such certificate shall supersede the inspection certificate previously issued for the produce involved . . . The superseded certificate shall become null and void upon the issuance of the appeal inspection certificate and shall no longer represent the quality described therein .

The appeal inspection must be performed by an inspector or inspectors of equal or higher position than the first inspector, and must involve inspection of least double the normal number of samples.[11] Procedures are also in place to assure that the lot to be inspected is the same lot as originally inspected.[12]

The appeal inspection in this instance was conducted on 420 cartons of "Tubby" brand lettuce. However, as previously mentioned, the lot originally consisted of a total of 630 cartons of "Tubby" brand lettuce. Complainant maintains that the appeal inspection should not be given any consideration because it was only conducted on a portion of the lot. In this regard, in *Vukasovich v. Feldman Bros. Produce Co.*, we held that an appeal inspection conducted on only a portion of a load that was originally inspected does not guarantee an accurate review of the original inspection; such an inspection may be valid in its own right, but not as an appeal inspection that renders the original inspection null and

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[10] 7 CFR § 51.31

[11] See USDA Fresh Product Branch's General Market Inspection Instructions, April 1988, paragraph 131(a) and 133.

[12] See USDA Fresh Product Branch's General Market Inspection Instructions, April 1988, paragraphs 120 – 149.

void.[13] Therefore, since only 420 of the 630 cartons of the lot was subject to the appeal inspection, we conclude that the original inspection was not reversed by the subsequent appeal inspection.

However, as previously stated, we can consider the appeal inspection in its own right. Federal inspection certificate T-577324-7 disclosed that the 420 cartons had average condition defects of 20%, including 10% tipburn and 10% decay. Since 210 cartons of the 630 cartons were not inspected, we will assume that they were free of defects. Taking into account the 210 cartons which we presumed were free of defects, we find that the entire lot of 630 cartons of "Tubby" brand lettuce had average condition defects of only 13%, including 7% decay. Therefore, even assuming that the portion of the lot that was not inspected contained no defects, we find that the average amount of decay was not within the acceptable tolerances. As a result, given the results of the appeal inspection, we find that Respondent has proven a breach as to the entire lot of 630 cartons of "Tubby" brand lettuce.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.[14] The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by proper accounting prepared by the ultimate consignee. In this regard, Respondent submitted into evidence two accounts of sale from its customer, W.H. Lailer & Co., Inc.[15] The first account of sale summarily shows that 620 cartons of "Tubby" label lettuce was sold at the average price of $9.74 per carton, for total proceeds of $6,036.00.[16] The second account of sale shows the breakdown of the sales of individual lots of

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[13] *Vukasovich v. Feldman Bros. Produce Co.*, 37 Agric. Dec. 436 (1978).

[14] UCC § 2-714(2).

[15] See Respondent's Answering Statement, Exhibit B and C.

[16] See Respondent's Answering Statement, Exhibit B.

produce with the number of containers sold at each price and the date on which the sales of each lot took place.[17] This account of sale shows that sales took place between July 3, 2003 and July 10, 2003 for total proceeds of $6,036.00.

We find that Respondent's accounting shows that the resale was prompt and proper. The account of sales shows that 620 cartons of "Tubby" lettuce were sold for total sales of $6,036.00, or $9.74 per carton. The load, however, consisted of a total of 630 cartons. We will add the missing ten cartons back in at the average sales price of $9.74, or $97.40. Therefore, we find that the entire lot of 630 cartons had a total reasonable value of $6,133.40.

The first and best method of ascertaining the value of goods as warranted is to use the average prices shown by USDA Market News Service Reports for the destination market on the first day on which resales could have been made following arrival.[18] In this case, we will refer to the prices reported by the USDA Market News Service office in Boston, Massachusetts, the nearest reporting office to Chelsea, Massachusetts. The report on July 3, 2003 shows that 24 count heads of iceberg lettuce originating out of California were mostly selling between $19.00 and $20.00 per carton. Using the average price of $19.50 per carton, we find that the 630 cartons had a value as warranted of $12,285.00.

Respondent's basic damages are measured as the difference between the value of the lot had they been as warranted ($12,285.00) and their value as accepted ($6,133.40), or $6,151.60. In addition, Respondent is entitled to recover the USDA inspection fee of $86.00 as incidental damages. Therefore, Respondent's damages for the 630 cartons of "Tubby" lettuce amount to $6,237.60.

In regard to the remainder of the load shipped under invoice 1455840, 210 cartons of "Foxy" brand lettuce, we find no evidence it failed to arrive in good condition. As a result, Respondent remains liable to Complainant for the adjusted invoice price of the lot of 210 cartons of "Foxy" brand lettuce.

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[17] See Respondent's Answering Statement, Exhibit C.

[18] *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990).

The adjusted invoice price for the load shipped under invoice 1455840 is $10,983.50. Respondent's damages amount to $6,237.60, leaving a balance due of $4,745.90. A review of the file shows that Respondent has already paid Complainant $7,050.40 for the load. Therefore, there is no amount due and owing Complainant from Respondent for the load shipped under invoice 1455840. As a result, the complaint is dismissed.

Now we turn to Respondent's counterclaim wherein it asserts that it is entitled to recover damages in the amount of $7,484.00 which it incurred as a result of Complainant's breach. We have found that Respondent's damages total $6,237.60. We find that Respondent is entitled to recover the amount which it has overpaid Complainant. As previously stated, we find that the amount due and owing Complainant from Respondent for the load shipped under invoice 1455840 is $4,745.90. Respondent paid Complainant $7,050.40. Therefore, we find that the amount due and owing Respondent from Complainant is $2,304.50.

Complainant's failure to pay Respondent $2,304.50 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act 'the full amount of damages sustained in consequence of such violations." Such damages include interest.[19] Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest.[20] Complainant in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

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[19] *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[20] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec 66 (1963).

Order

The complaint is dismissed.

Within 30 days from the date of this order Complainant shall pay the Respondent, as reparation, $2,304.50, with interest thereon at the rate of 10% per annum from August 1, 2003, until paid, plus the amount of $300.00.

Copies of this order shall be served upon the parties.

In re: DELORME INTERNATIONAL BROKERS, INC. v. FRESH NETWORK LLC.
PACA Docket No. R-04-0017.
Order of Dismissal.
Filed April 4, 2005.

Mark C.H. Mandell, for Complainant.
Thomas R. Oliveri, for Respondent.
Patrice Harps, Presiding Officer.
Order issued by William G. Jenson, Judicial Officer.

PACA-R – Failure to Furnish Bond – Dismissal.

The Secretary has authority to dismiss a reparation complaint without further procedure if a foreign Complainant fails to furnish the required bond. This is true even where the foreign Complainant is a resident of a country that allows a U.S. resident to file a claim against one of its citizens without furnishing a bond if the Secretary finds that denial of the waiver contemplated in section 6(e) of the PACA (7 USC 499(e)) is necessary in order to effectuate the purposes of the Act or to protect the interests of the businesses concerned.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a formal Complaint was filed on September 1, 2003, in which Complainant, a resident of Canada, seeks reparation from Respondent. Respondent

which filed an Answer thereto, denying liability to Complainant. Included in the Answer, Respondent filed a Petition to Demand the Filing of a Bond for Complainant. The Complainant was given an opportunity to respond to the Petition but did not do so.

In our March 15, 2004, Order we stated that pursuant to Section 6(e) of the PACA (7 U.S.C. § 499f(e)), the Complainant as a resident of Canada is required to file a bond. Canada is a country which permits the filing of a complaint by a resident of the U.S. without the furnishing of a bond. Thus, reciprocity exists between the two countries with regard to administrative complaints involving perishable agricultural commodities in foreign commerce and the Secretary has authority, therefore, to waive the filing of a bond by Complainant. *See,* 7 U.S.C. § 499f(e). However, we found that even if Complainant filed a request for waiver of the bond requirement, the facts set out in Respondent's Petition, that have not been challenged by Complainant, raise concerns regarding Complainant's accountability if Respondent prevails in this reparation action and becomes entitled to fees from Complainant, or if an Order is issued against Complainant on a possible counterclaim filed by Respondent. We concluded that in order to protect the interests of Respondent, the Secretary should exercise discretion and deny, in advance, a request for waiver of the required bond filing by Complainant. *See,* 7 C.F.R. § 47.6(b).

The Order Granting Petition to Demand Complainant to File a Bond issued on March 15, 2004, required Complainant to file a bond in double the amount of its claim within 30 days of receipt of the Order, and stated that if notification of the filing of the appropriate bond was not received by the Office of the Hearing Clerk within the prescribed time period, the Complaint in this matter would be dismissed without further procedure. Complainant did not seek reconsideration of the Order.

The Office of the Hearing Clerk has not received notification that Complainant has filed the required bond. Therefore, as stated in our Order, the complaint shall be dismissed without further procedure.

Order

The Complaint filed in PACA Docket No. R-04-0017 is hereby dismissed.

This Order shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: CHRISTOPHER BLOEBAUM.
PACA-APP Docket No. 05-0002.
Order Dismissing Case.
Filed January 21, 2005.

Mary Hobbie, for Respondent.
Stephen P. McCarron, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

Respondent is the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. Petitioner's counsel reported on December 21, 2004, that the Chief of the PACA Branch was reviewing Petitioner's request to determine whether Petitioner was responsibly connected to DAl-Don Produce Company, Inc.

This case has been prematurely opened and is accordingly, **DISMISSED** without prejudice.

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

In re: JOSEPH T. GERNIGLIA AND MORRIS C. LEWIS, III.
PACA-APP-04-0012.
PACA-APP-04-0013.
Order.
Filed March 2, 2005.

Charles Spicknall, for Respondent.
Robin N. Loeb, for Petitioner.
Order issued by Peter M. Davenport, Administrative Law Judge.

The above captioned matters were previously consolidated for hearing together with the case of E.Mason McGowin, III (PACA-APP

Docket No. 04-0011). Upon the Motion of the Administrator of Fruit and Vegetable Programs withdrawing his determination that E. Mason McGowin, III was dismissed was responsibly connected with Fresh Solutions, Inc., the said Petitioner was dismissed as a party. The matter is now before the Administrative Law Judge upon the Motion of Morris C. Lewis, III to withdraw his Petition for Review.

Being sufficiently advised, it is **ORDERED** that:

1.The Petition for Review filed by Morris C. Lewis, III is hereby withdrawn and **DISMISSED.**

2.PACA-APP Docket No. 04-0013 having been dismissed, the same is severed from the consolidated action and **STRICKEN** from the Docket and the caption shall be amended to reflect only the name of Joseph T. Cerniglia as Petitioner.

Copies of this **ORDER** shall be served upon the parties by the Hearing Clerk's Office.

In re: MICHIGAN REPACKING AND PRODUCE CO., INC.
PACA Docket No. D-02-0015.
Order Vacating Order Staying Effective Date Of Decision.
Filed March 15, 2005.

Charles Kendall, for Complainant.
Mary E. Gardner, for Respondent.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Motion of the Complainant seeking vacation of the Stay Order entered in this case by then Chief Administrative Law Judge James W. Hunt on May 8, 2003. This action was commenced on March 29, 2002 by the filing of a Complaint alleging willful violations of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. §499a *et seq.*), hereinafter "PACA" and the Regulations issued thereunder (7 C.F.R. Part 46). After several attempts at service, service was finally effected on September 20, 2002 upon Robert Tringale, the President of Michigan Repacking and Produce Co., Inc. Although no formal answer apepars of record, the file

does contain correspondence dated October 7, 2002 from Mr. Tringale to Complainant's attorney advising him of the bankruptcy of the Respondent and the automatic stay imposed by the bankruptcy proceedings. Following receipt of the letter on October 25, 2002, the Complainant filed a Status Report and on January 9, 2003, the Complainant filed its Motion for Decision Without Hearing by Reason of Default. The attempt to deliver the Motion by certified mail was again unsuccessful and was resent pursunat to the Rules of Practice by first class mail on February 10, 2003. Mr. Tringale sought and received an Extension of Time until April 10, 2003 to file an Answer. Notwithstanding the extension granted, no Answer was received and on April 21, 2003, a Decision Without Hearing by Reason of Default was entered by Judge Hunt.

Belatedly, Mr. Tringale was again heard from in the form of correspondence dated and received on May 6, 2003. In it, he wrote:

> I write to remind you of the fact this action has either been stayed or expressly barred. In other words, your office should have stopped pursuing this action or never have filed it in the first place. Either way, your actions are in direct violation of a federal court order. This order expressly states as follows:

Any and all pending claims by or on behalf of other persons or entities holding claims against any of the Defendants which arise under or relate to the PACA or unpaid deliveries of Produce are hereby stayed and all subsequent actions by any unpaid seller of Produce to the Company are hereby barred. *This prohibition shall apply to all action or proceedings before the USDA and in all courts or other forums pending further Order of this Court.* Except as set forth herein, all persons or entities having unsatisfied claims against the Defendants arising under or relating to the PACA for unpaid deliveries of Produce to the Defendants shall have the right to seek a recovery on such claims in this action only by following the procedure established herein. Counsel shall serve a copy of this Order upon the plaintiffs in any known actions promptly upon learining of any such further actions. (Emphasis in original)

Judge Hunt, construing the above correspondence as a Motion for Reconsideration, entered his Order Staying the Effective Date of the Decision on May 8, 2003. The Complainant filed a Rely to Respondent's Motion and on May 29, 2003, Judge entered an Order Continuing his Stay. A status updated was filed by the Complainant suggesting that clarification would be forthcoming; however, none was received and when directed to file a further Status Report, the Complaint reported that despite numerous attempts to obtain a clarification of the federal court order, none was now anticipated and at the same time renewed their Motion to Vacate the Stay Order. At the request of Mr. Tringale, Mary E. Gardner, an attoney for nine of the PACA creditors has advised that the consolidated case against Respondent in United States Court for the Eastern District of Michigan were dismissed pursuant to a stipulation and settlement agreement between the parties[1] As noted in the Complaint's Reply to Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Default, the instant action is a disciplinary hearing brought under the Perishable Commodities Act of 1930, as amended. Although actions by creditors are automatically stayed by the filing of a petition in bankruptcy, 11 U.S.C. § 362(b)(4) of the Bankruptcy Act expressly provides that the automatic stay does not extend to an action of proceeding by a governmental unit to enforce that unit's police or regulatory power:

> (b)The filing of a petition under section 301,302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

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[1] *AZ Puchi III Enterprises, Inc. vs. Michigan Repacking and Produce Co., Inc.* Case No. 01-73853 and a case consolidated with it (Case No. 01-73942).

opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

Morever, 11 U.S.C. § 525(a) specifically excludes the Perishable Agricultural Commodities Act from the code's provisions limiting the revocation, suspension, or refusal of licenses:

See. 525. Protection against discriminatory treatment

(a) **Except as provided in the Perishable Agricultural Commodities Act, 1930,** the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations of the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or as been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act (Emphasis added)

As is clear frm the legislative history, in carving out the above exceptions, Congress recognized the importance of having only financially responsible firms in the perishable agricultural commodity business and was well aware of the Department's well established

policy of revoking one's license for failure to pay in full for produce purchases. The Departmental policy has repeatedly been upheld in the Federal Circuit Courts. *Carlton Fruit Co.,* 49 *Agric. Dec.*513 (1990), *aff'd* 922 F.2D 847 (11th Cir. 1990) (unpublished); *Melvin Beene Produce Co.,* 41 *Agric. Dec.* 2422 (1982), *aff'd* 728 F.2d 347 (6th Cir. 1984); *Carpenito Bros. Inc.,* 46 *Agric. Dec.* 486 (1987), *aff'd* 851 F.2d 1500 (D.C. Cir. 1988) (Table).

Accordingly, being sufficiently advised, it is **ORDERED** that the Order Staying Effective Date of Decision dated May 8, 2003 and the Order Continuing Stay dated May 29, 2003 are **VACATED** and the Decision Without Hearing by Reason of Default dated April 21,2003 is reinstated as of this date.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: JOHN MANNING COMPANY, INC.
PACA. Docket No. D-03-0015.
Decision Without Hearing by Reason of Default.
Filed October 21, 2004.*

PACA - Default.

Ann Parnes, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, 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 April 22, 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 October 13, 2001 through August 28, 2002, Respondent John Manning Company, Inc., (hereinafter "Respondent") failed to make full payment promptly to 58 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,953,098.39 for 1,102 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was sent to Respondent's last known principal place of business by certified mail on October 29, 2003, but

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*This case was inadvertently omitted from Volume 63 Agric. Dec. Jul. - Dec. (2004) – Editor.

was returned unclaimed on December 10, 2003. The copy of the complaint was then re-mailed to a forwarding address by regular mail on December 18, 2003. Pursuant to section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"), the complaint is deemed served on December 18, 2003, the date on which the Hearing Clerk re-mailed the complaint by regular mail. 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 Georgia. Respondent's last known business address is 146 Forest Parkway, Building C, Forest Park, Georgia 30297.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 811167 was issued to Respondent on June 5, 1981. This license terminated on June 5, 2003, pursuant to Section 4(a) of the PACA (7U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period October 13, 2001 through August 28, 2002, Respondent purchased, received and accepted in interstate and foreign commerce 1,102 lots of perishable agricultural commodities from 58 sellers but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,953,098.39.

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 become 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 January 7, 2005, and effective on January 18, 2005. - Editor]

In re: WOOTEN FARMS, INC., d/b/a CAROLINA BROKERAGE CO., a/t/a VISTA PRODUCE CO.
PACA Docket No. D-03-0021.
Decision Without Hearing – Failure to Deny.
Filed: February 28, 2005.

PACA – Default.

Christopher Young-Morales and Ann K. Parnes, for Complainant.
Paul T. Gentile, for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) hereinafter referred to as the "Act", instituted by a Complaint filed on May 16, 2003, by the Associate Deputy Administrator, Fruit and

Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period March 1993 through July 2001 Respondent purchased, received, and accepted, in interstate and foreign commerce, from 19 sellers, 116 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $281,446.93.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On August 25, 2004 a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of August 25, 2004, 18 of the 19 sellers listed in the Complaint were still owed $279,425.08. Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued; Respondent did not answer the Motion. Hearing no objection, the Administrative Law Judge issued a Notice To Show Cause Why A Decision Without Hearing Should Not Be Issued, based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998),

> PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, 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. *Id*. at 548-549.

According to the Judicial Officer's policy set forth in *Scamcorp*, in this case, Respondent had 120 days from the date the complaint was served upon it, or until October 24, 2003, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and ordering that Respondent's violations be published.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of South Carolina. Its mailing address is 1001 Bluff Road, South Carolina State Farmers Market, Columbia, South Carolina 29201.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 901840 was issued to Respondent on September 4, 1990. This license terminated on September 4, 2001, when Respondent failed to pay the required annual fee.
3. As more fully set forth in paragraph III of the Complaint, during the period March 1993 through July 2001, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 19 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of $281,446.93.
4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect to the 116 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), for which the Order below is issued.

Order

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

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

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

Copies hereof shall be served upon parties.

In re: PERFECTLY FRESH CONSOLIDATION, INC.
PACA Docket No. D-05-0002.
Decision Without Hearing By Reason of Default.
Filed: March 31, 2005.

PACA – Default.

Christopher Yong-Morales, for Complainant.
Albert Israel, Christopher Bryan, Douglas B. Kerr, for Respondent.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 1, 2004, 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 17, 2002 through February 15, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 24 sellers, 286 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $373,944.19.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on October 1, 2004, and was returned by the U.S. Postal Service to the Hearing Clerk's office on October 18, 2004. The Hearing Clerk remailed the complaint via regular mail on November 5, 2004, and therefore served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Respondent is a corporation organized and existing under the laws of the state of California. Its business mailing address is 12840 Leyva Street, Norwalk, California 90650.

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

provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20021540 was issued to Respondent on August 21, 2002. This license terminated on August 21, 2003, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.

3.As more fully set forth in paragraph III of the complaint, during the period November 17, 2002 through February 15, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 24 sellers, 286 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $373,944.19.

Conclusions

Respondent's failure to make full payment promptly with respect to the 286 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 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

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

Copies hereof shall be served upon parties.

In re: PERFECTLY FRESH SPECIALITIES.
PACA Docket No. D-05-0003.
Decision Without Hearing by Reason of Default.
Filed March 31, 2005.

PACA - Default.

Christopher Young-Morales, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 1, 2004, 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 1, 2002 through February 20, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 796 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $263,801.40.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on October 1, 2004, and was returned by the U.S. Postal Service to the Hearing Clerk's office on October 18, 2004. The Hearing Clerk remailed the complaint via regular mail on November 5, 2004, and therefore served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §

1.139). As Respondent failed to answer within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Respondent is a corporation organized and existing under the laws of the state of California. Its business mailing address is 12840 Leyva Street, Norwalk, California 90650.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20021539 was issued to Respondent on August 21, 2002. This license terminated on August 21, 2003, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.

3.As more fully set forth in paragraph III of the complaint, during the period November 1, 2002 through February 20, 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 796 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $263,801.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 796 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 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

becomes final.

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

Copies hereof shall be served upon parties.

[This Decision and Order became final May 27, 2005 and effective June 7, 2005.-Editor]

In re: HUGO N. IRAHETA, d/b/a HUGO PRODUCE COMPANY and as HUGO IRAHETA PRODUCE COMPANY.
PACA Docket No. D-04-0011.
Decision Without Hearing by Reason of Default.
Filed March 31, 2005.

PACA - Default.

Ruben Rudolph, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, 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 "PACA" or the "Act"), instituted by a complaint filed on April 27, 2004 by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period of January through May 2002, Hugo N. Iraheta, doing business as Hugo Produce Company, and also doing business as Hugo Iraheta Produce Company (hereinafter "Respondent"), failed to make full payment promptly to 15 sellers of the agreed purchase prices in the amount of $322,394.59 for 78 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of

interstate commerce.

A copy of the complaint, filed April on 27, 2004, was sent to Respondent at 800 McGarry Street, # 6, Los Angeles, California 90021-1951 by certified mail on April 27, 2004. The complaint was returned to the Hearing Clerk's office "undelivered" on May 11, 2004. The complaint was then mailed to Respondent via regular mail to this address on May 14, 2004.

A copy of the complaint was sent to Respondent at 2900 Sunset Place, Apt. 323, Los Angeles, California 90005 by certified mail on May 14, 2004. Respondent had listed this address as his address in Respondent's Bankruptcy filing 0228581 in United States Bankruptcy Court for the Central District of California. The complaint mailed to this address was returned "undelivered" June 30, 2004. The complaint was then mailed to Respondent via regular mail to this address on July 2, 2004.

By operation of the rule 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.147(c)(1)), after the complaint was returned as unclaimed or refused by certified mail, it was deemed received by Respondent when the complaint was mailed again by regular mail on May 11, 2004. Respondent was deemed to have received the complaint at its last known address that Respondent had provided USDA. The USDA made a second attempt to provide Respondent with the complaint at an address that Respondent had listed as his address during Respondent's bankruptcy proceedings.

No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R.§ 1.139).

Findings of Fact

1. Hugo N. Iraheta, doing business as Hugo Produce Company and also doing business as Hugo Iraheta Produce Company, is an individual whose principal place of business is in the State of California. Respondent reported to the USDA that his business

mailing address is 800 McGarry Street, # 6, Los Angeles, California 90021-1951. Respondent's Bankruptcy filing 0228581 in United States Bankruptcy Court for the Central District of California indicates Respondent's address as 2900 Sunset Place, Apt. 323, Los Angeles, California 90005.

2. At all times material to the allegations of the complaint, Respondent was licensed under the provisions of PACA. License number 011258 was issued to Respondent on July 12, 2001. This license terminated on July 12, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when Respondent failed to pay the annual fee.

3. Respondent, during the period of January through May 2002, failed to make full payment promptly to 15 sellers of the agreed purchase prices in the amount of $322,394.59 for 78 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

4. On June 27, 2002, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the U.S. Bankruptcy Code (11 U.S.C. §701 *et. seq.*) in the United States Bankruptcy Court, Central District of California, docket number 0228581. Respondent filed for bankruptcy protection for himself individually, and also for his sole proprietorship companies Hugo Produce and Hugo Iraheta Produce Company. Respondent admits in bankruptcy schedule F that all 15 sellers also listed in paragraph III of the complaint held unsecured debts. In his bankruptcy petition, Respondent admits that all 15 fifteen creditors are owed the amount listed in paragraph III, or more, for produce debt incurred in 2002, for a total of $376,000. The Bankruptcy Court discharged Respondent's debts on October 7, 2002.

Conclusions

Respondent's failure to make full payment promptly with respect to the78 lots of perishable agricultural commodities set forth in Finding of Fact No. 3 above, constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

A finding is made that Respondent has committed wilful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published. This Order shall take effect on the eleventh day after this Decision becomes final.

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

[This Decision and Order became final June 24, 2005, and effective on July 5, 2005.-Editor]

In re: A & B PRODUCE, INC.
PACA Docket No. D-04-0021.
Decision Without Hearing by Reason of Default.
Filed: March 31, 2005.

PACA – Default.

Clara Kim, for Complainant.
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

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 August 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period December 2002 through October 2003, Respondent A & B Produce, Inc., (hereinafter "Respondent") failed to make full payment

promptly to 31 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,426,837.12 for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

On August 26, 2004, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was returned unclaimed on September 24, 2004. On November 12, 2004, a copy of the Complaint was re-mailed 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 Pennsylvania. Its business mailing address is 3301 S. Galloway Street, Unit 65, Philadelphia, Pennsylvania 19148-5442.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 20021152 was issued to Respondent on June 4, 2002. That license terminated on June 4, 2004, 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 December 2002 through October 2003, Respondent purchased, received and accepted in interstate and foreign commerce from 31 sellers, 204 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof,

in the total amount of $1,426,837.12.

Conclusions

Respondent's failure to make full payment promptly with respect to the 204 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.

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.

In re: POTATOES & VEGETABLE EXPRESS, INC., d/b/a POTATO EXPRESS AND POTATOES & VEGETABLE EXPRESS.
PACA Docket No. D-04-0014.
Decision Without Hearing by Reason of Default.
Filed: April 4, 2005.

PACA – Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro Se.
Decision and Order filed by Chief Administrative Law Judge, Marc R. Hillson

Decision

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on April 27, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period January 2000 through July 2002, failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $381,766.94 for 233 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was mailed, by certified mail, to Respondent's mailing address on May 19, 2004, and was returned to the office of the Hearing Clerk. A copy of the complaint was remailed to Respondent by regular mail on June 10, 2004, pursuant to section 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.147(c)(1)) (hereinafter, "Rules of Practice"). No answer to the complaint has been received. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Potatoes & Vegetable Express, Inc., d/b/a Potato Express and Potatoes & Vegetable Express (hereinafter "Respondent"), is a

corporation incorporated in the State of Nevada.[1]

At all times material herein, Respondents business address was 100 West Carey Avenue, Suite 11, North Las Vegas, Nevada 89030.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1991-1705 was issued to Respondent on September 10, 1991. This license was renewed on an annual basis, but terminated on September 10, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), due to Respondent's failure to pay the required annual renewal fee.

3.As more fully set forth in paragraph III of the complaint, Respondent, during the period January 2000 through July 2002, failed to make full payment promptly to 10 sellers of the agreed purchase prices in the total amount of $381,766.94 for 233 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

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

Order

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

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

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings

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[1]According to the public record s of the Nevada Secretary of State, Respondent's corporate status has been revoked.

35 days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

In re: CHRISTOPHER B. LOYD, d/b/a FARM FRESH PRODUCE.
PACA Docket No. D-04-0003.
Decision Without Hearing by Reason of Default.
Filed April 6, 2005.

PACA - Default.

Jeffrey Armistead, 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 December 2, 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 2000 through May 2002, Respondent Christopher B. Loyd, doing business as Farm Fresh Produce, (hereinafter "Respondent") failed to make full payment promptly to nine sellers, of the agreed purchase prices, or balances thereof, in the total amount of $363,500.27 for 125 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the Complaint was served upon Respondent, which Respondent has not answered. The time for filing an answer having expired, and motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the

Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Respondent is a corporation organized and existing under the laws of the state of Louisiana. Its business address while operating was 73621 Highway 25, Covington, Louisiana 70433. Its mailing address was P.O. Box 160, Folsom, Louisiana 70433.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 970376 was issued to Respondent on November 29, 1996. This license was suspended on November 4, 2002, when the company failed to produce records required under Section 13(b) of the PACA (7 U.S.C. § 499m(b)) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay its required annual renewal fee.

3.As more fully set forth in paragraph III of the Complaint, during the period May 2000 through May 2002, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of $363,500.27 for 125 lots of perishable agricultural commodities, which is purchased, received, and accepted in interstate and foreign commerce.

4.On June 30, 2002, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court Eastern District of Louisiana. That petition was designated Case No. 02-14588. Respondent admits in its Bankruptcy schedules that all nine of the sellers listed in paragraph III of the Complaint hold unsecured claims that are less than or equal to the amounts alleged in paragraph III, for a total of $363, 500.27.

Conclusions

Respondent's failure to make full payment promptly with respect to the 125 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

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

Copies hereof shall be served upon parties.

[This Decision and Order became final June 24, 2005 and effective on July 5, 2005.-Editor]

In re: PLATINUM FROZEN FOODS, INC.
PACA Docket No. D-04-0024.
Filed April 6, 2005.
Decision Without Hearing by Reason of Default.

PACA - Default.

Andrew Y. Stanton, 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, "PACA"), instituted by a complaint filed on September 24, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period November 2002 through November 2003, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $607,836.33 for 39 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate

and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested the issuance of an order finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and directing publication of the facts and circumstances of the violations.

A copy of the complaint was served upon Respondent on September 30, 2004. Respondent has not filed an answer within 20 days of service, pursuant to section 1.136(a) the of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (hereinafter, "Rules of Practice") (7 C.F.R. § 1.136(a)) and is, therefore, in default (7 C.F.R. § 1.136(c)). The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Platinum Frozen Foods, Inc. (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Illinois. Its business mailing address is 26 W 333 Street, Charles Road, Carol Stream, Illinois 60188-1944.

2.At all times material herein, Respondent was licensed under the PACA. License number 20011050 was issued to Respondent on May 8, 2001. This license terminated on May 8, 2003, when Respondent failed to submit the required renewal fee.

3.As more fully set forth in paragraph 3 of the complaint, Respondent, during the period November 2002 through November 2003, failed to make full payment promptly to five sellers of the agreed purchase prices in the total amount of $607,836.33 for 39 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to

the transactions referred to in Finding of Fact 3 above constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

Respondent, Platinum Frozen Foods, Inc., has committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations are hereby ordered published.

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

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

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 24, 2005 and effective on July 5, 2005.-Editor]

In re: DIVERSIFIED FOOD EXPORT, INC.
PACA Docket No. D-04-0008.
Decision Without Hearing by Reason of Default.
Filed: May 26, 2005.

PACA – Default.

Jeffrey Armistead, for Complainant.
Jordan L. Rappaport, for Respondent.
Decision and Order filed by Administrative Law Judge, Peter M. Davenport.

Decision

This is a disciplinary proceeding under the Perishable Agricultural

Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (hereinafter, APACA "), instituted by a complaint filed on March 8, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of $302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. §499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

A copy of the complaint was mailed, by certified mail, to Respondent's business address at c/o Kenneth S. Rappaport, Esq., 709 N.W. 12th Terrace, Pompano Beach, Florida 33069 and Respondent's mailing address at 1300 North Federal Highway, Boca Raton, Florida 33432. The complaint was received and accepted at both addresses on March 18, 2004, and March 13, 2004, respectively. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. §1.136(a)) (hereinafter, ARules of Practice "), an answer is due within 20 days after service of the complaint. As Respondent has failed to file an answer to the complaint within the time allowed for that purpose, Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. §1.136(c)).

On March 25, 2004, Respondent filed a document entitled "Suggestion of Bankruptcy." The document asserts that, on September 30, 2002, Respondent filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Florida, Case Number 02-27368-BKC-PGH. The document asserts further that, pursuant to section 362 of the Bankruptcy Code (11 U.S.C. §362), an automatic stay is in effect. However, Respondent's "Suggestion of

Bankruptcy" does not meet the requirements of an answer to the complaint that are set forth in section 1.136(b) of the Rules of Practice (7 C.F.R. §1.136(b)):

(b) *Contents*. The answer shall:
(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
(2) State that the respondent admits all the facts alleged in the complaint; or
(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

Respondent's "Suggestion of Bankruptcy" does not admit, deny or explain any of the allegations of the complaint. Moreover, the claim in the "Suggestion of Bankruptcy" that the automatic stay is in effect is not an adequate affirmative defense to the allegations of the complaint, as it is well established that disciplinary proceedings to enforce the PACA are not subject to the automatic stay provision in the Bankruptcy Code.

Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. §362(b)(4)) states that the filing of a bankruptcy petition does not stay Athe commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . . " The purpose of this disciplinary action is to enforce the regulatory power of the Department of Agriculture against a firm that has committed serious violations of the PACA by failing to make full and prompt payment for produce purchases. Section 525(a) of the Bankruptcy Code (11 U.S.C. §525(a)) provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license to a debtor who has filed for bankruptcy, with a few limited exceptions, one of which is when there is a disciplinary action brought under the PACA:

> (a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and

> Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [*emphasis supplied*].

The Department's Judicial Officer has held that PACA disciplinary proceedings are unaffected by the automatic stay, stating as follows, in *In re Ruma Fruit and Produce Co., Inc*., 55 *Agric. Dec.* 642, 654-655 (1996):

> Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. §525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service,* 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, 49 B.R. 494, 496- 98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), cert.

denied, 389 U.S. 835 (1967); *In re Fresh Approach, Inc., supra,* 49 B.R. at 496.

As Respondent's "Suggestion of Bankruptcy" does not constitute an answer, and an answer has not been filed within the time period allowed for that purchase, upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1.Diversified Food Export, Inc., (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Florida. At all times material herein, Respondent's business address was 709 N.W. 12th Terrace, Pompano Beach, Florida 33069. Respondent's mailing address is c/o Kenneth S. Rappaport, Esq., 1300 North Federal Highway, Boca Raton, Florida 33432.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 971814 was issued to Respondent on July 14, 1997. This license was renewed on an annual basis, but terminated on July 14, 2003, pursuant to section 4(a) of the PACA (7 U.S.C. §499d(a)), due to Respondent's failure to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period July 2000 through September 2002, failed to make full payment promptly to nine sellers of the agreed purchase prices in the total amount of $302,165.55 for 87 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

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

Order

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

This order shall take effect on the 11th day after this Decision becomes final. Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).
Copies hereof shall be served upon the parties.

In re: SILVER CREEK, INC., d/b/a QUALITY PRODUCE.
PACA Docket No. D-05-0004.
Decision Without Hearing by Reason of Default.
Filed: May 27, 2005.

PACA – Default.

Andrew Stanton, for Respondent.
Respondent, Pro Se.
Decision and Order issued by Administrative Law Judge, Peter M. Davenport.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"), instituted by a complaint filed on January 19, 2005, by the Associate Deputy Administrator, Fruit and Vegetable

Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged that Respondent, during the period April 2002 through July 2004, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of $752,378.73 for 232 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order publication of the facts and circumstances of the violations.

The complaint was mailed, by certified mail, to Respondent's business mailing address of at 107 2 East 44th Street, Boise, Idaho 83714-4820. The complaint was received and accepted on January 27, 2005. According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.136(a)) (hereinafter, "Rules of Practice"), an answer is due within 20 days after service of the complaint. As Respondent has failed to file an answer to the complaint within the time allowed for that purpose, Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Upon motion of the Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1.Silver Creek, Inc., also doing business as Quality Produce (hereinafter "Respondent"), is a corporation organized and existing under the laws of the State of Idaho. Its business mailing address is 1072 East 44th Street, Boise, Idaho 83714-4820.

2.At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2002-1581 was issued to Respondent on August 28, 2002. This license is next subject for

renewal on August 28, 2005, but was suspended on May 20, 2004, pursuant to section 8(d) of the PACA (7 U.S.C.§ 499h(d)) when Respondent failed to satisfy a reparation order.

3.As more fully set forth in paragraph III of the complaint, Respondent, during the period April 2002 through July 2004, failed to make full payment promptly to 17 sellers of the agreed purchase prices in the total amount of $752,378.73 for 232 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce.

Conclusions

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

Order

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

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

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

Copies hereof shall be served upon the parties.

In re: PRODUCE DIVERSIFIED SERVICES, INC.
PACA Docket No. D-04-0022.
Decision and Order By Reason of Default.
Filed: May 31, 2005.

PACA – Default.

Clara Kim, for Complainant.
Respondent, Pro Se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Procedural History

[1]This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § *499a et seq.*) (hereinafter frequently "the Act" or "the PACA"), instituted by a Complaint filed on September 15, 2004.

[2]The Complainant is the Administrator, Perishable Agricultural Commodities Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter frequently "AMS").

[3]On September 15, 2004, the Hearing Clerk sent to Respondent Produce Diversified Services, Inc. (hereinafter frequently "Respondent Produce Diversified" or "Respondent"), by certified mail, return receipt requested, to its business mailing address, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent was informed in the service letter, among other things, that it had 20 days from receipt to file its answer.

[4]Respondent Produce Diversified received the Complaint, Rules of Practice, and service letter on September 20, 2004, and did not answer the Complaint. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[5]Accordingly, the material allegations of the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

See 7 C.F.R. §1.130 *et seq.*

[6]AMS filed a Motion for a Decision Without Hearing by Reason of Default on April 22, 2005. Respondent Produce Diversified received a copy of the Motion April 26, 2005, and did not respond to the Motion.

Findings of Fact

[7]Respondent Produce Diversified Services, Inc. is a corporation organized and existing under the laws of the State of Minnesota, with a business mailing address of 1329 Pinehurst Avenue, St. Paul, Minnesota 55116.

[8]At all times material herein, Respondent Produce Diversified was licensed under the provisions of the PACA. PACA license number 20000201 was issued to Respondent on November 9, 1999. That license terminated on November 9, 2002 pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required license renewal fee.

[9]Respondent Produce Diversified Services, Inc. failed to make full payment promptly to 13 sellers of the agreed purchase prices, or balances thereof, in the total amount of $152,120.30, for 66 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during February 2002 through October 2002.

Conclusions

[10]The Secretary of Agriculture has jurisdiction.

[11]Respondent Produce Diversified Services, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during February 2002 through October 2002.

Order

[12]Respondent Produce Diversified Services, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)) during February 2002 through October 2002, and the facts and circumstances of the violations shall be published.
[13]This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, *See* attached Appendix A)

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

CONSENT DECISION

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

American Produce Company, Inc.[1] PACA Docket No. D-04-0001.
2/1/05.

[1] According to the public records of the Nevada Secretary of State, Respondent's corporate status has been revoked