

AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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

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PERISHABLE AGRICULTURE COMMODITIES ACT
COURT DECISIONS

FLEMING COMPANIES, INC. V. USDA
C.A.5 (Tex.),2006. No. 04-40802.
Decided Feb. 1, 2006.*

(Cite as: 164 Fed. Appx. 528).

PACA – Batter rule – Arbitrary and capricious, when not.

United States Court of Appeals, Fifth Circuit.

Before SMITH, DENNIS, and PRADO, Circuit Judges.
EDWARD C. PRADO, Circuit Judge**

In this appeal, Plaintiff-Appellant Fleming Companies, Inc. challenges the "Batter-Coating Rule,"¹ a regulation promulgated by the U.S. Department of Agriculture ("USDA") pursuant to the Perishable Agricultural Commodities Act ("PACA"),² on two grounds: first, that the rule is invalid pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;³ second, that the USDA's decision-making with regard to the Batter-Coating Rule was "arbitrary and capricious" in violation of the Administrative Procedures Act ("APA").⁴ Essentially for the reasons articulated by the district court in its comprehensive opinion on motions for summary judgment, *Fleming Companies, Inc. v. U.S. Department of Agriculture*, 322 F.Supp.2d 744 (E.D.Tex.2004), we AFFIRM.

*See also *Fleming Companies, Inc. et al.*, 63 Agric. Dec 958.- Editor.

**Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

¹7 C.F.R. § 46.2(u) (2005)

²7 U.S.C. § 499a-s (1996).

³ 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

⁴ 5 U.S.C. § 706(2)(A) (1996).

POST AND TABACK, INC. v. USDA¹
No. 04-1128.
Filed February 11, 2005.

(Cite as: 123 Fed. Appx. 406).

PACA– Prompt payment, when not – Res judicata, when not – Bribery of government inspector – Respondent Superior doctrine, scope of employment elements not applicable – Slow pay vs. No pay.

Court held that PACA licensee who entered into a final settlement agreement with most of their creditors for less the full payment will be held to be in a “no-pay” status (resulting in revoking of license) rather than “slow-pay” status. Court held that unlike criminal statutes – as regards to PACA, the usual elements of being “within the scope of employment” does not apply to the Respondent Superior element of bribery of a government official even for criminal acts of the employee.

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

Before: GINSBURG, Chief Judge, and HENDERSON and RANDOLPH, Circuit Judges.

JUDGMENT

This cause was considered on the record compiled before the Secretary of Agriculture and on the briefs of the parties. It is

ORDERED AND ADJUDGED that the petition for review be DENIED for the reasons stated in the accompanying memorandum.

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

¹Please use FIND to look at the applicable circuit court rule before citing this opinion. District of Columbia Circuit Rule 28(c). (FIND CTADC Rule 28.)

MEMORANDUM

Post & Taback petitions for review of the Secretary of Agriculture's decision and order concluding that Post & Taback "engaged in willful, flagrant, and repeated violations" of § 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4), by "failing to make full payment promptly to its produce sellers" and by "the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector." JA 242.

As to the first ground for the Secretary's decision, Post & Taback argues "this case should have been considered a slow pay rather than a no-pay case" because, after being sued by numerous suppliers, it paid the judgments entered by the district court prior to the hearing date on the USDA complaint. Brief of Petitioner at 8. As the Secretary makes clear, however, the judgment of the district court awarded Post & Taback's creditors only "75 cents on the dollar for their claims in exchange for waiving any further proceedings by them against Post & Taback." Brief of Respondent at 11. Such a compromise hardly satisfies the requirement of "full payment promptly." 7 U.S.C. § 499b(4). Further, "[o]nly 37 of the 58 creditors listed in the Agency's complaint filed claims" against Post & Taback in the district court, and "Post & Taback failed to provide a scintilla of evidence at the administrative hearing that it paid the creditors who were not parties to the trust action a single cent." Brief of Respondent at 20-21.

Post & Taback also contends all of its "PACA debt was extinguished as a matter of law when each creditors' claim was merged into a judgment," and that the Secretary is barred by the doctrine of res judicata from concluding otherwise. Brief of Petitioner at 11. The Secretary, however, was neither a party nor privy to the civil actions against Post & Taback in the district court, and is therefore not precluded by those adjudications. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

As to the second ground, Post & Taback contends the Secretary erred in holding it responsible for the conduct of its employee, who bribed a USDA inspector in exchange for favorable inspections of fruits and vegetables. The PACA provides that "the act, omission, or failure of any agent, officer, or other person acting for or employed by any [regulated entity] within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such [regulated

entity]." 7 U.S.C. § 499p. As the Secretary points out, "the plain language of the statute provides no escape hatch for merchants ... who allege ignorance of their employees' misconduct." Brief of Respondent at 30; *see also H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir.2003).

Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law concept, such as "the scope of employment," the Supreme Court has directed that we rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

**In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order Following Reargument.
Filed January 6, 2006.**

PACA – Bribery – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

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

Decision Summary

[1] Respondent KOAM Produce, Inc. (frequently herein “KOAM”), during April through July 1999, committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), at the Hunts Point Terminal Market in the Bronx, New York, New York. Under the Perishable Agricultural Commodities Act (frequently herein “the PACA”), the acts of the employee acting within the scope of his employment are deemed to be the acts of the employer. KOAM’s violations of the PACA were committed when its employee Marvin Friedman made 42 illegal cash payments to United States Department of Agriculture (frequently herein “USDA”) produce inspector William J. 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 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, even if everyone at KOAM except Marvin Friedman was ignorant of Marvin Friedman’s actions. Making illegal payments to a USDA produce inspector was an egregious failure by KOAM to perform its duty under the PACA to maintain fair trade practices. The remedy of 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 herein “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.

[6] This “Decision and Order Following Reargument” REPLACES my “Decision and Order” issued initially on April 18, 2005. KOAM timely filed its Petition to Rehear and Reargue (frequently herein “KOAM’s Reargument”), in accordance with Rule 1.146 of the Rules of Practice (7 C.F.R. § 1.146), on May 27, 2005. AMS timely filed its Response on July 1, 2005.

[7] KOAM did not actually seek rehearing; what KOAM filed is reargument. Prompted by KOAM’s Reargument and AMS’s Response, I have made changes, which are included herein. KOAM’s Reargument refers in part to evidence that was not presented in this case (*See* Tr. 181-83), and to the Baiardi case (which is not before me). Nevertheless, KOAM’s Reargument did call attention to issues that I have now addressed more fully, including my finding that the testimony of

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William J. Cashin was credible.

Findings Of Fact

[8] 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. *See* paragraphs [30] through [34] regarding my acceptance of William Cashin’s testimony as credible.

[9] 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. CX 1.

[10] KOAM began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997. Tr. 270.

[11] 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.

[12] 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.

[13] 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.

[14] Marvin Friedman was arrested on or about October 27, 1999. Tr. 271.

[15] 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.

[16] On September 20, 2000, Marvin Steven Friedman was found to have paid \$29,550² 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.

[17] 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 J. Cashin. Tr. 115-197.

[18] William J. Cashin was a USDA agricultural commodities grader, also called produce inspector, at the Hunts Point Terminal Market from July 1979 until August 1999. Tr. 192.

[19] For about 19 years of those 20 years (from 1980 through August 1999), William J. Cashin, in the course of his USDA work, accepted unlawful bribes or gratuities from many produce workers. Tr. 177-78, 192.

[20] William J. Cashin had 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.

[21] Beginning on March 23, 1999, William Cashin no longer kept the unlawful bribes or gratuities that were given to him, but instead turned them over to the law enforcement authorities over at the end of each work day. Tr. 194.

² 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.

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[22] More than half (approximately seven to eight) of the approximately 12 to 13 USDA agricultural commodities graders who were working at the Hunt's Point Terminal Market in March or April 1999, were convicted of taking bribes (including William Cashin). Tr. 161-62.

[23] In response to William J. 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 that Mr. Cashin received from Marvin Friedman are organized for each count of the Indictment, together with applicable inspection certificates, which show KOAM as having applied for the inspections. Tr. 136-97, CX 6 through CX 16.

[24] Marvin Friedman was acting within the scope of his employment as a produce 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. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 178-80, 184-86, 193.

[25] Factors which show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities, include the following: (a) Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; (b) the unlawful payments were incorporated into Marvin Friedman's regular work routine for KOAM; (c) Marvin Friedman was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; (d) Marvin Friedman made the unlawful payments during his regular work hours for KOAM; (e) Marvin Friedman made the unlawful payments on a regular basis; (f) Marvin Friedman appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[26] There is no evidence that Marvin Friedman or anyone else at

KOAM was intimidated or coerced into making the unlawful payments. The only evidence on that issue came from William Cashin, who testified that he never specified a payment amount and never pressured anyone at Koam to pay. William Cashin testified that he kept Marvin Friedman apprised of the number of inspections he had performed, and that Marvin Friedman gave him \$50 for each inspection. Tr. 164, 178-80, 184-86, 193.

Discussion

[27] 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.

[28] 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.

[29] Both the D.C. Circuit³ and the 6th Circuit⁴ have affirmed the PACA's use of its principal-agency provision under circumstances like those here. William J. Cashin, the USDA produce inspector (agricultural commodities grader), testified about the circumstances. Tr. 123-26, 128-29, 131-32.

³ *Post & Taback, Inc. v. USDA*, 65 Agric. Dec. 396 (2005). The citation was updated from the original text- Editor

⁴ *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

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Mr. Young-Morales: While he was at KOAM, as an employee, did Marvin Friedman ever give you any money in connection with any of your inspections?

Mr. Cashin: Yes, he did.

Mr. Young-Morales: Was the money that he gave you in payment of your normal inspection fee?

Mr. Cashin: No.

Mr. Young-Morales: that you have described?

Mr. Cashin: Not at all. By the time Marvin came along, KOAM had already established an account, and their billing - - they were on the billing system.

Mr. Young-Morales: Were the payments made by Marvin Friedman, that you've described, done in connection with each inspection?

Mr. Cashin: Yes, they were.

Mr. Young-Morales: How much were those payments per each inspection? Mr. Cashin: Fifty dollars per inspection.

Mr. Young-Morales: And approximately what year was it that Marvin Friedman started making payments to you?

Mr. Cashin: Marvin came along, to the best of my recollection, about 1996 or '97.

Mr. Young-Morales: Just to back up very quickly, do you know, do you remember when Ralph died?

Mr. Cashin: It wasn't long after the Company opened. It was some time in late '96 or early '97, as I recall.

Mr. Young-Morales: To your knowledge, were Ralph and Marvin Friedman at Koam at the same time ever?

Mr. Cashin: No. Not that I was aware of.

Mr. Young-Morales: How would - - were payments give(n) (to) you in connection with every inspection that you made?

Mr. Cashin: Yes.

Mr. Young-Morales: Okay. How would Marvin Friedman go about making the payments to you?

Mr. Cashin: After I was finished examining all the products, I used to write the inspections in the office upstairs. Marvin sat in the office all the way in the back. You go through the door, there's a few other offices, and he was in the back. And there was an extra desk there, and it was warm and it was dry, and I would sit there at the desk and I would write -- and he would ask me how many and I would tell him, and he would count the money and hand it to me.

Mr. Young-Morales: Was anyone else ever present during that

transaction that you've described?

Mr. Cashin: No.

Mr. Young-Morales: What was your understanding as to why you were receiving payments in connection with your inspections at Koam?

Mr. Cashin: I was helping Marvin.

Mr. Young-Morales: When you say help, what was your understanding of the meaning of help? What do you mean by help? In connection with an inspection.

Mr. Cashin: Helping in connection with an inspection came in any one of three ways. Altering the percentage of defects, especially the condition defects, in such a way that it was over the good delivery marks. Frequently, someone like Marvin and Ralph, too, would examine product, see a few decayed specimens in a box or a couple of boxes, and then call an inspection, and want that particular load of product - - produce, written so that the percentage of defects, especially decay, was over the good delivery mark.

Another way of help was the number of containers. Frequently, the amount that was inside -- the amount present at the time when I would arrive to do the inspection was less than what it originally was unloaded or came in as, and they would want the number of containers increased so it more closely matched the manifest.

The other way was to alter the temperatures. They would want the temperatures recorded on, or written on the certificate to be of a more acceptable level so it would lend legitimacy to the certificate.

Tr. 123-26.

* * * *

Mr. Young-Morales: Okay. How would Marvin Friedman have let you know that he wanted help, any kind of help, on a particular load?

Mr. Cashin: It was our, it was my policy with Marvin that when I arrived at Koam, I would find him, talk to him. Sometimes he was downstairs. Sometimes he was upstairs. And then we would discuss the various loads. And he would tell me I need a little help with this one. This one shows problems; you'll see it. This one - - and he and I would discuss the different things and he would tell me he needed help on things and what he needed help on.

Mr. Young-Morales: Were the figures that you had put down on an inspection, on an inspection certificate, when you gave help, an accurate reflection of the produce you were actually inspecting?

Mr. Cashin: No.

Tr. 128-29.

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* * * *

Mr. Young-Morales: If you -- and on what percentage of the loads that you inspected at Koam would you actually give help?

Mr. Cashin: I would estimate 75 to 80 percent.

* * * *

Mr. Young-Morales: If you did state the results inaccurately on any particular inspection back then, can you state today why you would have done so?

Mr. Cashin: Yes, I can.

Mr. Young-Morales: Why?

Mr. Cashin: It goes back to the original deal of help in any one of the three ways, help meaning the number of containers, help meaning to raise the percentage of defects, or to put down the temperatures at the correct level.

Mr. Young-Morales: In the event that - - well, even if the inspection certificates that you prepared were accurate, did you still get paid by Marvin Friedman?

Mr. Cashin: Yes, I did.

Mr. Young-Morales: What was your understanding as to why that would occur?

Mr. Cashin: I - - my understanding in that sense was either he was just saying thank you for helping in general, and also, it was my understanding that he was possibly paying for future help, just in general.

Tr. 131-32.

[30] I find the testimony of William J. Cashin (Tr. 115-197), to be credible. KOAM's Reargument challenges me to make more specific findings regarding William Cashin's credibility. There are factors that could impeach William Cashin's credibility: (a) William Cashin is a convicted felon (convicted of taking bribes such as those at issue here). (b) William Cashin admits to a 19-year history of taking unlawful bribes and gratuities (the last 5 months was for the benefit of the investigation). Tr. 177-78, 192. (c) William Cashin was given a light sentence; he was not required to serve jail time (beyond "time served", the day he was arrested, and he was not taken to jail); and he was not required to pay restitution or a fine. Tr. 160-161. (d) William Cashin was allowed to retire and was not asked to waive his Civil Service Retirement System pension. Tr. 161, 192, 195.

[31] William Cashin's taking of unlawful bribes and gratuities ("extra money", as Mr. Cashin thought of it, Tr. 194) demonstrates a disregard for honesty and truthfulness in the past.⁵ Nevertheless, William Cashin appeared to me to be telling the truth when he testified before me.

[32] The incentives that motivated William Cashin to cooperate in the investigation, and then to testify in numerous cases, may well have included the hope of a lenient sentence (which he got) and favorable treatment from his employer USDA (which he got). William Cashin did not need to report or testify untruthfully to receive the benefits of cooperating; he could receive the benefits of cooperating by reporting truthfully and testifying truthfully. There would have been no greater gain and thus, there was no incentive, to report or testify untruthfully.

[33] In observing Mr. Cashin, I found his testimony, on both direct- and cross-examination, to be intelligent, with good recall, and responsive, attentive, and thoughtful. Mr. Cashin's demeanor was otherwise unremarkable and sent no signal that I should be cautious in accepting his statements as true.

[34] Most persuasively to me, Mr. Cashin's testimony was essentially consistent with the all of the other evidence,⁶ including the in-Court assertions of Marvin Friedman and his lawyer and the other documentary evidence, and the testimony of Mr. Park and the other witnesses.

[35] Marvin Friedman paid the unlawful bribes and gratuities within

⁵ William Cashin failed initially to report and pay income tax on the unlawful bribes and gratuities he received. This is an additional illustration of disregard for honesty and truthfulness in the past, which is known to me not from this case, but from a similar case. See *M. Trombetta & Sons, Inc.*, 64 Agric. Dec.1869 (2005). Still, I find the testimony of William Cashin to be credible.

⁶ There is one discrepancy between William Cashin's testimony and other evidence. Mr. Cashin testified that, when Marvin Friedman paid him, there was never anyone else from KOAM present. Tr. 166-67. Mr. Cashin's testimony appears to conflict with notes from June 28, 1999 in one of the FBI form FD-302s, CX 14, p. 2, which suggests that C.J. last name unknown, was present (or at least nearby) when Marvin (Friedman) paid William Cashin \$300 (six \$50 bills). I find William Cashin's testimony to be reliable, despite the apparent conflict.

the scope of his employment as KOAM's produce buyer. As Judicial Officer William G. Jenson recently commented in a similar case:

Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

In re: M. Trombetta & Sons, Inc., 64 Agric. Dec. 1869 (2005).

[36] Marvin Friedman paid the unlawful bribes and gratuities while performing, or in connection with, his job responsibilities; the unlawful payments were incorporated into his regular work routine for KOAM; he was at his regular work place at KOAM when he paid the unlawful bribes and gratuities; he made the unlawful payments during his regular work hours for KOAM; he made the unlawful payments on a regular basis; he appeared to be acting on behalf of his employer KOAM; and the unlawful payments could have benefitted KOAM. These factors show that Marvin Friedman was acting within the scope of his employment as a produce buyer for KOAM, when he paid the unlawful bribes and gratuities. Tr. 120-24, 128-29, 131-132, 146-47, 152-53, 155-56, 163-64, 167, 307; CX 19 pp. 15-17.

[37] Marvin Friedman was acting within the scope of his employment when he paid the unlawful bribes and gratuities, even if KOAM did not authorize or direct him to do so, and even if KOAM was unaware of his doing so. *H.C. MacClaren, Inc. v. USDA*, 342 F.3d 584, 591 (6th Cir. 2003).

[38] 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. KOAM's argument has already been addressed by the United States Court of Appeals, the District of Columbia Circuit, in *Post & Taback, Inc. v. USDA*:

Post & Taback's argument that the Secretary should have looked to New York Penal Law § 20.20 to determine "when ... a criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable" is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law

concept, such as “the scope of employment,” the Supreme Court has directed that we rely “on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision *Post & Taback* advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

Post & Taback, Inc. v. USDA, 65 Agric. Dec. 395 (2005), 123 Fed. Appx. 406 (D.C. Cir. 2005) (copy enclosed to counsel).

[39] KOAM is 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.

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 more than 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.

[40] 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.

[41] 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* footnote 5; CX 14, p. 2); 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. 15-17.

[42] Marvin Friedman was not a witness before me. Neither KOAM nor AMS 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.

[43] Whether Marvin Friedman's unlawful payments were, or were not, being made with Mr. or Mrs. Park's involvement or awareness, would make no difference in the sanction recommended by AMS. Mr. Basil W. Coale, Jr. was AMS's sanction witness. Following is an excerpt of Mr. Coale's testimony on cross-examination. Tr. 319-22.

Mr. Gentile: Now the - - you've recommended on behalf of the Agency that the license for Koam, that it should be revoked; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: In doing so, have you taken into consideration the employment sanctions that follow such a sanction?

Basil W. Coale, Jr.: Yes.

Mr. Gentile: So it's your understanding that should the sanction be granted as you requested, that those responsibly connected with Koam Produce would not be permitted to be employed within the industry for at least a year; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: And that would include, by obvious definition, the active owners such as C.J. Park; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: And does that seem appropriate to you if Mr. Park was not aware, did not have knowledge of what Mr. Friedman was doing?

Basil W. Coale, Jr.: Under the Act, that's how it's written.

Mr. Gentile: But you've said you've taken into consideration that there is a sanction. Is it part of your consideration that he should, based upon your recommendation, not be permitted to work in this industry, even though he didn't know what was going on? Is that part of your recommendation?

Basil W. Coale, Jr.: The recommendation is that, based on the violations, that the license should be revoked, and now the sanctions are defined by the statute and flow from that finding.

Mr. Gentile: And if the sanction was a civil penalty, a fine, some sort of suspension, that would have a different effect on Mr. Park and anyone else responsibly connected; is that correct?

Basil W. Coale, Jr.: Correct.

Mr. Gentile: As part of your recommendation, have you taken into consideration whether or not Koam should lose its license or not based upon the actual knowledge of the owners of the Company?

Basil W. Coale, Jr.: The, that issue, we believe, was -- is dealt with in Section 16, is that the actions of the employees and the scope of their employment are the actions of the licensee.

Mr. Gentile: I understand what the section says. I've asked you whether or not you've taken into consideration whether or not the actual knowledge by the owner is a factor to be considered?

Basil W. Coale, Jr.: I guess you could say it's what we would recognize could be the position of someone, but it's not a driving factor that's considered, whether or not the principals knew or whether it's necessary to prove that the principals knew. It's that the actions of the employee and the scope of the employment are the actions of the licensee.

Mr. Gentile: Would you say, based upon what you just said, that it's the Agency's position that it's irrelevant as to whether or not there was actual knowledge by the owners?

Basil W. Coale, Jr.: I can't argue with that word.

Mr. Gentile: Does that mean yes or no? Does that mean you agree that it's the Agency's position that it's irrelevant --

Basil W. Coale, Jr.: Yes.

Mr. Gentile: -- as to whether or not the owners actually knew?

Basil W. Coale, Jr.: Yes.

Tr. 319-22.

[44] Mr. Coale had previously testified to explain AMS's basis for recommending revocation as the only appropriate sanction. Tr. 309-15.

Mr. Young-Morales: Are you aware of the sanction recommendation that Complainant recommends in this case?

Basil W. Coale, Jr.: Yes, I am.

Mr. Young-Morales: How are you aware of the sanctions?

Basil W. Coale, Jr.: I participated in the development of the recommendation.

Mr. Young-Morales: And what is the recommendation in this case?

Basil W. Coale, Jr.: The revocation of PACA license.

Mr. Young-Morales: What's the basis for your sanction recommendation?

Basil W. Coale, Jr.: There are several factors that were considered. One is the evidence of paying as part of the criminal investigation conducted by the FBI in the 42 different inspection certificates involved with the bribery.

As an aggravating factor, there is Mr. Cashin's testimony that the bribes were paid for a period much longer than that that is documented by the criminal investigation.

There is the factor to consider of the impact to the industry of bribes. The potential impact is very great. The fresh products branch of the Agricultural Marketing Services issues approximately 150,000 inspection certificates in a year. This come out to average out to hundreds a day. Shippers, growers, brokers, carriers, all use the results of those certificates to resolve their disputes, to evidence that they met their contract terms or to document the condition of product or products.

Paying bribes to an inspector undermines the credibility of the entire inspection process, and can impact how these traders resolve their disputes.

In addition, there's the fact of in a competitive market, especially like Hunt's Point, if one firm would know, would be paying bribes and another firm finds out, a competitive firm, they may feel to (sic) need to pay bribes just to compete.

And then, in addition, there's the deterrent effect. The Agency wants to not only deter with sanctions, this individual from repeating, this respondent from repeating its violations, but, in addition, deter any other firms who may be considering similar violations.

Mr. Young-Morales: Now in this case, Complainant's intention is that the payment of bribes to William Cashin were a violation. Does the fact that Mr. Cashin would -- excuse me. Does the fact that Mr. Cashin was a USDA employee have any effect on Complainant's sanction recommendations?

Basil W. Coale, Jr.: No, it does not.

Mr. Young-Morales: Why doesn't it?

Basil W. Coale, Jr.: Paying a bribe is a very serious violation of the PACA. Whether the bribe is paid to another industry member, another trader, or to a USDA employee such as an inspector, the fact that the bribes in this case were paid to - - excuse me, to a USDA produce inspector, does not excuse the fact that the bribes were paid.

Mr. Young-Morales: Does Complainant recommend any kind of civil penalty in this case as an alternative, possible alternative, to license revocation? And this is based on your sanction recommendation and on what you've heard in the court case so far.

Basil W. Coale, Jr.: No, it does not believe that a monetary penalty would be appropriate in this situation.

Mr. Young-Morales: Why not?

Basil W. Coale, Jr.: Paying bribes is a very serious violation of PACA, and in this specific instance, it went on for a long period of time. There's a great potential for damage to the industry in the way it does business, and this calls for the, only the most severe sanction, and that sanction is revocation of PACA license.

Mr. Young-Morales: In the course of the proceedings as a whole, have you heard anything with respect to Marvin Friedman paying bribes for expedited access to inspectors?

Basil W. Coale, Jr.: Not that I recall.

Mr. Young-Morales: Are you aware that it's a potential defense of the Respondent in this case?

Basil W. Coale, Jr.: Yes, I am.

Mr. Young-Morales: And, Mr. Coale, with that potential defense in mind, have you reviewed CX-18? And do you have a copy in front of you?

Basil W. Coale, Jr.: I have the official copy right here.

Mr. Young-Morales: Have you read it in its entirety?

Basil W. Coale, Jr.: Yes, I have.

Mr. Young-Morales: Could I direct you to page 17 of that document? Well, first of all, what is this document?

Basil W. Coale, Jr.: This is a copy of the February -- a transcript of the February 25th proceeding involving United States of America v. Marvin Steven Friedman.

Mr. Young-Morales: Would this be the plea agreement transcript, so to speak?

Basil W. Coale, Jr.: Where Mr. Friedman entered his pleas to the

criminal proceeding?

Mr. Young-Morales: Uh-huh.

Basil W. Coale, Jr.: Yes.

Mr. Young-Morales: If I could direct you to page 17. Well, excuse me. Let me direct you to page 16. Could I ask you -- and you may have to familiarize yourself with it again, but could I ask you who Mr. Krantz is in this transcript?

Basil W. Coale, Jr.: It is my understanding that he is Mr. Friedman's counsel.

Mr. Young-Morales: All right. And on line 19 -- excuse me, line 17, could you read the question by the Court?

Basil W. Coale, Jr.: The Court says, "Mr. Krantz, do you know of any valid defense that would prevail at a trial of Mr. Friedman?"

Mr. Young-Morales: And what is Mr. Krantz's response?

Basil W. Coale, Jr.: "No, Your Honor."

Mr. Young-Morales: And the Court's question?

Basil W. Coale, Jr.: The next question is, "Do you know any reason why Mr. Friedman should not be permitted to plead guilty?"

Mr. Young-Morales: And the answer?

Basil W. Coale, Jr.: "No."

Mr. Young-Morales: And the next question, and I'll stop there.

Basil W. Coale, Jr.: It appears that the Court says, "Mr. Friedman, tell me in your own words what you did in connection with the crime to which you are entering a plea of guilty?"

Mr. Young-Morales: Could you please read his answer on the next page?

Basil W. Coale, Jr.: "The defendant: On approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at Koam Produce, Inc., located in the Bronx. I was an employee of Koam at the time. I acted knowingly and intentionally, and I knew the payments were unlawful."

Mr. Young-Morales: And do you remember, ultimately, what Mr. Friedman pled guilty to when this transcript was all said and done? If not, I --

Basil W. Coale, Jr.: I believe it was 10 counts of bribery.

Mr. Young-Morales: Thank you, Your Honor. I have no further questions. Well, I may have -- well, yes.

Mr. Young-Morales: Even absent this, the evidence in this transcript,

or the information contained in this transcript, and absent the evidence that we have heard, much of the evidence that we've heard so far, if Respondent were to have shown that Marvin Friedman paid bribes to William Cashin for expedited inspections, would that change, do you think, your recommended sanction today?

Basil W. Coale, Jr.: No.

Mr. Young-Morales: Why?

Basil W. Coale, Jr.: Illegal payments made to a produce inspector undermine the credibility of the inspection process and therefore that could lead to industry-wide impact. And, in addition, even if the inspections themselves are not fraudulent factually, times, dates, temperatures, count, all that is still correct, it's still not a fair trading practice because other competitors on the market, then someone is moved getting moved to the back of the line and somebody else is moving to the front to get expedited treatment. So that's an unfair advantage as well.

Tr. 309-15.

Conclusions

[45] 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).

[46] Marvin Friedman was acting as KOAM Produce, Inc.'s agent, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[47] Marvin Friedman was acting within the scope of his employment, when he did what is described in paragraph [45]. 7 U.S.C. § 499p.

[48] 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).

[49] 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).

[50] KOAM is responsible under the PACA, even if ignorant of the misconduct of its employee Marvin Friedman, who paid the unlawful bribes or gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[51] 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).

[52] 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)).

[53] 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).

[54] Revocation of KOAM's license is commensurate with the seriousness of KOAM's violations of the PACA. Tr. 309-15. KOAM's violations were so egregious as to warrant revocation whether Marvin Friedman's unlawful cash payments (a) were a bribe or were a gratuity; (b) were associated with certificates that were falsified or with certificates that were truthful; (c) were or were not paid in response to intimidation or coercion (and the evidence in this case fails to prove intimidation or coercion; see paragraph [26]); and (d) were or were not known to Mr. or Mrs. Park or anyone else or KOAM (and the evidence in this case fails to prove that Mr. or Mrs. Park or anyone else at KOAM knew Marvin Friedman was illegally giving money to USDA inspectors; see paragraph [42]).

[55] 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. 309-15.

Order

[56] Respondent KOAM Produce, Inc.'s PACA license is revoked.
[57] The revocation of Respondent KOAM Produce, Inc.'s PACA license shall become effective on the 11th day after this Decision becomes final.

Finality

[58] 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).

A copy of this Decision and Order Following Reargument shall be served by the Hearing Clerk upon each of the parties, **together with** a copy of *Post & Taback, Inc. v. USDA*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

In re: DONALD R. BEUCKE.
Docket No. PACA-APP D-04-0009.
Decision and Order.
Filed January 6, 2006.

**PACA – PACA-APP – Responsibly connected – Stock ownership greater than 10%
– Resignation from Board of Directors, belated.**

Charles L. Kendall for Complainant.
Jane E. Bednar for Respondent.
Effie F. Anastassiou for Respondent.
Decision and Order by Chief Administrative Law Marc R. Hillson.

Decision

In this decision, I find that Petitioner Donald R. Beucke was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

Procedural History

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was “responsibly connected” to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). The determination was based on Petitioner’s 20 percent ownership of Garden Fresh, as well as his being vice-president and a director of that company from July 2000 through April 2003. That interval encompassed the period January 2002 through February 2003, during which time Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On February 24, 2004 Petitioner challenged the initial determination and requested that the PACA Branch Chief “review and reverse” the finding that he was responsibly connected to Garden Fresh. On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Beucke was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Beucke of his right to file a petition for review of his final determination. A petition for review was filed on June 1, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly \$380,000 for 109 lots of commodities purchased between January 2002 and February 2003. PX 6.

In another related proceeding, a responsibly connected determination

was also issued against Shane Martindale¹ for his role at Garden Fresh. While Mr. Martindale's petition was not formally consolidated with Mr. Beucke's, the two cases were grouped throughout the pre-trial process. Since there was no active case involving Garden Fresh, and thus no mandatory consolidation as required by Rule of Procedure 1.137(b), two separate hearings were scheduled, with Mr. Beucke's hearing taking place on March 1, 2005 and Mr. Martindale's hearing taking place the next day.

A hearing was conducted in this case on March 1, 2005 in San Jose, California. Petitioner was represented by Effie F. Anastassiou and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called six additional witnesses, while two witnesses testified on behalf of Respondent.

Facts

Petitioner Donald R. Beucke has been involved in the produce business for over 25 years, originally working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. Tr. 59, 61.² At one point he was president of Martindale. Tr. 84. During this period, Petitioner worked with other family members, including his step-brothers Wayne and Shane Martindale.

Around the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company he intended to operate in Las Vegas, Nevada. Tr. 61. Petitioner invested \$20,000 in Garden Fresh, and was listed as a 20% stockholder of the company. Tr. 61. Wayne and Shane Martindale were also listed on the PACA license certificate as 20% stockholders. RX 1. Nevada corporate records list Petitioner as a director and vice president of marketing. RX 3. Petitioner was authorized to sign checks on behalf of Garden Fresh, but there is no evidence that he did so after the first few

¹ Mr. Martindale's given name is Edward Shane Martindale, but he has generally been referred to as Shane Martindale.

² "Tr." refers to the transcript from the March 1, 2005 hearing. Even though the Beucke and Martindale matters were heard separately, although they were scheduled on consecutive days as a matter of administrative convenience, Respondent filed a single brief combining its discussion of the two cases, and liberally used testimony and other evidence from the Martindale hearing in those portions of its brief regarding the responsibly connected liability of Beucke. I am deciding this case solely based on the testimony and evidence received at the Beucke hearing on March 1, 2005.

months the company was operating. RX 13. Petitioner was one of the signatories on the application for a PACA license, RX 12, Tr. 87-89, and was listed on the application as a director, vice-president and 20% shareholder. Petitioner was issued a stock certificate in Garden Fresh Produce indicating that he owned 1000 shares in the company. RX 8, p. 3.

Petitioner maintained his positions with Garden Fresh during the time period that Garden Fresh committed its willful, flagrant and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran the company and that he had virtually no role in the company's operations other than making his initial \$20,000 investment. Tr. 60-66. He indicated that while Garden Fresh was operating out of Vegas, he maintained his position working full-time at Martindale Distributing in Salinas, California. He remembered attending a single meeting of the board in Las Vegas, but had no recollection of receiving a stock certificate, or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing). Tr. 62-64. He stated he wrote a single check on the company's behalf in the start-up phase of operations but otherwise wrote no checks for Garden Fresh, never saw any tax or financial books or records, and had virtually no duties. Tr. 62-64. He stated he was never involved in any business decisions for Garden Fresh. Tr. 65-66. He ordered some produce for Garden Fresh in the months shortly after it was founded, but not during the time period of the violations committed by Garden Fresh. Tr. 65. He also received some compensation—approximately \$1500—during the first year of operation of Garden Fresh. Tr. 65.

While working at Martindale Distributing, Petitioner began to hear that there were problems at Garden Fresh. Tr. 69. Beginning in December, 2002, he began receiving calls from Garden Fresh customers, who were also customers of Martindale Distributing, indicating that they were not getting paid in a timely basis. *Id.* He told them to call Wayne Martindale, and also told them that they should stop doing business with Garden Fresh if payment was becoming a problem. Tr. 70-71. He frequently placed calls to the Garden Fresh office in Las Vegas to try to determine the status of payments, but had great difficulty in reaching Wayne Martindale, and when he did talk to him was told that checks were in the mail, or that business would be picking up, new accounts had been landed, etc.—information which was not true. Tr. 71-73.

There is no evidence that Petitioner had any direct involvement in the

transactions that were the subject of the disciplinary case. Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh, and they only called Petitioner to get advice on how to get hold of Wayne Martindale, and to inform him of the situation. Tr. 17, 29-30, 41-42. During the violation period, Petitioner never saw the company's books, and had no role in deciding which creditors to pay. Before he resigned from Garden Fresh via letter of April 4, 2003, Petitioner signed off on the resignations of directors David N. Wiles (RX 7) and Bruce Martindale (RX 1).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh as far as they were concerned, and that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing on a timely basis.

Respondent's first witness was Evert Gonzalez, a senior marketing specialist for the PACA Branch. The investigation was initiated after the PACA Branch received reparation complaints. He described his investigation, which primarily involved visiting Garden Fresh's Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner, had equal authority and could sign checks and pay payables. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-9.

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).

In addition to penalizing the violating merchant, which in this case would be Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 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. Petitioner Donald R. Beucke was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested \$20,000 in the new company and was a 20% shareholder, a director and vice president of marketing.

2. Petitioner signed Garden Fresh's application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh, although there is no evidence that he signed any checks other than in the period shortly after the company started up.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, vice president and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1. In that letter, he requested that his name be removed from the PACA license.

9. Petitioner has extensive experience in the produce industry. At the time of the hearing he had worked in the produce industry for over 25 years, had held a number of positions, including president at Martindale Distributing, had co-founded Garden Fresh and Bayside Produce, and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received approximately \$1500 compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, vice president and director to prevent or correct the violations committed by Garden Fresh.

Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Donald Beucke was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under \$380,000. Thus, an individual who is responsibly connected

with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his 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.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with a lifetime of experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills.³ Indeed, once he knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he apparently chose to believe a series of untruthful statements from Wayne Martindale as to the company's fiscal health, and spent months trying to call Wayne Martindale without being put through to him, or even having Wayne Martindale hang up on him. Likewise, he could have disassociated himself from Garden Fresh by resigning, but instead

³ I emphatically reject the attempts of Respondent to insert evidence developed at the Martindale hearing into this proceeding. It was abundantly clear that the hearings were severed, a fact Respondent was aware of since the same attorney represented Respondent at both hearings. Much of Martindale's testimony was obviously intended to point the finger of blame at others, and Petitioner's attorney was not entitled to appear or examine witnesses in the Martindale hearing. Thus, allegations that there is evidence that Petitioner made purchases for Garden Fresh during the violation period, or that he chose which debts to pay, Resp. Br. at 16-18, are not being considered by me in making this decision.

signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Petitioner's inaction is particularly striking given that he knew as early as December 2002 that Garden Fresh was not paying its bills on time, if at all. He indicated that numerous customers of Garden Fresh called him at the office of Martindale Distributing, primarily to see if he could help them locate Wayne Martindale so that they could get paid. Tr. 69-71, 90-91. As a result of this, he advised some of these callers not to engage in further transactions with Garden Fresh, and began making his frequent phone calls to Wayne Martindale. He did not seek out all of Garden Fresh's customers to warn them of the company's problems. He did not, either on his own or with the participation of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh's Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company's condition. His failure to attempt to take any corrective actions other than trying to call Wayne Martindale, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business and a co-owner, officer and director of apparently at least two additional produce companies, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, "because he chose not to use the powers he had" has previously been found a basis for finding active participation. In re. Anthony Thomas, 59 Agric. Dec. 367, 392 (2000). Likewise, the need to take action to "counteract or obviate the fault of others" has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. Bell v. Dept. of Agriculture, 39 F. 3d 1199, 1201 (DC Cir.1994), citing Minotta v. U. S. Dept. of Agriculture, 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director and vice president. For starters, he was a co-founder of Garden Fresh and put up \$20,000 as part of the initial capitalization of Garden Fresh. This is a far cry from someone who is listed as an owner because their

spouse or parent put them on corporate records, and had no involvement in the corporation nor experience in the produce business. *Minotto v. USDA*, 711 F. 2d 406, 409 (D.C. Cir. 1983). Rather Petitioner is an experienced, savvy individual who had worked in the produce business for a quarter of a century, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re Joseph T. Kocot*, 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, vice president and co-owner in an attempt to establish a profitable business. He apparently shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts, other than telephone calls, of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

Conclusions of Law

1. Petitioner Donald R. Beucke was a 20% shareholder, director and vice president of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.

2. Between January 14, 2002 and February 26, 2003, Garden Fresh Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Donald R. Beucke was responsibly connected with Garden Fresh at the time the violations were committed.

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: JAMES E. THAMES, JR.
PACA-APP Docket No. 04-0003.
IN RE: GEORGE E. FULLER, JR.
PACA-APP Docket No. 03-0021.
IN RE: JON R. FULLER.
PACA-APP Docket No. 03-0020.
Decision and Order as to James E. Thames, Jr.
Filed January 24, 2006.

430 PERISHABLE AGRICULTURAL COMMODITIES ACT

PACA-APP – Perishable Agricultural Commodities Act – Failure to make full payment promptly – Responsibly connected – Nominal officer, director, and shareholder.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding James E. Thames, Jr. (Petitioner), was responsibly connected with John Manning Co., Inc., when John Manning Co., Inc., violated the PACA. The Judicial Officer found John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). During the violation period, Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite his being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. The PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-pronged test. The Judicial Officer stated, since Petitioner failed to carry his burden of proof that he met the second prong of the two-pronged test, a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA (the first prong of the two-pronged test), was unnecessary.

Ann Parnes, for Respondent.

Kenneth D. Federman, Bensalem, Pennsylvania, for Petitioner.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

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

PROCEDURAL HISTORY

On November 21, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that James E. Thames, Jr. [hereinafter Petitioner], was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as

amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On December 16, 2003, Petitioner filed a Petition For Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing on March 29, 2005, in Atlanta, Georgia. Kenneth D. Federman, Rothberg & Federman, P.C., Bensalem, Pennsylvania, represented Petitioner. Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On June 22, 2005, Petitioner filed "Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc." On June 24, 2005, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions and Order." On August 17, 2005, Petitioner filed "Reply Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc." On August 19, 2005, Respondent filed "Respondent's Reply to Petitioners' Proposed Findings of Fact, Conclusions of Law, and Order."

On October 17, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] concluding Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated the PACA (Initial Decision at 13).

On November 15, 2005, Petitioner appealed to the Judicial Officer, and on December 16, 2005, Respondent filed a response to Petitioner's appeal petition. On December 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision. Therefore, I adopt the substance of the Initial Decision as the final Decision and Order as to James E. Thames, Jr.

¹During the period October 13, 2001, through August 28, 2002, John Manning Co., Inc., failed to make full payment promptly to 58 sellers of the agreed purchase prices in the total amount of \$1,953,098.39 for 1,102 lots of perishable agricultural commodities which John Manning Co., Inc., 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)). *In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. 1187 (2004).

Additional conclusions by the Judicial Officer follow the ALJ's conclusion, as restated.

References to the transcript are designated by "Tr." The agency records upon which Respondent based his determinations that Petitioner, George E. Fuller, Jr., and Jon R. Fuller were responsibly connected with John Manning Co., Inc., are part of the record of this proceeding.² Exhibits in the agency record relating to Petitioner are designated by "JTRX"; exhibits in the agency record relating to George E. Fuller, Jr., are designated by "GFRX"; and exhibits in the agency record relating to Jon R. Fuller are designated by "JFRX."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

²See 7 C.F.R. § 1.136(a).

evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee

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

(b) Refusal of license; grounds

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

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

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

. . . .

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

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this

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

§ 499h. Grounds for suspension or revocation of license

....

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

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

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

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

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

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

7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

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

....

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

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

(5) Payment for produce purchased by a buyer, within 10

days after the day on which the produce is accepted;

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

7 C.F.R. § 46.2(aa)(5), (11).

**ADMINISTRATIVE LAW JUDGE’S INITIAL DECISION
(AS RESTATED)**

Preliminary Statement

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.³ The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an

³7 U.S.C. § 499a(b)(9).

officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.⁴ As Petitioner has failed to carry his burden of proof regarding the second prong of the two-pronged test, I conclude Petitioner was responsibly connected with John Manning Co., Inc., at the time John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Findings of Fact

1. John Manning Co., Inc., was formed in 1937 by John Manning and George E. Fuller, Sr. John Manning Co., Inc., was a specialty tomato re-packing house until 2000. (JFRX 7Q at 1.)
2. George E. Fuller, Sr., became sole owner of John Manning Co., Inc., when John Manning died in 1969 (JFRX 7Q at 1).
3. In 1981, Jon R. Fuller and George E. Fuller, Jr., the sons of George E. Fuller, Sr., entered the business and became stockholders of

⁴*In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (1984) (holding petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 Fed. Appx. 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

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John Manning Co., Inc. (JFRX 7Q at 1).

4. Petitioner is an individual who resides at 12230 Edgewater Drive, Hampton, Georgia (JTRX 6 at 1).

5. Petitioner has been working in the produce industry since 1963 (Tr. 32).

6. From 1967 to 1990, Petitioner worked as a manager at Dixon Tom-A-Toe, a tomato re-packing business located in Forest Park, Georgia (JTRX 19 at 3; Tr. 31).

7. In 1990, Petitioner joined John Manning Co., Inc., and bought stock from George E. Fuller, Sr. After Petitioner's purchase of stock, George E. Fuller, Sr., had 7 percent of the outstanding stock and the remaining 93 percent was divided equally between Petitioner, George E. Fuller, Jr., and Jon R. Fuller. (JFRX 7Q at 1; JTRX 11 at 1.)

8. Petitioner became the vice president and a director of John Manning Co., Inc., in June 1991, and remained the vice president and director of John Manning Co., Inc., at least through the period that John Manning Co., Inc., violated the PACA (JTRX 1).

9. In 1999, competition in the tomato re-packing business became fierce resulting in a lower customer base for John Manning Co., Inc., and a new direction for the company was sought. Petitioner introduced Stephen McCue to the Fullers in late 1999. Thereupon, Stephen McCue became president of John Manning Co., Inc., and he, Petitioner, George E. Fuller, Jr., and Jon R. Fuller held an equal number of shares. John Manning Co., Inc., greatly expanded with diversification into the handling of mixed fruits and vegetables. (JFRX 7Q at 1; JTRX 11 at 1; Tr. 32, 80.)

10. In September 1999, Petitioner signed a \$100,000 line of credit for John Manning Co., Inc., and in December 2000, Petitioner signed a \$250,000 line of credit for John Manning Co., Inc. Petitioner also signed a lease for John Manning Co., Inc.'s new headquarters. (Tr. 59, 88.)

11. In May of 2001, Stephen McCue informed Petitioner, George E. Fuller, Jr., and Jon R. Fuller that he was being courted by a produce

conglomerate and would only stay with John Manning Co., Inc., if allowed to purchase additional shares to increase the number of his shares to 51 percent of the total outstanding stock. Petitioner, George E. Fuller, Jr., and Jon R. Fuller agreed. (JFRX 7Q at 1; JTRX 11 at 1.)

12. On August 27, 2001, at a joint meeting of the board of directors and the shareholders of John Manning Co., Inc., the shares held by Petitioner and the Fullers were re-assigned so that Stephen McCue became a holder of 51 percent of the outstanding stock. Stephen McCue purchased for \$1 a share, 13,500 shares from George E. Fuller, Jr.; 13,500 shares from Jon R. Fuller; and 10,000 shares from Petitioner. Stephen McCue gave promissory notes in payment for the shares. As a result of the re-assignment of the shares, totaling 131,000 shares, Stephen McCue held 68,000 shares or slightly over 51 percent; Petitioner held 21,000 shares or slightly over 16 percent; George E. Fuller, Jr., held 17,500 shares or slightly over 13 percent; Jon R. Fuller held 17,500 shares or slightly over 13 percent; and George E. Fuller, Sr., held 7,000 shares or slightly over 5 percent. (JTRX 13 at 1; Tr. 51-52.)

13. When Stephen McCue initially joined John Manning Co., Inc., profits increased and so did the salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller. At the end of June 2001, John Manning Co., Inc., had profits of \$130,000, and George E. Fuller, Jr., and Jon R. Fuller were entitled to \$65,000 of retained earnings on which they paid taxes. The weekly salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller were increased from \$800 to \$1,000. When George E. Fuller, Jr., and Jon R. Fuller later sought their portions of the retained earnings, they were told the retained earnings were needed to pay expenses and instead George E. Fuller, Jr.'s and Jon R. Fuller's salaries were increased to \$1,200 per week. Petitioner did obtain some of the retained earnings and his salary remained \$1,000 per week. (GFRX 7Q at 1; Tr. 27, 81, 83, 86-89.)

14. The by-laws of John Manning Co., Inc., provide that the property and business of the corporation shall be managed by its board of directors that shall consist of no fewer than three and not more than five members. Each director shall hold office until the annual meeting of shareholders held next after the director's election and until a qualified successor shall be elected, or until the director's earlier death,

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resignation, incapacity to serve, or removal. Any director may be removed, with or without cause, by the affirmative vote of the majority of the issued and outstanding shares at any regular or special meeting. The board of directors shall have the power to determine which accounts and books of the corporation shall be open to the inspection of shareholders. The by-laws further provide for the following officers:

The president, who shall be the chief executive officer of the corporation, shall preside at all meetings of the stockholders and directors, shall ensure that all orders and resolutions of the board of directors are made effective, and, in addition to other specified duties, shall perform all other such duties as the board of directors may assign.

The vice president, who, in the absence of the president or in case of the president's failure to act, shall have all the powers of the president and shall perform such duties as shall be imposed upon the vice president by the board of directors.

The secretary, who shall attend and keep the minutes of all meetings of the board of directors and stockholders, shall have charge of the records and seal of the corporation, and shall perform all the duties incident to the office of the secretary of a corporation, subject at all times to the direction and control of the board of directors.

The treasurer, who shall keep full and accurate account of receipts and disbursements on the books belonging to the corporation, shall deposit all monies and other properties belonging to the corporation, shall disburse the funds of the corporation as may be ordered by the board of directors, shall render to the board of directors, whenever the board may require, an account of all transactions and of the financial condition of the corporation, and shall perform such other duties as shall be assigned to the treasurer by the board of directors. (JTRX 4.)

15. During the period October 13, 2001, through May 17, 2002, the officers of John Manning Co., Inc., were Stephen McCue, president; Petitioner, vice president; George E. Fuller, Jr., treasurer; and Jon R. Fuller, secretary. Stephen McCue, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted John Manning Co., Inc.'s board of directors. Stephen McCue attended to most of the buying and selling of produce for John Manning Co., Inc., and he had charge of all other aspects of the

business except for those handled by Petitioner, George E. Fuller, Jr., and Jon R. Fuller. Petitioner supervised the tomato lines and the packing crew. Petitioner also sold tomatoes to a few customers. George E. Fuller, Jr., assisted with tomato operations when Petitioner was absent; coordinated maintenance service on the company's trucks, forklifts, electrical jacks, and refrigeration; prepared inventory reports; and sometimes signed payroll checks. Jon R. Fuller was in charge of the company payroll; signed payroll checks; assisted with tomato operations when Petitioner was absent; purchased tomato supplies; and coordinated insurance for the company. On May 17, 2002, Stephen McCue terminated the employment of George E. Fuller, Jr., and Jon R. Fuller because they refused to put more money into the business, and they did not act as officers or directors after that date. Stephen McCue and Petitioner continued as president and vice president and members of the board of directors until the corporation stopped doing business in August 2002. (JFRX 7Q at 2; JTRX 11 at 2-3; Tr. 20, 33, 35, 67, 76, 89.)

16. Though John Manning Co., Inc., was profitable in June 2001, the company had problems paying bills. Petitioner asked Stephen McCue for financial information. Stephen McCue stated, as chief executive officer and president, he was not required to provide financial information to Petitioner. Financial information was not furnished by Stephen McCue until early May 2002. (JFRX 7Q at 2; JTRX 11 at 2.)

17. Though Petitioner knew in 2001, that John Manning Co., Inc., was having trouble paying its bills, John Manning Co., Inc.'s problems paying produce suppliers were first acknowledged and discussed at the April 24, 2002, meeting of the board of directors. Stephen McCue informed the board of directors that produce shippers were demanding money and that if the checking account was frozen pursuant to the PACA Trust Agreement, John Manning Co., Inc., could not pay. Stephen McCue asked George E. Fuller, Jr., and Jon R. Fuller for permission request money from George E. Fuller, Sr., to keep John Manning Co., Inc., from bankruptcy. They gave their permission, but emphasized George E. Fuller, Sr., would insist upon seeing some financials and that Zachary Thacker, the comptroller/chief financial officer who Stephen McCue had hired, had not yet provided the 2001 year-ending report for John Manning Co., Inc. (JTRX 14.)

18. On April 29, 2002, the board of directors held a meeting that Zachary Thacker attended. Financial difficulties were again discussed including \$200,000 owed to Weis-Buy which John Manning Co., Inc., could satisfy through weekly payments secured by an 8¾ percent note and a signed guarantee by the directors. Jon R. Fuller said he was not signing anything else unless some financials were forthcoming. Stephen McCue promised financial information would be delivered by May 1, 2002. (JTRX 15.)

19. On May 3, 2002, the board of directors held another meeting that was also attended by George E. Fuller, Sr., Zachary Thacker, and Don Foster, attorney for John Manning Co., Inc. The December 31, 2001, year-ending report was distributed. The report showed a \$140,805 loss in 2001 as well as a \$32,598 loss in the first quarter of 2002. Stephen McCue asked the stockholders for their personal cash infusion to help John Manning Co., Inc., during the financial hardship. He also expressed concern because of the Fullers' refusal to sign additional lines of credit with Weis-Buy. He stated John Manning Co., Inc., could save \$5,000 a week without George E. Fuller, Jr., Jon R. Fuller, and Petitioner on the payroll, and others could perform their jobs. Stephen McCue stated the company had a "50/50 shot of making or failing." Stephen McCue stated he was going to do his best to save John Manning Co., Inc. George E. Fuller, Sr., stated John Manning Co., Inc., should reorganize under bankruptcy laws, but Stephen McCue said reorganization was not an option. George E. Fuller, Sr., then said, under the circumstances, he could not put any more money into John Manning Co., Inc. (JTRX 16.)

20. John Manning Co., Inc., shut down in August 2002, and its PACA license terminated on June 5, 2003, for failure to pay the annual PACA license renewal fee (JTRX 1 at 1, JTRX 11 at 3).

21. On April 22, 2003, a disciplinary complaint was filed under the PACA against John Manning Co., Inc., for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)) from October 13, 2001, through August 28, 2002, by failing to pay \$1,953,098.39 to 58 sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce. The disciplinary complaint resulted in a default decision being entered against John Manning Co., Inc., that published the finding that it had committed willful, flagrant, and repeated

violations of the PACA.⁵ (JTRX 5-6.)

22. Petitioner attended numerous board of director meetings during the time he was a director of John Manning Co., Inc., including board meetings held on February 23, 2000, March 22, 2000, April 19, 2000, May 15, 2001, August 27, 2001, April 24, 2002, April 29, 2002, and May 3, 2002 (JFRX 7I-7P; JTRX 13-16).

Conclusion

Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to prove by a preponderance of the evidence that he was a nominal officer, director, and shareholder of John Manning Co., Inc. Petitioner had an actual significant nexus with John Manning Co., Inc., during the violation period. John Manning Co., Inc.'s by-laws vested all oversight and governance powers in the board of directors, and together, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted the majority of the board of directors. Though Stephen McCue, as majority stockholder, could have removed Petitioner as an officer and a director, he did not. Petitioner therefore had powers that he failed to use in an effort to prevent John Manning Co., Inc.'s violations of the prompt payment provision of the PACA. Under these circumstances, Petitioner was so positioned that he should have known of the misdeeds and taken steps to "counteract or obviate the fault of others."⁶ Petitioner therefore cannot be found to be a nominal officer, director, or shareholder under controlling legal precedents that have interpreted and applied the term "nominal" within the meaning of the PACA.

The PACA allows a person who otherwise comes under its "responsibly connected" definition to show he or she should not be so considered by satisfying both parts of an evidentiary test that he or she was not actively involved in the activities resulting in a violation and

⁵*In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. 1187 (2004).

⁶*Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). *See also Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D. C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001).

was only nominally a partner, an officer, a director, and a shareholder of a violating PACA licensee. Inasmuch as Petitioner cannot be found to have only “nominally” been an officer, a director, and a shareholder of John Manning Co., Inc., I find it unnecessary to address whether under the applicable precedents Petitioner met his burden of proof that he was not actively involved in the activities resulting in a violation.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in Petitioner’s Appeal Petition. First, Petitioner asserts the ALJ found a discussion of the issue of Petitioner’s active involvement in the activities resulting in a violation of the PACA unnecessary because the ALJ concluded Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of John Manning Co., Inc. Petitioner requests, if I find necessary a discussion of the issue of Petitioner’s active involvement in the activities resulting in John Manning Co. Inc.’s violations of the PACA, that I refer to Petitioner’s discussion of active involvement in Petitioner’s Brief in Support of the Appeal of James E. Thames, Jr. to the Chief’s Determination He Was Responsibly Connected to John Manning Co., Inc. (Petitioner’s Appeal Pet. at ¶ 1.A.)

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.⁷ The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite his being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

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

⁷7 U.S.C. § 499a(b)(9).

demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

I agree with the ALJ's conclusion that Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.⁸ As Petitioner has failed to carry his burden of proof regarding the second prong of the two-pronged test, I agree with the ALJ that a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA (the first prong of the two-pronged test), is unnecessary.

Second, Petitioner states the ALJ's conclusion that Petitioner was not a nominal officer, director, and stockholder of John Manning Co., Inc., is error (Petitioner's Appeal Pet. at ¶ 1.B).

I agree with the ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of John Manning Co., Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁹

⁸See note 4.

⁹*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, (continued...)

The record establishes Petitioner had an actual, significant nexus with John Manning Co., Inc., during the violation period.

Petitioner had 39 years of experience in the produce business. Prior to his employment by John Manning Co., Inc., in 1990, Petitioner had considerable experience in the tomato re-packing business, where he worked as a manager for Dixon Tom-A-Toe, in Forest Park, Georgia, from 1967 to 1990. At John Manning Co., Inc., Petitioner supervised nearly all of the tomato re-pack operations and packing crew on a daily basis, hired and fired employees, and took orders for produce. (JTRX 19 at 3; Tr. 30-33, 35, 39.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹⁰ Petitioner held the positions of vice president and director at John Manning Co., Inc., from June 1991 until John Manning Co., Inc., stopped doing business in 2002. During the time he held these positions, Petitioner was active in corporate decision-making. Petitioner co-signed lines of credit for John Manning Co., Inc., signed the lease for John Manning Co., Inc.'s new headquarters, and nominated and voted for Stephen McCue to be president of John Manning Co., Inc. (JFRX 7I at 1; Tr. 29, 37-38, 59, 87-88). During his tenure as a director on the board of directors, Petitioner attended and participated in numerous board meetings (JTRX 13-16; JFRX 7I-7P). Petitioner knew by the April 24, 2002, board of directors meeting that John Manning Co., Inc., was not paying its produce sellers in accordance with the PACA.

Substantial compensation as a result of a person's association with the violating PACA licensee is another factor in determining whether that person was or was not a nominal officer or director.¹¹ Petitioner earned \$1,000 a week during the period when John Manning Co., Inc., violated the PACA (Tr. 27). A salary of \$52,000 per year suggests that Petitioner's roles as vice president and director were not nominal. Moreover, payment of dividends to Petitioner out of the retained earnings (Tr. 27, 88-89) indicates Petitioner was not merely a nominal stockholder.

⁹(...continued)

510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

¹⁰*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

¹¹*In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1543 (1998); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1495-96 (1998).

In short, I find Petitioner had an actual, significant nexus with John Manning Co., Inc. Petitioner had the appropriate business experience to be a corporate officer and director, participated in corporate decision-making, received substantial compensation for his services, and attended and participated in board meetings.

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

ORDER

I affirm Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order as to James E. Thames, Jr., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order as to James E. Thames, Jr.¹² The date of entry of the Order in this Decision and Order as to James E. Thames, Jr., is January 24, 2006.

In re: EDWARD S. MARTINDALE.
PACA-APP Docket No. 04-0010.
Decision and Order.
Filed January 27, 2006.

PACA-APP – Responsibly connected – Nominal officer, when not – Resignation, belated.

¹²See 28 U.S.C. § 2344.

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P. Sterling Kerr for Petitioner.
Charles L. Kendall for Respondent.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Petitioner Edward S. Martindale was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

Procedural History

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was “responsibly connected” to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). RX 2. The determination was based on Petitioner’s 20 percent ownership of Garden Fresh, as well as his being secretary and a director of that company from July 2000 through April 2003. That interval encompassed the period January 2002 through February 2003, during which time Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On March 23, 2004 [Petitioner] challenged the initial determination, contending that he had tendered his resignation from the company before the violative acts took place and that he was “in no way ‘actively involved’ with Garden Fresh” during the violation period. RX 3. On May 10, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Martindale was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Martindale of his right to file a petition for review of his final determination. A petition for review was filed on June 10, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency

filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly \$380,000 for 109 lots of commodities purchased between January 2002 and February 2003. RX 12.

A hearing was conducted in this case on March 2, 2005 in San Jose, California. Petitioner was represented by P. Sterling Kerr, and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called one additional witness, while Respondent called three witnesses, including two PACA Branch employees.

Facts

Petitioner Edward Shane Martindale¹ has worked in the produce business for approximately fifteen years. He began working at Martindale Distributing, a business run by his father in Salinas, California. When he began working there, his stepbrother Donald R. Beucke and his older brother Wayne Martindale were already involved in the business. He started out in the company as a produce inspector and “on grounds” buyer. When his father retired from the company in 1999, Petitioner, along with his stepbrother and brother, purchased the company with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, he has been the 100% owner of Martindale Distributing. Tr. 36, 41-42.

In late 1999 or early 2000, Wayne Martindale, who with his stepbrother Donald Beucke had already started Bayside Produce, a produce company with a warehouse in San Diego, “started talking about wanting to open another company in Las Vegas.” Tr. 42. Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh. Petitioner was a 20% shareholder of the new company, and was listed as a director and secretary. He was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh (RX 10, p. 4) although he stated he had never seen it before the institution of this proceeding. He signed the original PACA license application and the check in payment of the PACA licensing fee. He submitted his resignation and reassigned his stock on April 4, 2003. By

¹ Petitioner’s legal name is Edward Shane Martindale but he is generally known as Shane Martindale. Tr. 34.

letter dated April 28, 2003, he notified the PACA Branch that he was no longer connected with Garden Fresh, and asked that his name be removed from Garden Fresh's PACA license. RX 1, p. 16.

Petitioner stated that he originally decided to join the company because he was good with bills and money management. Tr. 85. During the early days of the company's operations, Petitioner, working out of Martindale Distributing's Salinas office, handled much of Garden Fresh's paperwork, even receiving a salary for taking care of payables that were sent to his office in Salinas. He classified his principal duties with Garden Fresh as that of an accounts payable manager, but at the end of 2001 he basically stopped writing checks for the company, when his brother Wayne moved that part of Garden Fresh's operations to Las Vegas. He stated that he relinquished his role because of differences of opinion with his brothers, and that problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills, caused him to "disassociate" himself from Garden Fresh. Tr. 49. He told the other shareholders that he would no longer be involved with handling the payables for Garden Fresh. Tr. 49-50. All the Garden Fresh invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas in December, 2001. Tr. 50.

Petitioner purchased some produce on behalf of Garden Fresh in the first year it did business, but recalled making no such purchases after his brother took the company's payables to Las Vegas at the end of 2001. He did issue some checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." Tr. 52, 95. He was not directly involved in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh. After December 2001, he indicated that he did not actively monitor Garden Fresh on a regular basis, even though he was still a shareholder, officer and director. Tr. 52. He fielded calls for Garden Fresh from his Salinas office, and became aware in 2002 that there were complaints about Garden Fresh concerning the way the company was handling accounts payable. He tried to see that the caller was put in touch with Wayne Martindale to attempt to resolve the issue. Tr. 52-53. Other than referring callers to his brother, he only could recall warning one company, Sun America Produce, that he had concerns about the way Garden Fresh was paying its bills. Tr. 81. Even though he knew there were financial problems, he did not ask to see a financial statement or bank statements, basically relying on statements

from Wayne Martindale and Donald Beucke “that things were getting better.” Tr. 99.

Before he resigned from Garden Fresh by letter dated April 4, 2003, Petitioner had signed off on documents accepting the resignation of David Wiles (RX 11) and Bruce Martindale (RX 1, p. 13).

Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary person they dealt with when dealing with Garden Fresh. Mr. Quijada testified that he never had any slow pay problems with Martindale Distributing and characterized Petitioner as “an upstanding individual.” Tr. 22.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints. Tr. 108-109. He described his investigation, which primarily involved visiting Garden Fresh’s Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Tr. 110-111. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner, had equal authority and could sign checks and pay payables. Tr. 112. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-1

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).

In addition to penalizing the violating merchant, which in this case would be Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 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. Petitioner Edward Shane Martindale was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner was a 20% shareholder, a director and secretary of Garden Fresh.

2. Petitioner signed Garden Fresh's application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh. As the money manager of Garden Fresh, he handled a significant portion of the payables in 2001. Even after the payables were transferred to Las Vegas in late 2001, he handled occasional payments as directed by Wayne Martindale.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, secretary and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1, p. 16. In that letter, he requested that his name be removed from the PACA license.

9. Petitioner has extensive experience in the produce industry. At

the time of the hearing he had worked in the produce industry for over 15 years; had held a number of positions, including sole ownership of Martindale Distributing; was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, secretary and director to prevent or correct the violations committed by Garden Fresh.

Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Edward S. (Shane) Martindale was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under \$380,000. Thus, an individual who is responsibly connected with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his 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.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with fifteen years experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills. This is particularly glaring in the case of Petitioner, whose strongest field of expertise was apparently in money management and handling payables, and who knew to a certainty in 2001 that there were major problems with Garden Fresh's accounts in 2001, before the violations that were the subject of the disciplinary action even took place. Indeed, once he knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he figuratively washed his hands of the matter, handing off the books to his brother Wayne, and taking no actions consistent with his positions as 20% owner, officer and director to correct the situation. He could have disassociated himself from Garden Fresh by resigning, but instead signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Further, Petitioner issued some checks in 2002, usually at the direction of Wayne Martindale, at a time when he knew that the Garden Fresh was having trouble making its payments. Tr. 52, 55. He may have even made some purchases for Garden Fresh during this time period. Tr. 17-18. By making payments at a time when he knew the company was not making payments to some of its creditors, Petitioner

was in effect choosing which debts to pay, even though it was ostensibly under the “direction” of Wayne Martindale or Donald Beucke. As a co-owner, officer and director, he cannot duck his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. His executing these checks at a time when he knew Garden Fresh was having financial problems is just the kind of conduct referred to by the Judicial Officer in *In re. Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), when he held that check writing and choosing which debts to pay “can cause an individual to actively involved in failure to pay promptly for produce. *Id.*, at 1488-1489.

Petitioner’s inaction is particularly striking given that he knew as early as December 2001 that Garden Fresh’s purchase order and invoice process was in such disarray that he passed it over to Wayne Martindale in Las Vegas. Even though he received many calls from Garden Fresh sellers looking for Wayne Martindale because they were not getting paid, he did not seek out all of Garden Fresh’s customers to warn them of the company’s problems. He did not, either on his own or with the participation of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh’s Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company’s condition. His failure to attempt to take any corrective actions, his “washing his hands” of the payables situation by handing the books to his brother, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, “because he chose not to use the powers he had” has previously been found a basis for finding active participation. *In re. Anthony Thomas*, 59 Agric. Dec. 367, 388 (2000). Likewise, the need to take action to “counteract or obviate the fault of others” has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. *Bell v. Dept. of Agriculture*, 39 F. 3d 1199, 1201 (DC Cir.1994), citing *Minotta v. U. S. Dept. of Agriculture*, 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the

evidence, that he was only a nominal 20% shareholder, director and secretary. For starters, he was a co-founder of Garden Fresh, and was actively involved in managing the money and paying the bills of the company at its outset. This is a far cry from someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business. Minotto v. USDA, *supra*, 711 F. 2d at 409. Rather Petitioner is an experienced, savvy individual who had worked in the produce business for at least fifteen years, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re Joseph T. Kocot*, 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, secretary and co-owner in an attempt to establish a profitable business. He presumably would have shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

Conclusions of Law

1. Petitioner Edward Shane Martindale was a 20% shareholder, director and secretary of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.
2. Between January 14, 2002 and February 26, 2003, Garden Fresh

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Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

Conclusion and Order

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA (7 U.S.C. § 499b(4)) for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Edward Shane Martindale was responsibly connected with Garden Fresh at the time the violations were committed.

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: PHILIP J. MARGIOTTA.
PACA APP Docket No. 03-0007.
Decision and Order.
Filed January 31, 2006.**

PACA-APP – Responsibly connected – Active participation – Bribes – Actual knowledge of bribe not required.

Mark C.H. Mandell for Petitioner.
Mary Hobbie for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

[1] I decide that Petitioner Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc., as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999. As the manager of Trombetta's Hunts Point Terminal Market facility, while he was an officer of Trombetta (the Secretary), Philip J. Margiotta was "actively involved" in Trombetta's activities, especially Trombetta's Hunts Point Terminal Market activities. There is no evidence of wrongdoing by Philip J. Margiotta; yet by running the Hunts Point Terminal Market portion of the company, he was overwhelmingly "actively involved", within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta's PACA violations.¹ To be found to be "responsibly connected" or to be found to be "actively involved", wrongdoing is not required.

Procedural History

[2] Petitioner Philip J. Margiotta (herein frequently Philip J. Margiotta), filed his petition for review on March 21, 2003. The agency record was filed on April 9, 2003.

[3] Philip J. Margiotta is represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey.

[4] Respondent, Chief, PACA Branch, Fruit and Vegetable Programs,

¹ Trombetta, through employee Joseph (Joe Joe) Auricchio, violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Agricultural Marketing Service, United States Department of Agriculture (herein frequently PACA), was represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

[5] This case was consolidated with the disciplinary action² for the hearing, and all the evidence was available for each case. The nine-day hearing was held before me, Jill S. Clifton, in New York, New York, on July 14-18, July 21-23, and August 21, 2003. Witnesses testified and exhibits were admitted into evidence. The transcript is referred to as “Tr.” Philip J. Margiotta’s exhibits are designated by “RX” (based on the disciplinary action). PACA’s exhibits are designated by “CX” and “AX” (based on the disciplinary action); and the Certified Agency Record exhibits are designated by “CARX”.

[6] Philip J. Margiotta (and Trombetta) submitted 22 exhibits, RX A through RX V, and a DVD submitted post-hearing.

[7] Philip J. Margiotta (and Trombetta) 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. 575, 1651-1681).

[8] PACA (and AMS) 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.

[9] PACA (and 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).

² *In re M. Trombetta and Sons, Inc.*, 64 Agric. Dec. 1869 (2005) .

[10] All of the parties' exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence.

[11] The proposed transcript corrections, filed April 5, 2004, and April 12, 2004, were accepted.

[12] Philip J. Margiotta's Proposed Findings of Fact, Conclusions of Law, and Order, with opening brief was timely filed on October 21, 2005; his reply was timely filed on November 30, 2005.

[13] PACA's Proposed Findings of Fact, Conclusions, and Order with response brief was timely filed on November 14, 2005.

Findings of Fact

[14] The testimony of each witness was credible.

[15] Philip J. Margiotta, full name Philip James ("Phil") Margiotta, is an individual who was born on August 13, 1949, and whose mailing address was 41 Bellain Avenue, Harrison, New York 10528. Tr. 498-500, 1607-08, 1684; CARX 3; AX 1.

[16] Philip J. Margiotta is fifth generation in the business known as M. Trombetta and Sons, Inc. (herein frequently referred to as Trombetta), tracing its roots to the 1890s. Tr. 500.

[17] Trombetta was owned 60% by Philip J. Margiotta's father, 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. 1676-77.

[18] Trombetta's PACA license records covering 1998 through 2003 show Philip J. Margiotta as secretary; P.J. Margiotta (the father of Philip J. Margiotta (Tr. at 5)), as president, treasurer and 60 percent shareholder; and Stephen Trombetta as vice president and 40 percent shareholder. CARX 1. [19] Philip J. Margiotta was not an owner of Trombetta, but he was an employee of Trombetta and an officer, the Secretary, of Trombetta. Tr. 499, 1338, 1341-1342.

[20] Philip J. Margiotta, during April through July 1999, was the

manager of Trombetta's Hunts Point Terminal Market facility, while he was the Secretary of Trombetta. Tr. 499.

[21] Philip J. Margiotta ran Trombetta's business at the Hunts Point Terminal Market³ in the Bronx, New York, New York, and he had worked in the business for more than 30 years. Tr. 499, 1340, 1342, 1344.

[22] Trombetta's managers at all times material herein and particularly in 1999 were Philip J. Margiotta at the Hunts Point Terminal Market, and Stephen ("Steve") Trombetta at the Bronx Terminal Market. Tr. 502, 1677.

[23] P.J. Margiotta retired from active participation in Trombetta in 1993. He had not drawn a salary for more than ten years, at the time of the hearing. Tr. 1653, 1672, 1680.

[24] Stephen Trombetta had visited Trombetta's Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. Tr. 1312.

[25] Trombetta's Hunts Point Terminal Market facility is where Trombetta, through its employee Joseph (Joe Joe) Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, during April 1999 through July 1999. *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

[26] Joseph (Joe Joe) Auricchio was acting in the scope of his employment as Trombetta's produce salesperson when he paid the unlawful bribes and gratuities, and Auricchio's willful violations of the PACA are deemed to be Trombetta'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).

[27] Trombetta was responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee

³ Trombetta also owns a facility at the Bronx Terminal Market, which is approximately 10 miles from Trombetta's facility at the Hunts Point Terminal Market. Tr. 1312.

who paid the unlawful bribes and gratuities to the United States Department of Agriculture produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[28] Philip J. Margiotta oversaw Trombetta; he generally ran the firm. Tr. 499, 1340, 1342.

[29] Philip J. Margiotta bought produce on behalf of Trombetta, negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Tr. 1340, 1342, 1369.

[30] In carrying out his oversight responsibilities at Trombetta's Hunts Point Terminal Market facility, Philip J. Margiotta observed the merchandise as it was received from shippers and sold to customers. Tr. at 1342-43.

[31] Philip J. Margiotta ensured that the store was clean and neat and that produce was not lost due to negligence. Tr. 1342-43.

[32] Philip J. Margiotta observed the work of the foreman (who watches the porters) and the other employees. Philip J. Margiotta was responsible for addressing any union problems. Philip J. Margiotta supervised the office help, to ensure that Trombetta's purchases and sales were properly recorded. Tr. 1343-45.

[33] Philip J. Margiotta supervised the sales staff, advised them what product was coming into Trombetta, and what Philip J. Margiotta thought the market would be for the various commodities handled by Trombetta. Tr. 1344.

[34] Philip J. Margiotta decided which shippers to pay and, after consultation with the shippers, how much to pay them. Tr. 1369-70.

[35] Philip J. Margiotta hired all the sales help (Tr. 1346), including Joseph (Joe Joe) Auricchio. Tr. 505.

[36] Joseph (Joe Joe) Auricchio was one of Trombetta's employees monitored by Philip J. Margiotta. Tr. 508, 529-30, 550.

[37] Philip J. Margiotta failed to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[38] Philip J. Margiotta worked through the union to terminate two employees of Trombetta who had engaged in theft. Tr. 1344-45. Joseph (Joe Joe) Auricchio was also terminated. Tr. 1152.

[39] Philip J. Margiotta signed, as corporate secretary, Trombetta's PACA license renewal applications for 2001-2002 (CARX 1, p. 7), 2000-2001 (CARX 1, p. 11), 1999-2000 (CARX 1, p. 15), 1998-1999 (CARX 1, p. 19), and 1997-1998 (CARX 1, p. 23). See also Tr. 1362-1363.

[40] Philip J. Margiotta was authorized by Trombetta to sign checks and was on the signature card of Trombetta's bank. Tr. 1338-39; CARX 5, p. 3. Philip J. Margiotta signed most of the checks generated by Trombetta's Hunts Point Terminal Market facility. Tr. 1369; CARX 8.

[41] Among Trombetta's checks signed by Philip J. Margiotta were checks in payment for Trombetta's annual PACA license renewals, covering the years 1997-1998 through 2001-2002. CARX 1, pp. 8, 12, 16, 20, 24.

[42] Philip J. Margiotta signed two renewal applications for Trombetta's New York State Farm Products Dealer License, identifying himself as secretary of Trombetta, on April 8, 1998 and March 22, 1999, covering the periods May 1, 1998 through April 30, 1999, and May 1, 1999 through April 30, 2000, respectively. CARX 6 at pp. 1-2 and 3-4.

[43] The April 1999 issue of The Blue Book identified Philip J. Margiotta as supervisor of sales for Trombetta. CARX 9.

Discussion

[44] This Discussion, paragraphs [44] through [57], focuses on why I determine that Philip J. Margiotta was "actively involved" in the activities that led to Trombetta's failure to perform its duty to maintain fair trade practices required by the PACA. 7 U.S.C. § 499b(4).

[45] 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.

[46] Philip J. Margiotta wrote to PACA on September 25, 2002: Please note in your file that I respectfully deny that I was responsibly connected with M. Trombetta & Sons, Inc., in connection with the alleged violations alleged in the Complaint served with your letter to me regarding the above matter. Any acts forming the basis of that complaint were done or not done by a former employee of my company who had no authority to do so and of which I had neither knowledge nor the opportunity to control or stop.

I therefore dispute your Branch's initial determination and ask for a formal hearing as provided by law.

CARX 3.

[47] Trombetta's former employee, Joseph (Joe Joe) Auricchio, apparently acted alone in paying the unlawful bribes and gratuities.⁴ In 1999, he was earning between \$800 and \$900 per week as a salesperson for Trombetta; he did not earn any commissions as part of his salary; and he would receive bonuses equivalent to one or two weeks pay at

⁴ On June 21, 2000, Joseph Auricchio was found to have paid approximately \$29,100 in cash bribes 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. ALJX 1, p. 2; see A. Offense Level, including footnote.

Christmas. Tr. 532, 1131. On an income of \$40,000 to \$50,000 per year (Tr. 1138), did Joseph (Joe Joe) Auricchio pay, out of his own pocket, the unlawful bribes and gratuities amounting to \$7,000 to \$10,000 per year (ALJX 1, p. 2)? He could have. As Philip J. Margiotta explained, keeping his salesperson job may have been worth “paying off for,” to Joseph (Joe Joe) Auricchio. Tr. 1136-1138. The salesperson job was a union job, with retirement benefits, and medical benefits, including dental. Joseph (Joe Joe) Auricchio was nearing retirement, and probably did not want to go back to trucking. The status of the salesperson job was a step upward from being a trucker or porter. Tr. 1137-1138.

[48] Joseph (Joe Joe) Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of Trombetta’s Hunts Point Terminal Market facility. Tr. 509, 515, 1126, 1150, 1345, 1348. Mr. Auricchio was able to pay unlawful bribes and gratuities to USDA produce inspectors without being observed. Tr. 137-138, 538-39, 543, 549-50, 1114-1119, 1120-1131.

[49] A determination from the disciplinary case follows.

Considering all of the evidence, Respondent (Trombetta), but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within Respondent other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at Respondent’s place of business for about 20 years, collected no bribes from Respondent until Joseph Auricchio started to work as a salesperson for Respondent in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent. Nevertheless, I hold Respondent responsible for the actions of Joseph Auricchio, just as if Respondent itself had performed each of Mr. Auricchio’s acts.

In re M. Trombetta & Sons, Inc., 64 Agric. Dec. 1869 (2005).

[50] There is no evidence that Philip J. Margiotta knew of or contributed to the payment of unlawful bribes and gratuities by Trombetta's employee Joseph (Joe Joe) Auricchio. Tr. 1152-1153, 1358, 1360. Philip J. Margiotta did fail to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[51] The "activities that resulted in a violation of the PACA" are not limited to Joseph (Joe Joe) Auricchio's activities of wrongdoing. Being actively involved in innocent activities for Trombetta suffices. I find Philip J. Margiotta to have been actively involved during April through July 1999 in the "activities that resulted in a violation of the PACA", based upon his being Trombetta's Secretary and his having full management responsibility for Trombetta's Hunts Point Terminal Market facility.

[52] Philip J. Margiotta argues that "there was nothing that Mr. Margiotta could do to discover Auricchio's actions and thus be chargeable with preventing or stopping them." Reply Brief, p. 6. I disagree. I find that Philip J. Margiotta's testimony establishes that he was not proactive in preventing illegal activities of the type engaged in by Mr. Auricchio, until after Mr. Auricchio's unlawful bribes and gratuities came to light. Tr. 520-27, 1161, 1346-58. Philip J. Margiotta did instruct Mr. Auricchio, once, probably in about 1995, after Mr. Auricchio told him he could probably get the guy (USDA) over here (to inspect a shipment): "Let me explain something to you very certainly; we've been here since it opened and we've been in business for a very long time; we do not, do not break the rules so just forget about it." Tr. 521. Explaining that Mr. Auricchio was "making an inference that he could pay them" . . . "to get them to come sooner," Philip J. Margiotta testified that he told Mr. Auricchio: "We never did that kind of stuff nor would we allow anyone that worked for us to do that sort of thing. And that's not only that. That if a truck comes in and there's 99 packages on it and you take off 102 and I find out that manifest better be changed to 102. I don't want more. I don't want less. And I don't pay anybody, period. and if you don't like it you can't work here. And that was the end of the conversation. Tr. 524-25.

[53] My determination does not, however, depend on whether Philip J. Margiotta should have done something more. It is sufficient under the

470 PERISHABLE AGRICULTURAL COMMODITIES ACT

PACA that Philip J. Margiotta was actively involved in Trombetta's activities that resulted in a violation of the PACA. Managing Trombetta's Hunts Point Terminal Market facility certainly entailed active involvement.

[54] Philip J. Margiotta was unable to establish the first of two prongs required to avoid being found responsibly connected. He failed to prove by a preponderance of the evidence that he was not actively involved in Trombetta and Sons, Inc.'s failures, during April through July 1999, to perform its duty to maintain fair trade practices required by the PACA.

[55] During April through July 1999, Philip J. Margiotta was Trombetta's Secretary. An officer need not control a company to be found responsibly connected. Here, however, Philip J. Margiotta ran the company. Every officer of a corporation is held to be responsibly connected, unless he can prove that he should be excepted (by proving both prongs of the two prong test).

[56] Philip J. Margiotta cannot prove the first prong of the *Norinsberg* exception. Thus, Philip J. Margiotta must be determined to be responsibly connected to Trombetta during its PACA violations. Philip J. Margiotta's judgment, discretion, and control were exercised in the activities he undertook for Trombetta, including the running of the business, buying fruits and vegetables, supervising other Trombetta employees, paying the bills, and the like. Tr. 499.

[57] Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc. as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999.

Conclusions

[58] Philip J. Margiotta, the manager of Trombetta's Hunts Point Terminal Market facility while he was an officer of Trombetta (the Secretary), was "actively involved" in Trombetta's activities, especially Trombetta's Hunts Point Terminal Market activities.

[59] Trombetta's Hunts Point Terminal Market activities led to its violations of the PACA, when, through its employee, Joseph (Joe Joe) Auricchio, Trombetta failed to perform its duty to maintain fair trade

practices.

[60] Wrongdoing is not required to be found to be “actively involved” within the meaning of 7 U.S.C. § 499a(b)(9).

[61] Wrongdoing is not required to be found to be responsibly connected as defined by 7 U.S.C. § 499a(b)(9).

[62] There is no evidence of wrongdoing by Philip J. Margiotta, yet by running Trombetta’s Hunts Point Terminal Market facility, while he was an officer of Trombetta, he was overwhelmingly “actively involved”, within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta’s PACA violations.

[63] Philip J. Margiotta, by being the Secretary of M. Trombetta & Sons, Inc. who was “actively involved” within the meaning of 7 U.S.C. § 499a(b)(9) in the activities which led to Trombetta’s PACA violations, was responsibly connected to Trombetta as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999, when Trombetta violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Order

[64] This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated February 11, 2003 (AX 1, Tr. 1684), that Philip J. Margiotta was responsibly connected with Trombetta and Sons, Inc., Bronx, New York, during Trombetta’s PACA⁵ violations.

[65] Accordingly, Philip J. Margiotta 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)).

[66] 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).

⁵ Section 2(4) of the PACA, 7 U.S.C. 499b(4), during April through July 1999.

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: CORONET FOODS, INC.
PACA Docket No. D-05-0018.
Proposed Decision Without Hearing Based on Admissions.
Filed March 21, 2006.

PACA – Default – Admission in Answer admitting bankruptcy.

Jonathon Gordy for Complainant.
Robert A. Marino for Respondent.
Decision and Order 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 - §499f)(“PACA”), instituted by a complaint filed on August 12, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”) alleging that Respondents Coronet Foods, Inc. of Wheeling West Virginia (“Coronet East”), and Coronet Foods, Inc., of Salinas, California (“Coronet West”), (collectively “Respondents”) have willfully violated the PACA.

The Complaint alleged that during the period July 2003 through October 2004, Coronet West failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of \$2,235,283.80 for 565 lots of perishable agricultural commodities, which Coronet West purchased, received and accepted in interstate or foreign commerce or in contemplation of interstate or foreign commerce. In addition, the Complaint alleged that during the period September 2003 through October 2004, Coronet East failed to make full payment promptly to twenty-one sellers of the agreed purchase prices in the total amount of \$3,028,297.76 for 557 lots of perishable agricultural commodities, which Coronet East purchased, received and accepted in interstate or foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice”) *See* 7 C.F.R. § 1.139.

The Complaint was served upon Respondents on Aug. 17, 2005. Respondents requested an extension of the time to answer the Complaint on September 1, 2005, and Respondents were granted the extension on September 2, 2005. On September 26, 2005, through their attorneys, Respondents filed an Answer and Affirmative Defenses to the Complaint (“Answer”).

Respondent’s Answer denied violations of the PACA while admitting that they owed on October 10 and October 11 2004 the amounts set forth in the Complaint (*see* Answer ¶¶ III-V) and that only some of the produce sellers had been paid as part of the Respondent’s pending bankruptcy cases. (*See* Answer ¶¶ III-IV., pg. 3 ¶ 8, pg. 4 ¶ 6.) Respondent attributes any untimely payments and unpaid balances owed to remaining sellers to the fact that many of the suppliers had extended payment terms. (*See* Answer ¶¶ III-IV, First Affirmative Defense pg. 2)

On December 18, 2005, Complainant filed a “Motion for Decision

Without Hearing in Based on Admissions.” Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant’s motion is hereby granted and the following decision is issued in the disciplinary case against Respondents Coronet East and Coronet West without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice.

In this case, Respondent has failed to deny or otherwise respond to the jurisdictional allegations in the complaint, including an allegation that it was operating subject to a PACA license at the time of alleged violations. Pursuant to the Rules of Practice, if an answer fails to deny or otherwise respond to specific complaint allegations, they are deemed admitted. *See* 7 C.F.R. § 1.136(c).

Respondents, in the Answer at paragraphs III and IV, admitted that some of the produce suppliers had been paid in connection with their respective bankruptcy cases. Coronet West additionally asserts that the produce sellers listed in the Complaint were paid in connection with California Bulk Sales Law. (Answer at ¶ IV.) The Respondents, in their individual Bankruptcy proceedings, have reached settlements with the PACA produce sellers that were approved by the bankruptcy court. Section 2(4) of the PACA requires produce dealers to make full, prompt payment for fruit and vegetable purchases at the agreed contract prices to all of their sellers, usually within ten days of acceptance unless the parties agreed in writing to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa). In both cases, Respondents’ bankruptcy settlements have not resulted in full payment to the all of the produce sellers listed in the Complaint.

In Coronet East’s Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 04-03822, Coronet East admitted through its June 16 account report that for eleven produce sellers Coronet East admitted that it owed \$984,027.46 in the Answer, only \$712,014.61 was paid in settlement, leaving a remaining \$272,012.85 in unpaid produce to those eleven produce sellers. (*See* Answer ¶ III; PACA Account Report, *In re: Coronet Foods, Inc.*, Case No. 5:04-bk-03822 (June 16, 2005) (ECF Docket No. 402).) In addition, for the following produce sellers Coronet East admitted that it owed the amounts listed in the Complaint, but has failed to make any payment:

<i>Seller Name</i>	<i>Produce Acceptance Dates</i>	<i>No. of Lots</i>	<i>Amount Unpaid</i>
The Sanson Co.	03/31/04	1	\$ 2,812.50

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The Herbal Garden	05/06/04	1	\$ 120.00
Weis Buy Farms	07/22/04 – 08/20/04	6	\$ 80,245.80
Murakami Produce	09/07/04 – 09/18/04	<u>6</u>	<u>\$ 32,376.75</u>
Total		14	<u>\$115,555.05</u>

In Coronet West’s Bankruptcy proceeding in the Northern District of West Virginia Bankruptcy Court, case no. 05-00151, Coronet West admitted in its Monthly Operating Report dated August 9, 2004 that for fourteen produce sellers Coronet West admitted it owed \$1,915,587.54 in the Answer, only \$1,613,512.54 was paid in settlement, leaving a remaining \$302,075.00 in unpaid produce. (See Answer ¶ IV; Monthly Operating Report for the Period July 1, 2005 through July 31, 2005 *In re: Coronet Foods, Inc. – Western Division*, Case No. 5:05–bk-00151 (August 9, 2004) (ECF Docket No. 188).) In addition, for the following produce sellers Coronet West admitted that it owed the amounts listed in the Complaint, but Coronet West has failed to make any payment:

<i>Seller Name</i>	<i>Produce Acceptance Dates</i>	<i>No. of Lots</i>	<i>Amount Unpaid</i>
Los Angeles Salad	10/23/04 – 06/04/04	9	\$ 1,890.00
Andrew Smith	05/01/04 – 07/08/04	27	\$ 125,663.59
Taylor Farms	05/18/04 – 09/11/04	<u>3</u>	<u>\$ 2,895.40</u>
Total		103	<u>\$ 130,448.99</u>

It has long been held that bankruptcy discharge does not prevent disciplinary enforcement on debts that were the subject of the bankruptcy. See, e.g., *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 623 (1988) (“Bankruptcy law expressly preserves the right of the Secretary [of Agriculture] to revoke a bankrupt’s license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy”) In this case, the admissions in the Answer and the bankruptcy filings demonstrate that Respondents have failed to make full payment as required by the PACA.

In summary, Coronet East failed to pay \$387,567.90 to fifteen of its produce creditors and Coronet West failed to pay \$432,523.99 to seventeen of its produce creditors. In total, the bankruptcy documents show that Respondents failed to pay \$820,091.89 to thirty-two of their produce creditors.

The Department’s policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

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

See In re Furr’s Supermarkets Inc., 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)).

Here, Respondents admit that they have failed to pay fully thirty-two of the sellers listed in paragraphs III and IV of the Complaint in the amount of \$790,091.89 for 751 lots of perishable agricultural commodities that Respondents purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004. Respondents have each failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA and do not assert that they will achieve full compliance with the PACA by making full payment within 120 of the service of the complaint. Nor do Respondents assert that they will pay these sellers by the date of the hearing. This is a “no-pay” case.

The only appropriate sanction in a “no-pay” case is license revocation, or where there is no longer any license to revoke, as is the case here, the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violation of the PACA and publication of the facts and circumstances of the violations. *See In re Furr’s Supermarkets Inc.*, 62 Agric. Dec. at 386 - 387. A civil penalty is not appropriate in this case because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA” and it would not be consistent with the Congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid. *See In re Scamcorp, Inc.*, 57 Agric. Dec. at 570 - 571. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See 7 C.F.R.*

§ 1.139.¹

Respondents have defended on several grounds that are without merit.

First, Respondents have defended that “Through custom and practice, Coronet East and Coronet West historically and routinely paid PACA payables in accordance with terms agreed to by Coronet East’s produce vendors. There was a well-established course of dealings between the Respondents and their suppliers that supported payment on terms other than normally required by PACA.” (Answer at pg. 2.) This defense is without legal merit because the regulations require that payment agreements for terms other than those specified in the regulations must be in writing before the transaction. 7 C.F.R. § 46.2(aa)(5), (11). Oral and implied agreements are not a possible defense to disciplinary action under the PACA because the agency has specified times for payment through the administrative rulemaking. *Caito Produce Co.*, 48 Agric. Dec. at 610 (citing 37 Fed. Reg. 14,561 (1972) and 49 Fed. Reg. 45,735, 45,740 (1984)). Respondents have failed to assert that the agreements were in writing before the transactions at issue as the regulations require, and therefore Respondent’s “custom and practice” defense fails.

Second, Respondents have defended that their bankruptcy cases have discharged the debts associated with the Complaint. (Answer at pg. 3-4 ¶ 8, pg. 4 ¶ 6.) Bankruptcy discharge does not alter the Respondents’ duty under the PACA to pay fully and promptly. *See Marvin Tragash Co. v. United States Department of Agriculture*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967). Partial payment is not sufficient under section 2(4) of the PACA. *Finer Foods Sales Co.*, 708 F.2d at 782; *Marvin Tragash Co.*, 524 F.2d at 1258. In this case, Respondents have failed to pay all of their produce creditors, and bankruptcy discharge does not alter this fact. Further, in disciplinary cases, the settlement of claims after the respondent has already failed to pay fully and promptly for produce is irrelevant. *See, e.g., In re Tom’s Quality Produce, Inc.*, 56 Agric. Dec. 1033, 1033 (1996); *Full Sail Produce*, 52 Agric. Dec. at 619; *see also In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) *aff’d* 923 F.2d 862 (9th Cir. 1991) (citing cases). Therefore, Respondents’ bankruptcy defenses fail.

Finally, Respondents have argued that the sequence of events leading to the filing of Bankruptcy lead to an “unexpected and severe loss of business.” (Answer at pg. 3 ¶ 4.) “Even though a respondent has good

¹ A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b).

excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." *Caito Produce Co.*, 48 Agric. Dec. at 614. Respondents have failed to pay for fully and promptly for produce. Respondent's loss of customers because of the unexpected Salmonella poisoning of several of Respondent's ultimate consumers does not excuse Respondents from remaining undercapitalized so that they were unable to pay their produce creditors. See, e.g., *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 n.2 (1989) (rejecting a respondent's defense that a city's exercise of eminent domain caused the respondent's customers to reduce their dealings with the respondent). In addition, the circumstances of this case do not negate the willfulness of the Respondents' action.

While a finding of willfulness is not required for a finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations, Respondents' violations were willful. See *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 628-29 (1996); *Full Sail Produce*, 52 Agric. Dec. at 622 (1993). The Department follows the rule generally stated by *Hogan Distributing, Inc.*, 55 Agric. Dec. at 629: "A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." To determine willfulness one looks to a respondent's violations of express requirements of the PACA and the regulations, the length of time during which the violations occurred, and the number and dollar amount of the transactions involved. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998).

The Fourth Circuit and the Tenth Circuit define the word "willfulness," as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent standard, Respondents' actions were willful because Respondents knew or should have known that they were incapable of making full payment promptly. See *Five Star Food Distributors*, 56 Agric. Dec. 880, 897 (1997).

Respondents have failed to make full payment for over half a million dollars of over 700 lots of produce. This is an express violation of Sec. 2(4) of the PACA, which requires full payment promptly. Under these

circumstances, Respondents violations are willful, repeated and flagrant.

Findings of Fact

Respondent Coronet East is a corporation organized and existing under the laws of the State of West Virginia. Respondent Coronet East's business address is 15th & McColloch Sts, Wheeling, West Virginia 26003. Its mailing address is P.O. Box 6688, Wheeling, West Virginia, 26003.

Respondent Coronet East's PACA license was issued on January 18, 1966. This license terminated January 18, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet East failed to pay the required annual renewal fee. Respondent Coronet West is a corporation organized and existing under the laws of the State of California. Respondent Coronet West's business address is 20800 Spence Rd, Salinas, California 93219. Its mailing address is P.O. Box 6862, Wheeling, West Virginia, 26003.

Respondent Coronet West's PACA license issued April 25, 1990. This license terminated April 25, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)) when Respondent Coronet West failed to pay the required annual renewal fee.

Respondent Coronet East has failed to make full payment promptly to 15 of the 21 sellers listed in paragraph III of the Complaint in the amount of \$357,567.90 for 306 lots of perishable agricultural commodities that Coronet East purchased, received and accepted in interstate commerce or foreign commerce during the period of September 2003, to September 2004.

Respondent Coronet West has failed to make full payment promptly to 17 of the 21 sellers listed in paragraph IV of the Complaint in the amount of \$790,091.89 for 445 lots of perishable agricultural commodities that Coronet West purchased, received and accepted in interstate commerce during the period of July 2003 to September 2004.

Conclusions

Respondents' failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 5 and 6 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

Respondents Coronet East and Coronet West are found to have committed willful, repeated and flagrant violations of section 2(4) of the PACA, and the facts and circumstances of the violations set forth above shall be published.

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

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service of it 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 of this Decision shall be served upon the parties.

In re: KLEIMAN & HOCHBERG, INC.

PACA Docket No. D-02-0021.

In re: MICHAEL H. HIRSCH.

PACA Docket No. APP-03-0005.

In re: BARRY J. HIRSCH.

PACA Docket No. APP-03-0006.

Decision and Order.

Filed April 5, 2006.

PACA – Perishable agricultural commodities – Bribery – Motive for payment to inspector – Liability of PACA licensee for officer’s acts – Liability of PACA licensee not irrebuttable – Scope of employment – Knowledge of acts of an officer – Willful, flagrant, and repeated violations – Responsibly connected – Actively involved – Nominal – License revocation appropriate – Right to engage in occupation.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson’s decision concluding that Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its vice president and part owner, John Thomas, paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities. The Judicial Officer also concluded that Michael H. Hirsch, the president, a director, and a part owner, and Barry J. Hirsch, the treasurer and part owner, were responsibly connected with Kleiman & Hochberg, Inc., at the time Kleiman & Hochberg, Inc., violated the PACA. The Judicial Officer rejected Kleiman & Hochberg, Inc.’s, Michael H. Hirsch’s and Barry J. Hirsch’s contentions that: (1) John Thomas’ payments to United States

Department of Agriculture inspectors were not bribes, but, instead, the result of extortion; (2) Kleiman & Hochberg, Inc., did not violate the PACA when John Thomas paid United States Department of Agriculture inspectors because no produce supplier or grower was economically disadvantaged by John Thomas' payments; (3) John Thomas was not acting within the scope of his employment when he paid United States Department of Agriculture inspectors; (4) Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture inspectors because Kleiman & Hochberg, Inc.'s other officers and owners had no knowledge of the payments; (5) Kleiman & Hochberg, Inc., could not avoid liability under 7 U.S.C. § 499p once John Thomas pled guilty to bribing United States Department of Agriculture inspectors; and (6) the imposition of employment sanctions on individuals responsibly connected with Kleiman & Hochberg, Inc., unconstitutionally violates their right to engage in a chosen occupation.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service and the Chief of the PACA Branch.

Mark C.H. Mandell, Annandale, NJ, and David H. Gendelman, New York, NY, for Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture inspector on numerous occasions, in willful,

flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint and raising four affirmative defenses (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc. On March 14, 2003, Barry J. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal

inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a \$180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to, and requested oral argument before, the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,¹ is refused because the parties have thoroughly briefed the issues and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusions that Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of the PACA and Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; however, I disagree with the sanction imposed on Kleiman & Hochberg, Inc., by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision as the final Decision and Order.

The Agricultural Marketing Service exhibits are designated by "CX." Kleiman & Hochberg, Inc.'s exhibits are designated by "RX." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Michael H. Hirsch, which is part of the

¹7 C.F.R. § 1.145(d).

record in this proceeding,² are designated by “RCMH.” Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Barry J. Hirsch, which is part of the record in this proceeding,³ are designated by “RCBH.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

²7 C.F.R. § 1.136(a).

³See note 2.

shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is

automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

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

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

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

....

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

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to

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

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

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

increased amount; penalties

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

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

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

license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

. . . .

(e) Alternative civil penalties

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

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

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

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

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

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

....

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

(b) Whoever—

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

(A) to influence any official act[.]

....

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

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

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

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

.....

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

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A)(2).

DECISION

Decision Summary

I conclude Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of its vice president and owner of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke Kleiman & Hochberg, Inc.'s PACA license. I also conclude Michael H. Hirsch and Barry J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA. Accordingly, Michael H. Hirsch and Barry J. Hirsch are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Findings of Fact

1. Kleiman & Hochberg, Inc., is a New York corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474 (Answer ¶ 3).

2. At all times material to this proceeding, Kleiman & Hochberg, Inc., was a licensee under the PACA. PACA license number 108036 was issued to Kleiman & Hochberg, Inc., on June 17, 1947. Kleiman & Hochberg, Inc., has renewed its PACA license annually. (Answer ¶ 3; CX 1.)

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

4. William Cashin began inspecting produce at Kleiman & Hochberg, Inc., in 1979. At that time, William Cashin dealt with "Seymore," a salesman employed by Kleiman & Hochberg, Inc., who, beginning in the early 1980s, paid William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin personally. (Tr. 38-41.)

5. After "Seymore" retired from Kleiman & Hochberg, Inc., in the mid 1980s, William Cashin dealt with John Thomas when he performed inspections at Kleiman & Hochberg, Inc. Beginning in the late 1980s or early 1990s, John Thomas began making payments to William Cashin and other United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. John Thomas began by paying United States Department of Agriculture inspectors \$25 for each inspection of perishable agricultural commodities, but in the 1990s, John Thomas increased the payments to \$50 for each inspection. John Thomas continued making payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc, until August 4, 1999. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin and other United States Department of Agriculture inspectors personally. (Tr. 41-48, 509-18.)

6. During the time in which John Thomas made payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc., John Thomas was the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (CX 1; Tr. 41-42, 243).

7. On March 23, 1999, William Cashin was arrested by agents of the

Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture produce inspectors by PACA licensees located at the Hunts Point Terminal Market. (Tr. 50-52; CX 19.)

8. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General, William Cashin continued to perform his duties as a United States Department of Agriculture produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio, audio/video, or video recording devices. At the end of each day, William Cashin would give Federal Bureau of Investigation agents his tapes, turn in any money he received from PACA licensees, and recount his activities. The Federal Bureau of Investigation agents would prepare a "302" report summarizing what William Cashin told them about that day's activities. (Tr. 51-56; CX 10.)

9. During the period March 26, 1999, through August 4, 1999, Kleiman & Hochberg, Inc., through John Thomas, Kleiman & Hochberg, Inc.'s vice president and 31.6 percent stockholder, made the following payments to a United States Department of Agriculture produce inspector in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from eight produce sellers in interstate or foreign commerce:

a. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 26, 1999, inspection of oranges shipped to Kleiman & Hochberg, Inc., by DNE World Food Sales reflected on United States Department of Agriculture Inspection Certificate Number K-678087-8.

b. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 26, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-678088-6.

c. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Central American Produce, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679411-9.

d. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by I. Kunik Co. reflected on United States Department of Agriculture Inspection Certificate Number K-679412-7.

e. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 20, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679420-0.

f. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 29, 1999, inspection of grapes shipped to Kleiman & Hochberg, Inc., by Fisher Brothers Sales, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679825-0.

g. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 29, 1999, inspection of strawberries shipped to Kleiman & Hochberg, Inc., by Dole Fresh Vegetables, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-680301-9.

h. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766208-3.

i. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc.,

reflected on United States Department of Agriculture Inspection Certificate Number K-766209-1.

j. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 16, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Robert Ruiz, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767028-4.

k. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 16, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767030-0.

l. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 4, 1999, inspection of sweet cherries shipped to Kleiman & Hochberg, Inc., by Stemilt Growers, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-769886-3.

(Tr. 61-70; CX 10-CX 18; RX A-RX L.)

10. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged John Thomas with seven counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that John Thomas:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	3/26/99	\$100

498 PERISHABLE AGRICULTURAL COMMODITIES ACT

TWO	4/19/99	\$100
THREE	4/22/99	\$50
FOUR	4/29/99	\$100
FIVE	5/28/99	\$100
SIX	6/24/99	\$50
SEVEN	8/5/99	\$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8A.

The bribes charged in the indictment cover the payments John Thomas made to William Cashin in connection with the 12 inspections of perishable agricultural commodities identified in Finding of Fact 9. (CX 10-CX 18.)

11. On October 17, 2001, John Thomas pled guilty to one count in an information which superceded the indictment referred to in Finding of Fact 10. Specifically, John Thomas pled guilty to bribery of public officials (18 U.S.C. § 201(b)). (CX 9.) The superceding information to which John Thomas pled guilty states, as follows:

From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2. John Thomas was sentenced to 2 years' probation and a \$10,000 fine (CX 9).

12. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1278; CX 1; RCMH 1).

13. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Michael H. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included the purchase, sale, and examination of perishable agricultural commodities; "[taking] care of credit, accounts receivable, and general daily problems of the business"; responsibility for inventory; applying for United States Department of Agriculture inspections of perishable agricultural commodities; interacting with United States Department of Agriculture produce inspectors; dealing with companies that shipped perishable agricultural commodities to Kleiman & Hochberg, Inc.; making price-after-sale arrangements with shippers of perishable agricultural commodities; reviewing and sending accountings to shippers; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Barry J. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1189, 1220, 1265-67, 1270-72, 1277-78.)

14. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was usually at Kleiman & Hochberg, Inc.'s place of business from 7:30 a.m. to between 4:00 p.m. and 6:00 p.m. (Tr. 1266).

15. Michael H. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1267-69, 1274-75).

16. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1181, 1214-15; CX 1; RCBH 1).

17. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Barry J. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included checking on the inventory of perishable agricultural commodities; ensuring that the inventory of perishable agricultural commodities was properly stored and rotated; buying, selling, and examining perishable agricultural commodities; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; monitoring the activities of

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Kleiman & Hochberg, Inc., employees; ensuring that shippers of perishable agricultural commodities were paid promptly; settling disputed claims with shippers; applying for United States Department of Agriculture inspections of perishable agricultural commodities; examining accountings sent to shippers; ensuring that Kleiman & Hochberg, Inc., was run “smoothly” and “properly”; and, along with Michael H. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1181-82, 1189-95, 1208-11, 1215-22.)

18. Barry J. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1198-1205, 1211-14).

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), John Thomas’ payments of bribes to United States Department of Agriculture produce inspectors are deemed the acts of Kleiman & Hochberg, Inc.

2. Kleiman & Hochberg, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Michael H. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Barry J. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

I. Kleiman & Hochberg, Inc., Willfully, Flagrantly, and Repeatedly Violated the PACA

A. John Thomas, an Officer and Major Stockholder of Kleiman & Hochberg, Inc., Paid Bribes to United States Department of Agriculture Produce Inspectors

Both John Thomas and William Cashin freely acknowledged that John Thomas made \$50 payments to William Cashin in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from produce sellers. There was no dispute that these 12 payments were representative of a long-standing practice that went back until the late 1980s or early 1990s. John Thomas even testified that he paid William Cashin an additional \$150 for three inspections of perishable agricultural commodities that were not included in the Complaint. It is likewise undisputed that John Thomas was the vice president of Kleiman & Hochberg, Inc., and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., at the time he paid William Cashin and other United States Department of Agriculture produce inspectors. (CX 1; Tr. 41-48, 243, 509-18.)

B. Kleiman & Hochberg, Inc., is Liable for John Thomas' Bribery

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

John Thomas, the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., testified that he paid bribes to United States Department of Agriculture produce inspectors in order to ensure United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., were not delayed (Tr. 509-12). John Thomas stated the money used to pay the bribes came out of his own pocket (Tr. 547). John Thomas also stated, and Michael H. Hirsch and Barry J. Hirsch confirmed, that John Thomas acted without Michael H. Hirsch's or Barry J. Hirsch's

knowledge or approval (Tr. 519, 1198-1205, 1211-14, 1267-69, 1274-75). However, the purpose behind the bribes, even as expressed by John Thomas, was to benefit Kleiman & Hochberg, Inc., as the alleged threat of delayed United States Department of Agriculture produce inspections would harm Kleiman & Hochberg, Inc., as an entity. Even though John Thomas, as a nearly one-third owner of Kleiman & Hochberg, Inc., would obviously share in any benefit that Kleiman & Hochberg, Inc., received, it is evident that the bribes were designed to benefit Kleiman & Hochberg, Inc., in the conduct of its business. As long as John Thomas was acting within the scope of his employment, which he clearly was, acts committed by him are deemed to be acts committed by Kleiman & Hochberg, Inc. Thus, as a matter of law, the knowing and willful bribes by John Thomas are deemed to be knowing and willful bribes by Kleiman & Hochberg, Inc.⁴

Even if Michael H. Hirsch and Barry J. Hirsch were unaware of John Thomas' payment of bribes, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, violations by an officer and owner are violations by the employer even if the employer's other officers and owners had no actual knowledge of the violations and would not have condoned them.⁵ The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

C. Bribery of United States Department of Agriculture Produce Inspectors Violates the PACA

⁴*Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1885-86 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839, 1851-52 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

⁵*See In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003) (stating, pursuant to the PACA, knowing and willful violations by an employee are deemed to be knowing and willful violations of the employing PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.⁶

John Thomas testified he bribed United States Department of Agriculture produce inspectors as alleged in the Complaint, but contends he paid the bribes only to obtain prompt inspections of Kleiman & Hochberg, Inc.'s perishable agricultural commodities (Tr. 509-12). Even if John Thomas only bribed United States Department of Agriculture inspectors in exchange for prompt inspections, Kleiman & Hochberg, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of

⁶7 U.S.C. § 499b(4).

Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes to United States Department of Agriculture produce inspectors.⁷

D. Kleiman & Hochberg, Inc.'s PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.⁸ John Thomas, and

⁷*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), appeal docketed, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

⁸*See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), appeal dismissed, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), appeal dismissed *sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), appeal dismissed, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, (continued...)

therefore Kleiman & Hochberg, Inc., knew the bribes paid to William Cashin in the 12 inspections involved in this proceeding, as well as the countless additional payments over the previous decade, were illegal, but essentially decided that he needed to make these payments for the benefit of Kleiman & Hochberg, Inc. Clearly, John Thomas made a business decision to violate the PACA, rather than to pursue alternative measures. Kleiman & Hochberg, Inc.'s payments to United States Department of Agriculture produce inspectors were clearly intentional.

Likewise, Kleiman & Hochberg, Inc.'s violations were "flagrant." A violation of law is flagrant if it is "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned."⁹ The payment of a bribe to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because, as discussed in this Decision and Order, *supra*, it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States

⁸(...continued)

1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’")

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

⁹Merriam-Webster's Collegiate Dictionary 441 (10th ed. 1997).

Department of Agriculture produce inspector. The long-standing practice of Kleiman & Hochberg, Inc., bribing William Cashin and other United States Department of Agriculture produce inspectors, easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, Kleiman & Hochberg, Inc.'s violations are repeated because repeated means more than one.¹⁰ John Thomas paid William Cashin and other United States Department of Agriculture produce inspectors multiple bribes in connection with numerous inspections of perishable agricultural commodities over approximately a 10-year period.

Thus, I conclude Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. The Appropriate Sanction Against Kleiman & Hochberg, Inc., Is License Revocation

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

¹⁰See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

[BY MR. KENDALL:]

Q. Are you aware of the sanction Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I participated in development of the sanction recommendation.

Q. Have you heard the evidence presented at this hearing for this point?

A. Yes, I have.

Q. Are you now prepared to provide Complainant's sanction recommendation in this case?

A. Yes.

....

Q. At this point what is the sanction recommendation in this case?

A. That would be a license revocation.

Q. What's the basis for Complainant's sanction recommendation?

A. The basis of Complainant's sanction recommendation is on various factors. One of the factors is that bribery payments did occur. As an aggregate factor Mr. Thomas' plea and Mr. Cashin's testimony shows that the bribery payments occurred as far back as 1990. The role of the inspection certificate as another factor is relied upon on the industry in terms of being able to

resolve contract disputes quickly.

Approximately 150,000 inspections are performed each year by the Fresh Products Branch. It is important that - and essential that the information that is reflected on these inspections are accurate and impartial. If there's any indication or any suspicion that the inspection has been tainted because of a bribery payment being made in order to obtain false information on the inspection undermines the role of that certificate.

If there's any question about the credibility of inspection and the process in which that inspection was performed in terms of how it reflects an impartial review in terms of the quality and condition of the product, would undermine the whole process and be disruptive.

If there's a question about that on the part of the shipper in terms of the reliability of the inspection would be detrimental to the whole process, and affect how disputes are resolved - hundreds of disputes are resolved - each day. As well as resolving thousands of dollars in unjustified price adjustments.

Another factor is where you have a wholesaler who's paying bribes to a produce inspector to obtain false information. Other wholesalers may feel that they have to make bribery payments as well. For example, what I mean by that is if you have a wholesaler on the market - on Hunts Point Market - who is making bribery payments to a produce inspector and they are able to use the results of that inspection to negotiate price adjustments to the transaction related to that inspection that would lower prices, then they would be in a position to sell the product at a lesser price. When you have other wholesalers on the market who would be selling the same product see that this is the only way that they can compete is by making bribery payments to a produce inspector, they may feel that that's what they'll have to do.

This would have an affect on the whole market in terms of its credibility, whether you've got firms that - where you have firms making bribery payments, but also in terms of firms that

aren't making bribery payments, it would affect them.

Also, the Department, for this type of violation, a strong sanction of license revocation is - would be appropriate in this case. Because not only would it deter Respondent, but it would also deter other members of the industry from contemplating making a serious violation such as that of making bribery payments to a produce inspector.

Q. Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

A. No.

Q. Why not?

A. The Department believes that this violation is a serious violation under the PACA. That whether these bribery payments - in terms of bribery payments, whether these bribery payments were made to someone else in the industry or whether the bribery payments were made to a produce inspector, a violation of the Respondent making these bribery payments does not excuse that firm from that violation.

Q. Does Complaint recommend a civil penalty in this case as an alternative to license revocation?

A. No.

Q. Why not?

A. In terms of the seriousness of this violation a civil penalty would not be appropriate. By making bribery payments to a produce inspector is a serious violation and it affects the industry as a whole. A license revocation would be a revocation to seek - and, also, the industry needs to be put on notice that making bribery payments is not something that can be allowed.

Also, it has been consistent policy of the Department to

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recommend a license revocation in the situations where you have a serious violation of bribery payments taking place.

Tr. 349-53.

I find John Thomas' payment of bribes to United States Department of Agriculture produce inspectors within the scope of his employment are deemed to be the actions of Kleiman & Hochberg, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.¹¹ While sanctions in similar cases are not required to be uniform,¹² I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

III. Michael H. Hirsch and Barry J. Hirsch Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.¹³ The record establishes Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

¹¹*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

¹²*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

¹³7 U.S.C. § 499a(b)(9).

The record also establishes Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Michael H. Hirsch and Barry J. Hirsch to demonstrate by a preponderance of the evidence that they were not responsibly connected with Kleiman & Hochberg, Inc., despite their positions at, and ownership of, Kleiman & Hochberg, Inc.

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

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

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

I find Michael H. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg,

Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I also find Barry J. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Michael H. Hirsch failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. I also find Barry J. Hirsch failed to carry his burden of proof that he was only nominally an officer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.¹⁴

The record establishes Michael H. Hirsch and Barry J. Hirsch each had an actual, significant nexus with Kleiman & Hochberg, Inc., during the violation period. Michael H. Hirsch and Barry J. Hirsch assert they actively managed Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA.¹⁵ This fact refutes any possible contention that either Michael H. Hirsch or Barry J. Hirsch could prove

¹⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

¹⁵See Petitioners' Brief and Supplemental Proposed Findings of Fact, Conclusions of Law, and Order at 1 (stating in proposed finding of fact 1 "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021"; stating in proposed finding of fact 2 "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021").

he was not responsibly connected by demonstrating he was only nominal. Under the statutory definition of the term *responsibly connected*, the fact that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA does not exonerate them unless they also prove by a preponderance of the evidence that their positions at, and ownership of, Kleiman & Hochberg, Inc., were nominal. Michael H. Hirsch has not established by a preponderance of the evidence that he was only nominally the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. Barry J. Hirsch has not established by a preponderance of the evidence that he was only nominally the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise two issues in "Complainant's and Respondent's Appeal to the Decision and Order." First, the Agricultural Marketing Service and the Chief contend the Chief ALJ's assessment of a civil penalty, is error.

The Chief ALJ assessed Kleiman & Hochberg, Inc., a \$180,000 civil penalty (Initial Decision at 35). While the Chief ALJ found Kleiman & Hochberg, Inc.'s payment of bribes to United States Department of Agriculture inspectors serious violations of the PACA, he found that revocation of Kleiman & Hochberg, Inc.'s PACA license was not warranted because John Thomas paid the bribes to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., rather than to gain a competitive advantage over shippers or growers (Initial Decision at 25).

John Thomas' motivation for the payment of bribes to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities is not relevant to the sanction to be imposed against Kleiman & Hochberg, Inc. A PACA licensee's payment to a United States Department of Agriculture produce inspector to obtain an expedited inspection of perishable agricultural commodities negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in the quality and condition determinations rendered by

the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities. A PACA licensee's payment of bribes to a United States Department of Agriculture produce inspector, whether the payment is designed to obtain an expedited inspection or to obtain an economic advantage over shippers and growers, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors.

The record establishes that Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors for approximately 10 years. Kleiman & Hochberg, Inc.'s violations of the PACA are egregious. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.¹⁶ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding. Therefore, I revoke Kleiman & Hochberg, Inc.'s PACA license.

Second, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA, is error.

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

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

¹⁶See note 11.

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

I agree with the Chief ALJ that Michael H. Hirsch and Barry J. Hirsch demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite numerous portions of the record which establish that Michael H. Hirsch and Barry J. Hirsch were actively involved in the day-to-day management of Kleiman & Hochberg, Inc.; however, there is no evidence that Michael H. Hirsch or Barry J. Hirsch participated in activities resulting in John Thomas' payment of bribes to United States Department of Agriculture produce inspectors. More to the point, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch proved by a preponderance of the evidence that Michael H. Hirsch and Barry J. Hirsch were not actively involved in activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Michael H. Hirsch and Barry J. Hirsch were each actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of Kleiman & Hochberg, Inc. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual that owns more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress has rejected the *per se* approach urged by the Agricultural Marketing Service and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of

the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

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 [the PACA] 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.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is “to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.”¹⁷ The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would “allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.”¹⁸ Michael H. Hirsch and Barry J. Hirsch each carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

**Kleiman & Hochberg, Inc.’s, Michael H. Hirsch’s,
and Barry J. Hirsch’s Appeal Petition**

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise six issues in “Respondent’s and Petitioners’ Joint Appeal Petition To the Judicial Officer Pursuant To 7 C.F.R. § 1.145 From the Decision of the Hon. Marc R. Hillson, C.A.L.J., Dated December 3, 2004.” First,

¹⁷H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

¹⁸H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate the PACA because John Thomas did not pay bribes to United States Department of Agriculture produce inspectors, but, instead, was the victim of extortion by a corps of corrupt United States Department of Agriculture employees installed for more than a decade at the Hunts Point Terminal Market.

As an initial matter, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas did not pay bribes to United States Department of Agriculture produce inspectors. The record contains substantial evidence that John Thomas paid bribes to United States Department of Agriculture inspectors, including evidence of John Thomas' plea of guilty to bribery of public officials over approximately a 10-year period (CX 8-CX 9). The information to which John Thomas pled guilty states, as follows:

From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2.

Moreover, even if I found that all of John Thomas' payments to United States Department of Agriculture produce inspectors were made as a result of extortion by United States Department of Agriculture employees (which I do not so find), I would conclude that Kleiman & Hochberg, Inc., violated the PACA. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity

of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, whether a bribe or the result of extortion, undermines the trust produce sellers place in the integrity of the United States Department of Agriculture inspector and the accuracy of the United States Department of Agriculture inspection certificate.¹⁹

The extortion cited by Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch (Tr. 509-11) is not a "reasonable cause," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for Kleiman & Hochberg, Inc.'s failure to perform the implied duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch argue that Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), because John Thomas' payments to United States Department of Agriculture produce inspectors had no effect on Kleiman & Hochberg, Inc.'s produce transactions or Kleiman & Hochberg, Inc.'s produce suppliers. John Thomas testified that his payments of bribes to United States Department of Agriculture produce inspectors were designed only to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have consistently argued that no produce supplier was economically disadvantaged by John Thomas' payments to United States Department of Agriculture produce inspectors.

Bribery of a United States Department of Agriculture produce inspector, even if the bribery does not economically disadvantage any produce seller or grower, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States

¹⁹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839, 1855 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005).

Department of Agriculture produce inspectors. A PACA licensee's payments to United States Department of Agriculture produce inspectors, even if the payments are only designed to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that Kleiman & Hochberg, Inc., did not violate the PACA because no produce supplier was economically disadvantaged as a result of John Thomas' payments to United States Department of Agriculture produce inspectors.

Third, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend John Thomas' payments to United States Department of Agriculture produce inspectors were not within the scope of John Thomas' employment with Kleiman & Hochberg, Inc.; therefore, Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors.

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;²⁰ (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.²¹

The record clearly establishes that John Thomas was within the scope of his employment with Kleiman & Hochberg, Inc., when he paid bribes to United States Department of Agriculture produce inspectors. John Thomas paid bribes to United States Department of Agriculture produce inspectors at Kleiman & Hochberg, Inc.'s place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by Kleiman & Hochberg, Inc. John Thomas was authorized to apply for United States Department of Agriculture inspections of perishable

²⁰Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

²¹See generally Restatement (Second) of Agency § 228 (1958).

agricultural commodities and the bribes John Thomas paid to United States Department of Agriculture produce inspectors were intended to benefit Kleiman & Hochberg, Inc. (Tr. 345-46, 392-93, 509, 518, 554; CX 10.) Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas was not acting within the scope of his employment when he paid United States Department of Agriculture produce inspectors.

Fourth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors because Michael H. Hirsch and Barry J. Hirsch did not know of John Thomas' violations until after his arrest in October 1999.

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

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed United States Department of Agriculture produce inspectors. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of the bribery.²² The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case

²²*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 789-91 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, “the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.” 7 U.S.C. § 499p. According to the Sixth Circuit, acts are “willful” when “knowingly taken by one subject to the statutory provisions in disregard of the action’s legality.” *Hodgins v. United States Dep’t of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). “Actions taken in reckless disregard of statutory provisions may also be considered ‘willful.’” *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions’ legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

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

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

PACA, deemed the acts of the produce wholesaler, as follows:

Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker . . ." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

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

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of John Thomas' bribes and would not have condoned those bribes had they known of them.²³ The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Fifth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc.'s liability for John Thomas' bribery became a foregone conclusion

²³See note 5.

and an unconstitutional irrebuttable presumption.

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch assert. Kleiman & Hochberg, Inc., could avoid liability under the PACA for John Thomas' bribery either by showing John Thomas was not acting for or employed by Kleiman & Hochberg, Inc., at the time he bribed United States Department of Agriculture produce inspectors or by showing that John Thomas' bribes were not made within the scope of his employment or office. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc., was irrebuttably presumed to be liable for John Thomas' bribery.

Sixth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend the imposition of employment sanctions violates Michael H. Hirsch's and Barry J. Hirsch's constitutional right to engage in their chosen occupation.

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.²⁴

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.²⁵ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent

²⁴*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

²⁵H.R. Rep. No. 1041 (1930).

of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.²⁶ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.²⁷ A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.²⁸

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

²⁶*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

²⁷*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

²⁸*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the Congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch 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)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch 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)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Decision and Order.²⁹ The date of entry of the Order in this Decision and Order is April 5, 2006.

**In re: HALE-HALSELL COMPANY.
PACA Docket No. D-05-0019.
Decision and Order.**

²⁹See 28 U.S.C. § 2344.

Filed April 20, 2006.

PACA – Perishable agricultural commodities – Failure to file timely answer – Failure to pay – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

The Judicial Officer issued a decision in which he found that Hale-Halsell Company (Respondent) violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Judicial Officer concluded Respondent failed to file a timely answer to the Complaint, and, under the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), was deemed to have admitted the allegations in the Complaint and waived the opportunity for hearing. The Judicial Officer found Respondent's denial of the allegations in the Complaint in its appeal petition far too late to be considered. The Judicial Officer ordered the publication of the facts and circumstances of Respondent's PACA violations.

Ruben D. Rudolph, Jr., for Complainant.

Scott P. Kirtley, Tulsa, OK, for Respondent.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 16, 2005. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Hale-Halsell Company [hereinafter Respondent], during the period August 6, 2003, through February 12, 2004, failed to make full payment promptly to 14 sellers of the agreed purchase prices in the total amount of \$412,968.87 for 113 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V).

The Hearing Clerk served Respondent with the Complaint, the Rules

of Practice, and a service letter on August 23, 2005.¹ Respondent failed to file an answer to the Complaint within 20 days after service, as required by the Rules of Practice.²

On November 29, 2005, in accordance with the Rules of Practice,³ Complainant filed a Motion for Decision Without Hearing By Reason of Default [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing By Reason of Default [hereinafter Proposed Default Decision]. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.⁴ Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by the Rules of Practice.⁵

On January 30, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing By Reason of Default [hereinafter Initial Decision]: (1) finding, during the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$412,968.87; (2) concluding Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering publication of the facts and circumstances of Respondent's PACA violations (Initial Decision at 2-3).

On February 15, 2006, Respondent appealed to the Judicial Officer. On March 17, 2006, Complainant filed Complainant's Response to Respondent's Appeal. On March 21, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

¹United States Postal Service Domestic Return Receipts for Article Number 7004 1160 0001 9223 2237 and Article Number 7004 1160 0001 9223 2244.

²See 7 C.F.R. § 1.136(a).

³See 7 C.F.R. § 1.139.

⁴United States Postal Service Domestic Return Receipts for Article Number 7004 2510 0003 7121 6193 and Article Number 7004 2510 0003 7121 6209.

⁵See 7 C.F.R. § 1.139.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

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

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section

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

....

(e) Alternative civil penalties

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

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

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

DEPARTMENT OF AGRICULTURE

....

SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

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

....

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

DECISION

Statement of the Case

Respondent failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued 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 Oklahoma. Respondent's business address is 9111 E. Pine Street, Tulsa, Oklahoma 74115. Respondent's mailing address is P.O. Box 52898, Tulsa, Oklahoma 74158-2898.

2. At all times material to this proceeding, Respondent was licensed under the provisions of the PACA. License number 19990802 was issued to Respondent on March 31, 1999. Respondent's PACA license terminated on March 31, 2005, when Respondent failed to pay the annual fee, as required by section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. During the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce, from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$412,968.87.

Conclusion of Law

Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises one issue in its Appeal of Decision Without Hearing By Reason of Default and Response to Motion for Decision Without Hearing By Reason of Default [hereinafter Appeal Petition]. Respondent denies that it committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Pet. at 2).

Respondent's denial of the allegations in the Complaint comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because it failed to file an answer to the Complaint within 20 days after the Hearing Clerk served it with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 23, 2005.⁶ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer

⁶See note 1.

of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon Respondent for the purpose of determining whether Respondent has willfully violated the PACA. Respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the PACA (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the service letter transmitting the Complaint and the Rules of Practice that a timely

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answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 16, 2005

Hale-Halsell Company	Hale-Halsell Company
9111 E. Pine Street	P.O. Box 52898
Tulsa, Oklahoma 74115	Tulsa, Oklahoma 74158-2898

Gentlemen:

Subject: In re: Hale-Halsell Company, Respondent -
PACA Docket No. D-05-0019

Enclosed is a copy of a Complaint, which has been filed with this office under the Perishable Agricultural Commodities Act, 1930, as amended.

Also enclosed is a copy of the rules of practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent's answer was due no later than September 12, 2005. Respondent's first and only filing in this proceeding is Respondent's Appeal Petition, which Respondent filed February 15, 2006, 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On November 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.⁷ The

⁷See note 4.

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Hearing Clerk informed Respondent in the service letter transmitting Complainant's Motion for Default Decision and Complainant's Proposed Default Decision that objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision must be filed within 20 days after service, as follows:

CERTIFIED RECEIPT REQUESTED

November 30, 2005

Hale-Halsell Company 9111 E. Pine Street Tulsa, Oklahoma 74115	Hale-Halsell Company P.O. Box 52898 Tulsa, Oklahoma 74158-2898
--	--

Gentlemen:

Subject: In re: Hale-Halsell Company, Petitioner [sic]

-
PACA Docket No. D-05-0019

Enclosed is a copy of Complainant's Motion for a Decision Without Hearing by Reason of Default; together with a copy of the Decision Without Hearing by Reason of Default which has been received and filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office a response to the Motion.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On January 30, 2006, the ALJ issued an Initial Decision in which the

ALJ found Respondent admitted the allegations in the Complaint by reason of default. Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,⁸ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁹

⁸See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

⁹See generally *In re Mary Jean Williams* (Decision as to Mary Jean Williams), 64 Agric. Dec. 1347 (2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed almost 8 months after the respondent's answer was due and the respondent is deemed, by her failure to file a timely answer, to have admitted violations of the regulations issued under the Animal Welfare Act, as amended); *In re Alliance Airlines*, 64 Agric. Dec. 1595 (2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed 2 months 6 days after the respondent's answer was due and the respondent is deemed, by its failure to file a timely answer, to have admitted violations of the Plant Protection
(continued...)

Respondent's first filing in this proceeding was filed with the Hearing Clerk 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁰

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

ORDER

⁹(...continued)

Act and regulations issued under the Plant Protection Act); *In re Herman Camara*, 62 Agric. Dec. 26 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 2 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Beef Promotion and Research Order and the Beef Promotion Regulations issued under the Beef Promotion and Research Act of 1985); *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 16 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Horse Protection Act of 1970, as amended), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 F. App'x 456 (6th Cir. 2003); *In re Wayne W. Coblenz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's response to the complaint was filed 7 months 8 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Packers and Stockyards Act, 1921, as amended and supplemented), *aff'd*, 89 F. App'x 484 (6th Cir. 2003).

¹⁰*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's PACA violations shall be published. The publication of the facts and circumstances of Respondent's PACA violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹¹ The date of entry of the Order in this Decision and Order is April 20, 2006.

In re: COOSEMANS SPECIALTIES, INC.
PACA Docket No. D-02-0024.
In re: EDDY C. CRECES.
PACA Docket No. APP-03-0002.
In re: DANIEL F. COOSEMANS.
PACA Docket No. APP-03-0003.
Decision and Order.
Filed April 20, 2006.

PACA – Perishable agricultural commodities – Bribery – Willful, flagrant, and repeated violations – Responsibly connected – License revocation – Civil penalty – Administrative Procedure Act opportunity to comply inapplicable – Falsified USDA inspection certificate – Employment bar applicable to multiple PACA licensees – Interference with chosen occupation – Simultaneous disciplinary and responsibly connected proceedings.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding Cooseman Specialties, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its vice president and part owner, Joe Faraci, paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer also concluded that Eddy C. Creces, the secretary, the treasurer, and a part owner, and Daniel F. Coosemans, the president and a part owner, were responsibly connected with

¹¹See 28 U.S.C. § 2344.

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Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA. The Judicial Officer held: (1) Coosemans Specialties, Inc.'s payments of bribes to a United States Department of Agriculture inspector violate the PACA, even if Coosemans Specialties, Inc., paid the bribes only to obtain prompt produce inspections; (2) Coosemans Specialties, Inc.'s payments of bribes were willful; therefore, the notice and opportunity to determine or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)), are inapplicable; (3) Coosemans Specialties, Inc.'s bribery of a United States Department of Agriculture inspector violates the PACA, even if the United States Department of Agriculture inspector did not falsify any United States Department of Agriculture inspection certificates; (4) bribery of a United States Department of Agriculture inspector is a serious violation of the PACA and, where willful, flagrant, and repeated, warrants revocation of the violator's PACA license; (5) the Administrative Procedure Act provisions relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) are not applicable to responsibly connected proceedings; (6) the employment bar in the PACA is not limited based upon the number of PACA licensees by whom the responsibly connected person is employed; (7) the imposition of employment sanctions under the PACA on persons responsibly connected with a PACA violator, does not unconstitutionally violate the right to engage in a chosen occupation; and (8) conducting an administrative disciplinary proceeding simultaneously with related responsibly connected proceedings does not violate the due process rights of persons determined to be responsibly connected.

Reuben D. Rudolph, Jr., for the Agricultural Marketing Service and the Chief of the PACA Branch.

Stephen P. McCarron, Washington, DC, for Coosemans Specialties, Inc., and Eddy C. Creces.

Martin Schulman, Woodside, NY, for Daniel F. Coosemans.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Coosemans Specialties, Inc.: (1) during the period April 1999 through August 1999, made illegal payments to a United States Department of Agriculture inspector

in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to April 1999, made illegal payments to United States Department of Agriculture inspectors on numerous occasions, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V). On October 1, 2002, Coosemans Specialties, Inc., filed an answer denying the material allegations of the Complaint and raising five affirmative defenses (Answer ¶¶ 3-6, A-E).

On January 6, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA. On February 6, 2003, Eddy C. Creces and Daniel F. Coosemans each filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's January 6, 2003, determinations that they were responsibly connected with Coosemans Specialties, Inc.

On March 21, 2003, Administrative Law Judge Jill S. Clifton consolidated the disciplinary proceeding, *In re Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024, with the two responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003.

On October 27-29, 2003, Administrative Law Judge Leslie B. Holt presided over a hearing in New York, New York. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Coosemans Specialties, Inc., and Eddy C. Creces. Martin Schulman, Schulman & Schulman, Woodside, New York, represented Daniel F. Coosemans. Subsequent to the hearing, Administrative Law Judge Leslie B. Holt became unavailable and the proceeding was reassigned to Administrative Law Judge Victor W. Palmer [hereinafter the ALJ]. Coosemans Specialties, Inc., and Eddy C. Creces initially moved for a new hearing, and on March 19, 2004, the ALJ issued an order granting the motion for a new hearing. Subsequently, Coosemans Specialties, Inc., Eddy C. Creces, and

Daniel F. Coosemans waived their right to a new hearing and requested that the ALJ render a decision based upon the October 27-29, 2003, hearing. The ALJ scheduled briefing dates and the parties completed their post-hearing briefing on May 20, 2005.

On July 13, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ: (1) concluded Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and part owner, paid bribes to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce; (2) concluded Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; and (3) revoked Coosemans Specialties, Inc.'s PACA license (Initial Decision at 8, 16-17).

On October 4, 2005, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans appealed to the Judicial Officer. On October 24, 2005, the Agricultural Marketing Service and the Chief filed a response to Coosemans Specialties, Inc.'s, Eddy C. Creces', and Daniel F. Coosemans' appeal petitions. On November 7, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

Agricultural Marketing Service exhibits are designated by "CX." Coosemans Specialties, Inc.'s exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL

COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

....

§ 499b. Unfair conduct

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

....

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

of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

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

(b) Refusal of license; grounds

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

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

(B) within two years prior to the date of application has

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

....

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

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

from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

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

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

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

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

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

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

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business,

the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

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

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

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

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

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

.....

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

(b) Whoever—

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

(A) to influence any official act[.]

.....

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

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

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

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

.....

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

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Findings of Fact

550 PERISHABLE AGRICULTURAL COMMODITIES ACT

1. On March 23, 1999, the Federal Bureau of Investigation arrested William J. Cashin, a produce inspector employed by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, for taking bribes in violation of 18 U.S.C. § 201(b)(2). After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture inspectors by PACA licensees at the Hunts Point Terminal Market. William Cashin participated by being wired by the Federal Bureau of Investigation with audio and audio/visual equipment he then used to tape the inspections he conducted at the Hunts Point Terminal Market. At the end of each day, William Cashin gave the tapes and the bribe money he received to the Federal Bureau of Investigation and was then de-briefed by Federal Bureau of Investigation agents who prepared FBI 302 reports that identified the person paying the cash bribe, the company that employed the person paying the bribe, the type of produce inspected, and the amount of the cash payment. For his cooperation, William Cashin plead guilty to one count of bribery for which he served no jail time and was not required to pay a fine. William Cashin was allowed to retain his future federal pension for serving as an inspector from July 1979 through August 1999, and the official reason given for his resignation from the United States Department of Agriculture was to “pursue a different career opportunity.” (CX 11-CX 19; Tr. 131-37, Tr. 181.)

2. William Cashin was one of nine United States Department of Agriculture inspectors who were taking bribes for inspections they performed for Hunts Point Terminal Market wholesalers. United States Department of Agriculture supervisors assigned requested inspections so that the corrupt United States Department of Agriculture inspectors would perform the inspections for the bribe-paying wholesalers. For their participation, the United States Department of Agriculture supervisors received kickbacks. The bribery practices at the Hunts Point Terminal Market had existed for approximately 20 years when William Cashin was arrested. (Tr. 174-77, 186-87.)

3. Coosemans Specialties, Inc., is a New York corporation doing business at the Hunts Point Terminal Market with a mailing address of 249 Row B, NYC Terminal Market, Bronx, New York 10474. Coosemans Specialties, Inc., has held PACA license number 861254 since May 28, 1986, and has renewed the PACA license annually through the present. (CX 1, CX 1A; Tr. 41-42.)

4. In 1999, the three principal officers of Coosemans Specialties, Inc., were Daniel F. Coosemans, president; Eddy C. Creces, secretary and treasurer; and Joe Faraci, vice president. In 1999, Daniel F. Coosemans, Eddy C. Creces, and Joe Faraci each owned 33% percent of the outstanding shares of stock in Coosemans Specialties, Inc., until July 1, 1999, when Joe Faraci sold most of his shares of stock to Daniel F. Coosemans and Eddy C. Creces for \$150,000 and reduced his ownership share to 9 percent. (CX 1 at 11, CX 4 at 1; Tr. 507.)

5. Since 1994, William Cashin dealt with Joe Faraci whenever Coosemans Specialties, Inc., requested an inspection of perishable agricultural commodities. Joe Faraci regularly made illegal payments of \$50 to William Cashin for each inspection he performed from 1994 through 1999. In exchange for the \$50 payments, William Cashin would "help" Coosemans Specialties, Inc., when needed, by preparing United States Department of Agriculture inspection certificates that he would falsify by (1) increasing the percentage of defects, (2) increasing the number of containers inspected, or (3) changing the temperatures of the load. William Cashin gave such "help" on 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr. 124-30.)

6. After becoming a participant in the investigation conducted by the Federal Bureau of Investigation, William Cashin conducted 14 inspections in 1999 for Coosemans Specialties, Inc., for which Joe Faraci paid him \$60 for one inspection and \$50 for each of the others. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Joe Faraci with eight counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that Joe Faraci:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	4/1/99	\$60

552 PERISHABLE AGRICULTURAL COMMODITIES ACT

TWO	5/11/99	\$350
THREE	5/20/99	\$150
FOUR	5/26/99	\$50
FIVE	7/26/99	\$200
SIX	8/2/99	\$50
SEVEN	8/4/99	\$50
EIGHT	8/12/99	\$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 7 at 1-2.

The bribes charged in the indictment cover the payments Joe Faraci made to William Cashin in connection with the 14 inspections of perishable agricultural commodities identified in Finding of Fact 8 (CX 11-CX 18).

7. Joe Faraci was arrested on October 27, 1999. On June 22, 2001, Joe Faraci pled guilty to count one of the indictment that alleged his payment of a bribe on April 1, 1999, at Coosemans Specialties, Inc.'s Hunts Point place of business. Joe Faraci was sentenced to 15 months in prison, 3 years of supervised release, and a \$4,000 fine. Joe Faraci was also ordered to make restitution to victims pursuant to PACA proceedings. (CX 8.)

8. William Cashin testified that, in 1999, Joe Faraci paid him bribes in respect to 14 inspections of produce performed for Coosemans Specialties, Inc. There was no contradicting testimony. William Cashin's testimony, combined with the eight-count indictment filed against Joe Faraci, the FBI 302 reports, and the contemporaneous United States Department of Agriculture inspection certificates William Cashin prepared, establish that Joe Faraci paid bribes to William Cashin on behalf of Coosemans Specialties, Inc., in respect to the following 14 inspections William Cashin performed:

Inspection 1

On April 1, 1999, William Cashin performed one inspection of garlic at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$60 (CX 11).

Inspections 2 and 3

On May 11, 1999, William Cashin performed two inspections (one of mangoes and one of plantains) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$350 that included bribe money for five prior inspections (CX 12).

Inspections 4, 5, and 6

On May 17, 1999, William Cashin performed three inspections (one of snow peas and sugar snap peas, one of Haitian mangoes, and one of sweet peppers) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$150 (CX 13).

Inspection 7

On May 26, 1999, William Cashin performed one inspection of a load of radicchio at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 14).

Inspections 8, 9, 10, and 11

On July 23, 1999, William Cashin performed four inspections (one of radicchio, one of tomatoes, one of plum tomatoes, and one of mesculin) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$200 (CX 15).

Inspection 12

On August 2, 1999, William Cashin performed one inspection of sweet peppers at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 16).

Inspection 13

On August 2 or 3, 1999, William Cashin performed one inspection of tomatoes at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 17).

Inspection 14

On August 12, 1999, William Cashin performed one inspection of

asparagus at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of \$50 (CX 18).

9. Coosemans Specialties, Inc., employs at its Hunts Point Terminal Market facilities approximately 40 people. Twenty-five of its employees are porters who load and unload produce and perform other warehouse duties. Eight or nine of Coosemans Specialties, Inc.'s employees are office workers and five are salespeople. (Tr. 428.)

10. There are 52 merchants at the Hunts Point Terminal Market. In comparison to the others, Coosemans Specialties, Inc., is medium-sized. Coosemans Specialties, Inc., owns four Hunts Point Terminal Market warehouse units and receives about 100 lots of produce on each of the 5 days per week it operates. Coosemans Specialties, Inc.'s 2002 gross revenue was just over \$24,000,000 with an annual payroll of \$2,100,000. (Tr. 427-29, 434.)

11. Daniel F. Coosemans, who principally resides in Miami, Florida, and Panama, came to the United States in the 1980's to introduce a marketing concept he started in Belgium for franchising the specialty fruit and vegetable business. He started his first company in Belgium. He then started businesses on a partnership basis in the United States. His method has been to identify a market, then start a new company in that market, and then find a partner who would run the company allowing Daniel F. Coosemans to start other companies elsewhere. Daniel F. Cooseman's first United States company was started in Los Angeles, California. He located his second company, which Eddy C. Creces runs for him, at the Hunts Point Terminal Market in New York. There are now 27 such companies around the world and 20 of them are in the United States. After he set up these companies, Daniel F. Coosemans' involvement with each of them has been to be its financing entity and to check its monthly statements to determine whether it is achieving the profits he believes to be appropriate. Altogether Daniel F. Coosemans' companies have 550 employees in the United States with overall weekly revenues in the tens of thousands. (Tr. 619-29.)

Discussion

Coosemans Specialties, Inc., Violated the PACA When Joe Faraci Paid Bribes to a United States Department of Agriculture Inspector

The record establishes that Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and partial owner during 1999, paid bribes to a United States Department of Agriculture produce inspector in respect to 14 inspections of perishable agricultural commodities performed at Coosemans Specialties, Inc.'s request. The United States Department of Agriculture produce inspector who received the bribes so testified. Joe Faraci, who was charged with eight counts of bribing a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Coosemans Specialties, Inc., and pled guilty to one count of the indictment, was not called to testify.

Section 16 of the PACA (7 U.S.C. § 499p) provides that the act, omission, or failure of any agent, officer, or any 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. Officers and owners of a PACA licensee, other than the bribing officer or owner need not have actual knowledge of the illegal payments by one officer or agent, for the PACA licensee to be held to have committed knowing and willful violations of the PACA.¹

Coosemans Specialties, Inc., argues that the payment of a bribe to a United States Department of Agriculture inspector, though a reprehensible violation of other federal laws, is not a violation of the PACA. Even though *In re Post & Taback, Inc.*, has held otherwise, Coosemans Specialties, Inc., contends the case was wrongly decided and overstates the goals of the PACA.

Coosemans Specialties, Inc.'s argument is unpersuasive. First, *In re Post & Taback, Inc.*, as affirmed by the United States Court of Appeals for the District of Columbia Circuit, is binding in this proceeding. Second, Coosemans Specialties, Inc.'s premises are flawed.

Coosemans Specialties, Inc., argues that violations of the PACA are limited to "regulating conduct of licensees towards other merchants which results in some financial detriment on a specific transaction" (Brief of Respondent and Petitioner Creces at 21). Coosemans Specialties, Inc., further asserts the code of fair dealing between produce merchants, which the PACA was enacted to establish, was not violated by Joe Faraci's payments to a United States Department of Agriculture produce inspector (Brief of Respondent and Petitioner Creces at 22).

¹See *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820-21(2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

To support these propositions, Coosemans Specialties, Inc., contends Joe Faraci's payments to William Cashin were really nothing more than tips for prompt service. However, the only evidence as to the reason for the payments is the testimony of the United States Department of Agriculture produce inspector that he was being paid bribes to "help" Coosemans Specialties, Inc., with the inspections. The person who actually paid the bribes did not testify to contradict the United States Department of Agriculture inspector. Coosemans Specialties, Inc., can only point to the statement by Joe Faraci at the time he pled guilty to bribing a United States Department of Agriculture produce inspector that he paid the bribes in order to obtain prompt United States Department of Agriculture inspections, as follows:

[THE COURT:]

Q. All right, Mr. Faraci, before I accept your plea, I have to be satisfied that you are in fact guilty of the charge to which you have just pleaded guilty. So tell me in your own words what it is you did that makes you guilty of this charge.

[MR. FARACI:]

A. Whenever we need an inspection I gave or I asked to insure them to come faster, I gave them a \$50 gift. This way they will come faster to do the inspection.

Q. You gave --

A. The inspector, William Cashin.

Q. Excuse me?

A. I gave William Cashin \$50 to come quicker to do the inspection.

Q. And this was to do inspection of produce?

A. Yes.

Q. And this occurred at the Hunts Point Terminal Market?

A. Yes.

Q. On approximately how many occasions did you give him money to do these inspections?

MR. MORIARTY: May I interrupt for a half moment your Honor?

THE COURT: Sure.

MR. MORIARTY: Your Honor, under the terms discussed with the government, Mr. Faraci is prepared to admit that to each count of the indictment, to each inspection within that indictment that he had paid the \$50 for the same conduct as just elicited concerning Count 1.

THE COURT: There was a total indictment then of \$960.

MR. MORIARTY: I think that is correct.

Q. Did you pay \$960 to this inspector as is alleged in the indictment?

A. Yes.

Q. And did you know it was illegal to do so at the time you did it?

A. Yes, your Honor.

Q. And did this occur in the year of '99?

A. Yes.

RX 15 at 14-15.

However, Joe Faraci's statement that he only paid bribes in order to obtain prompt inspections of perishable agricultural commodities was a self-serving statement designed to de-emphasize the seriousness of his crime and possibly reduce his sentence. Joe Faraci's statement made

during his allocution was contrary to his admission when he pled guilty to count one of the indictment that specified, as follows:

JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York.

CX 7 at 1.

In addition to Joe Faraci's admission, William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to "help" Coosemans Specialties, Inc., in respect to 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr.130). Even if there were contradicting, credible evidence showing that Coosemans Specialties, Inc.'s bribes were not given to influence the outcome of the inspections, Coosemans Specialties, Inc.'s bribing a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over its shippers who supplied it with produce. Coosemans Specialties, Inc., also gained an unfair advantage over competing wholesalers.

The PACA is designed to protect producers of perishable agricultural products who in many instances send their products to a buyer or commission merchant who is thousands of miles away. PACA was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.²

The PACA seeks to bring about fair dealing between members of the produce industry who conduct interstate and foreign commerce long-distance, where shipments must move quickly to avoid losses caused by rot and decay. When the receiver tells the shipper that the value of the shipment has been lowered because of rot and decay, the distant out-of-state or foreign shipper has only the receiver's word as verified by a United States Department of Agriculture inspection certificate. A United States Department of Agriculture inspection

²See *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

certificate that supports the receiver's claim that the produce has deteriorated can cause a shipper to accept a lower than anticipated price. A United States Department of Agriculture inspection certificate can also induce the shipper to continue to deal with the receiver in the future since a United States Department of Agriculture inspection certificate that supports the receiver's evaluation of the condition of perishable agricultural commodities on receipt makes the receiver appear to be reliable and trustworthy. Therefore, Coosemans Specialties, Inc.'s bribery of a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over the shippers and growers who supplied Coosemans Specialties, Inc., with produce as well as over competing wholesalers.

Even if the bribed inspector never falsified any United States Department of Agriculture inspection certificates, Coosemans Specialties, Inc.'s illegal payments to a United States Department of Agriculture inspector, standing alone, violated the PACA. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for a PACA licensee in connection with any transaction involving any perishable agricultural commodity, which is received in interstate or foreign commerce to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with the transaction.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123 (2d Cir. 2003), upheld a reparation award rendered in favor of a shipper who accepted reduced prices from a receiver based on inspections by three of the United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were convicted of accepting bribes. The Judicial Officer made a finding in the case that there was no showing that falsified inspections were issued as to the produce, but that nevertheless all of the price adjustments were voidable because of the shipper's mistake and the receiver's misrepresentation regarding the integrity of the inspection process. The United States Court of Appeals for the Second Circuit, in affirming the Judicial Officer, stated:

It is clear that, when the parties agreed to the price adjustments, DiMare [the shipper] was mistaken as to both whether Koam [the receiver] had paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted the bribes.

....

Koam's fault obviously caused DiMare's mistake, as Koam knew that its employee had bribed USDA inspectors, yet Koam neglected to inform DiMare of this fact. In addition, in light of Koam's involvement in bribery (as demonstrated by [its employee] Friedman's guilty plea), it would be unconscionable to enforce the price-adjustment agreements, which resulted from the work of inspectors who had accepted bribes.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127-28 (2d Cir. 2003).

As was the case in *Koam*, when Coosemans Specialties, Inc., paid bribes in respect to inspections without informing the shippers, Coosemans Specialties, Inc., violated its duty to inform the shippers of that fact. Coosemans Specialties, Inc.'s duty to inform shippers of the bribes it pays is found in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and its failure to inform the shipper each time a bribe was paid in respect to an inspection of perishable agricultural commodities was a separate violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Coosemans Specialties, Inc., paid bribes in connection with 14 inspections of perishable agricultural commodities in 1999. Coosemans Specialties, Inc.'s PACA violations were therefore repeated.³ Coosemans Specialties, Inc.'s violations were also flagrant and willful.⁴ Accordingly, I conclude Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

PACA License Revocation is the Appropriate Disciplinary Sanction

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the

³See *H.C. MacClaren v. United States Dep't of Agric.*, 342 F. 3d 584, 592 (6th Cir. 2003).

⁴See *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-30 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.⁵

Both Eddy C. Creces and Daniel F. Coosemans request, if Coosemans Specialties, Inc., is found to have violated the PACA, that I assess Coosemans Specialties, Inc., a civil penalty. They so request because, if they are determined to be "responsibly connected" to a PACA licensee that has had its license revoked, each will be barred from employment by PACA licensees for 1 year, and after 1 year, employment shall be conditioned upon the posting of a surety bond acceptable to the Secretary of Agriculture.⁶

Bribery is such an egregious violation of the PACA that the only appropriate sanction is one that will deter Coosemans Specialties, Inc., and other PACA licensees from paying bribes to United States Department of Agriculture inspectors in the future.

Daniel F. Coosemans also argues that the restrictions that revocation will place upon his participation in the activities of the 20 other PACA licensed companies in which he has an ownership interest is excessive and a consequence never intended by Congress. However, the language of the PACA is clear and unambiguous. If the PACA requires amendment, the amendments must come from Congress and may not be made here.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

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

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate disciplinary sanction. My views accord with those of John Koller, the administrative official who

⁵7 U.S.C. § 499h(a), (e).

⁶7 U.S.C. § 499h(b).

testified at the hearing (Tr. 549-54).

John Koller stated that approximately 150,000 produce inspections are performed each year and if there is any suspicion that the inspections are tainted in any way, the entire industry is affected. Inasmuch as United States Department of Agriculture inspection certificates are used to resolve hundreds of disputes each day, the objectivity of the United States Department of Agriculture inspector should not be compromised by payments he or she receives from wholesalers nor should other wholesalers be made to feel that they too should make such payments in order to be competitive. The Agricultural Marketing Service recommends PACA license revocation to deter Coosemans Specialties, Inc., and any future potential violators from making illegal payments to United States Department of Agriculture produce inspectors. The recommendation is consistent with prior case law.⁷ Accordingly, Coosemans Specialties, Inc.'s PACA license should be revoked.

Eddy C. Creces and Daniel F. Coosemans Were Responsibly Connected with Coosemans Specialties, Inc.

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁸ The record establishes that, in 1999, Eddy C. Creces was the secretary, the treasurer, and a holder of 33% percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Eddy C. Creces increased the percentage of outstanding stock which he owned to 45½ percent. The record also establishes that, in 1999, Daniel F. Coosemans was the president and a holder of 33% percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Daniel F. Coosemans increased the percentage of outstanding stock which he owned to 45½ percent. The burden is on Eddy C. Creces and Daniel F. Coosemans to demonstrate by a preponderance of the evidence that they were not responsibly

⁷*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸7 U.S.C. § 499a(b)(9).

connected with Coosemans Specialties, Inc., despite their positions at, and ownership of, Coosemans Specialties, Inc.

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

Neither Eddy C. Creces nor Daniel F. Coosemans proved by a preponderance of the evidence that he was merely a nominal officer or a nominal shareholder of Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA.

Nonetheless, Eddy C. Creces argues he should not be found to be responsibly connected with the Coosemans Specialties, Inc., because he did not willfully commit the bribery violations. But the payment of bribes by an employee of a PACA licensee is a willful violation of the PACA.⁹

Eddy C. Creces further argues that a determination of responsible connection would deprive him of his property, specifically his stock ownership, without due process in violation of the Fifth Amendment to the Constitution of the United States. A similar argument was advanced and rejected in *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). *Zwick* was followed and other constitutional objections to the employment bar provisions of the PACA were raised and rejected in *Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1546-47 (11th Cir. 1997).

Daniel F. Coosemans similarly argues that the application of the employment bar provisions to him constitutes a denial of his constitutional rights. He cites in support of his argument various cases concerning constitutional restrictions on governmental regulation of other trades and professions. However, the cited cases are inapposite. *Zwick* and *Bama Tomato Co.* considered such arguments in the specific

⁹*In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828-29 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

context of the PACA's employment bar provisions and found the arguments unavailing. Therefore, the argument that the PACA employment bar provisions are unconstitutional is again rejected as contrary to applicable case law.

For the foregoing reasons, I affirm the Chief's January 6, 2003, determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA.

Appeal Petitions

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans raise eight issues in Brief of Appellant-Petitioner Daniel F. Coosemans [hereinafter Appeal Petition of Daniel F. Coosemans] and Appeal Petition of Respondent and Petitioner Creces. First, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's conclusion that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture produce inspector in connection with inspections of perishable agricultural commodities constitute violations of the PACA, is error. Coosemans Specialties, Inc., and Eddy C. Creces assert the Agricultural Marketing Service did not allege that Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or wholesalers and the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc. (Appeal Pet. of Respondent and Petitioner Creces at 5-8.)

I disagree with Coosemans Specialties, Inc.'s and Eddy C. Creces' contentions that a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) may only be shown if Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or other wholesalers and that the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc.

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with

the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.¹⁰

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.¹¹

¹⁰7 U.S.C. § 499b(4).

¹¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

Second, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's finding that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture inspector are willful, is error. Coosemans Specialties, Inc., and Eddy C. Creces argue that, since Coosemans Specialties, Inc.'s violations were not willful, the ALJ erred by failing to dismiss the Complaint because the Agricultural Marketing Service did not comply with the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)). (Appeal Pet. of Respondent and Petitioner Creces at 7.)

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

...
(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or

carelessly disregards the requirements of a statute.¹² The record

¹²See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____, slip op. at 28 (Apr. 5, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’")

(continued...)

clearly establishes that Joe Faraci intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable to this proceeding.

Third, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend the ALJ's finding that William Cashin falsified United States Department of Agriculture inspection certificates, is error (Appeal Pet. of Respondent and Petitioner Creces at 8-12; Appeal Pet. of Daniel F. Coosemans at 7-8).

Even if I were to find William Cashin's testimony lacked credibility and insufficient evidence to establish that William Cashin falsified any of the United States Department of Agriculture inspection certificates he provided to Coosemans Specialties, Inc., those findings would not change the disposition of this proceeding. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities, even if the payment does not result in a United States Department of Agriculture inspector's falsification of a United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and

¹²(...continued)

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

bribes to United States Department of Agriculture produce inspectors.¹³

Fourth, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's failure to impose a civil money penalty, is error (Appeal Pet. of Respondent and Petitioner Creces at 13-16).

I find Joe Faraci's payment of bribes to a United States Department of Agriculture produce inspector within the scope of his employment are deemed to be the actions of Coosemans Specialties, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. Bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary to deter Coosemans Specialties, Inc., from future similar violations of the PACA and to deter other PACA licensees from similar violations of the PACA. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.¹⁴ While sanctions in similar cases are not required to be uniform,¹⁵ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

Fifth, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend Eddy C. Creces and Daniel F. Coosemans should not be found responsibly connected with Coosemans Specialties, Inc., because their actions were not willful and they received no notice and

¹³*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

¹⁴*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

¹⁵*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____, slip op. at 35 (Apr. 5, 2006); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

opportunity to demonstrate or achieve compliance as provided in the Administrative Procedure Act (5 U.S.C. § 558(c)) (Appeal Pet. of Respondent and Petitioner Creces at 16-17; Appeal Pet. of Daniel F. Coosemans at 17-18).

The Administrative Procedure Act provides, before institution of agency proceedings for the withdrawal, suspension, revocation, or annulment of a license, the licensee must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

Neither Eddy C. Creces nor Daniel F. Coosemans is a PACA licensee. The responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, concern merely the determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Eddy C. Creces or Daniel F. Coosemans. Therefore, with respect to the responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.

Sixth, Daniel F. Coosemans contends the ALJ erroneously ignores the fact that Congress did not intend to prevent a person such as Daniel F. Coosemans, who is involved with the ownership of 21 PACA licensees, from continuing as an employee and shareholder of those PACA licensees notwithstanding the fact that he is found responsibly connected with another PACA licensee, the license of which has been revoked or suspended (Appeal Pet. of Daniel F. Coosemans at 8-13).

The PACA defines the term responsibly connected as affiliated or connected with a commission merchant, dealer, or broker as partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.¹⁶ The PACA bars all PACA licensees from employing persons who have been responsibly connected with any PACA licensee whose license has been

¹⁶7 U.S.C. § 499a(b)(9).

revoked by the Secretary of Agriculture.¹⁷ The PACA contains no provision limiting the employment bar based upon the number of PACA licensees by whom the responsibly connected person is employed, as Daniel F. Coosemans contends.

Seventh, Daniel F. Coosemans contends preventing him from continuing employment in PACA licensee companies by finding him responsibly connected violates his substantive due process rights (Appeal Pet. of Daniel F. Coosemans at 13-15).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹⁸

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹⁹ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.²⁰ Since the restriction on the employment of *responsibly connected* individuals is rationally related

¹⁷7 U.S.C. § 499h(b).

¹⁸*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁹H.R. Rep. No. 1041 (1930).

²⁰*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Daniel F. Coosemans' due process rights by arbitrarily interfering with his chosen occupation.

Contrary to Daniel F. Coosemans' position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.²¹ A number of courts have rejected constitutional challenges to the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.²²

Eighth, Daniel F. Coosemans contends conducting a proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., simultaneously with the proceeding to determine whether Coosemans Specialties, Inc., violated the PACA, violates Daniel F. Coosemans' procedural due process rights. Daniel F. Coosemans takes the position the disciplinary proceeding to determine whether Coosemans Specialties, Inc., violated the PACA must be concluded before beginning the responsibly connected proceeding to determine whether he was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA. (Appeal Pet. of Daniel F. Coosemans at 15-17.)

None of the cases cited by Daniel F. Coosemans support his contention that conducting a disciplinary proceeding to determine

²¹*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

²²*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

whether a PACA licensee violated the PACA simultaneously with a related responsibly connected proceeding, violates the procedural due process rights of the person determined to be responsibly connected. Moreover, I cannot locate any case supporting Daniel F. Coosemans' contention. Further still, both Daniel F. Coosemans and Coosemans Specialties, Inc., have been provided notice and an opportunity to be heard. I find no violation of their due process rights merely because the disciplinary proceeding regarding the allegations of Coosemans Specialties, Inc.'s violations of the PACA and the responsibly connected proceeding regarding Daniel F. Coosemans' relationship to Coosemans Specialties, Inc., are conducted simultaneously.

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), Joe Faraci's payments of bribes to a United States Department of Agriculture produce inspector are deemed the acts of Coosemans Specialties, Inc.

2. Coosemans Specialties, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Daniel F. Coosemans was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Eddy C. Creces was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

1. Coosemans Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Coosemans Specialties, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Coosemans Specialties, Inc.

2. I affirm the Chief's January 6, 2003, determination that Eddy C. Creces was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Eddy C. Creces 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)), effective 60 days after service of this Order on Eddy C. Creces.

3. I affirm the Chief's January 6, 2003, determination that Daniel F. Coosemans was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Daniel F. Coosemans 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)), effective 60 days after service of this Order on Daniel F. Coosemans.

RIGHT TO JUDICIAL REVIEW

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans must seek judicial review within 60 days after entry of the Order in this Decision and Order.²³ The date of entry of the Order in this Decision and Order is April 20, 2006.

In re: JOSEPH T. CERNIGLIA.
PACA APP Docket No. 04-0012.
Decision and Order.
Filed May 4, 2006.

PACA -- Responsibly connected -- Alter ego -- Resignation ineffective -- de facto officer.

Charles Spicknall for Complainant.
Respondent Pro se.

²³See 28 U.S.C. § 2344.

Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

Joseph T. Cerniglia initiated this proceeding by filing a petition that seeks the reversal of a determination by the Chief of the PACA Branch of the Agricultural Marketing Service that Mr. Cerniglia, within the meaning of the Perishable Agricultural Commodities Act (“the PACA”; 7 U.S.C. § 499a (b)(9)), was “responsibly connected” with a corporation when it was found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The consequence of the Chief’s determination is that Mr. Cerniglia becomes subject to restrictions upon his PACA licensing and employment as set forth at 7 U.S.C. § 499d and § 499h.

The PACA licensing and employment restrictions apply to any person who is a “responsibly connected... officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association” holding a PACA license as a commission merchant, dealer, or broker, that is found to have flagrantly or repeatedly violated section 2 of the PACA. The PACA’s definition section further states, however, that “(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 was not an owner of a violating licensee...which was the alter ego of its owners.”(7 U.S.C. § 499a(b)(9)).

Although Mr. Cerniglia argues that he was not actively involved in the violations that the corporate licensee was found to have committed, his principal and most compelling argument is that before the commission of the violations, he had resigned all offices in the corporation and had relinquished all of his shares of its stock. Therefore, he cannot be said to come within the essential, first requirement of the “responsibly connected” definition of being an “officer, director, or holder of more than 10 per centum of the outstanding stock....” However, this is not a case of first impression. Controlling Departmental precedent is set forth in *Anthony L. Thomas*, 59 Agric. Dec. 367 (2000). Here, as in *Thomas*, the resignation as a corporate officer was incomplete and ineffective, and Mr. Cerniglia’s active involvement as

a *de facto* officer of the corporate licensee continued through the time the corporation violated the PACA. Therefore, the determination by the Chief of the PACA Branch is being affirmed, and an order is being entered that Mr. Cerniglia was responsibly connected to the corporate licensee when it flagrantly and repeatedly violated section 2(4) of the PACA.

Procedural Background

On December 3, 2003, the PACA Branch filed a disciplinary complaint against Fresh Solutions, Inc. alleging that it was a corporation licensed under the PACA that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint further alleged that a pending application for a new PACA license should be denied. The proceedings were initially assigned to Administrative Law Judge Leslie B. Holt and then reassigned to Administrative Law Judge Jill Clifton. They each held teleconferences with Mr. Cerniglia and others believed to be principals of the corporation. In the teleconference conducted by Judge Clifton, a previously scheduled hearing in respect to the disciplinary proceeding was cancelled in light of the fact that an answer had not been filed and the PACA Branch had moved for a decision by reason of default. Judge Clifton also ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with the pending disciplinary proceeding. On February 13, 2004, the PACA Branch notified Mr. Cerniglia that it had made an initial determination of his responsible connection to Fresh Solutions, Inc. (RX-3). By letter dated February 19, 2004, Mr. Cerniglia responded, stating that he had resigned as an officer and a director of the corporation on January 1, 2002 when 100% of the stock of Fresh Solutions, Inc. was transferred to Morris Lewis. (RX-4). Mr. Cerniglia thereafter submitted documents in support of his contention that he was not an officer, director or shareholder of the corporation during the period of August 16, 2002 through April 29, 2003, when the disciplinary complaint alleged that Fresh Produce, Inc. failed to pay for \$351,968.50 in produce purchased from eight produce sellers in violation of section 2(4) of the PACA. On April 12, 2004, Judge Clifton issued a decision against Fresh Produce, Inc. finding that because of its failure to pay produce dealers as alleged in the disciplinary complaint, it had committed willful, repeated and flagrant violations of section 2(4) of the PACA and ordered the publication of the facts and circumstances of the violations. Judge Clifton included in

her Order findings that Fresh Solutions, Inc. is unfit to be licensed and that its application for a PACA license was therefore refused. (RX-26). The decision was not appealed and became final on June 30, 2004. By letter dated July 7, 2004, the Chief of the PACA Branch notified Mr. Cerniglia that on behalf of the agency, the Chief had made a final determination that Mr. Cerniglia was responsibly connected to Fresh Solutions, Inc. during the period of the violations. On August 4, 2004, Mr. Cerniglia filed a petition for review of the agency's determination. Similar determinations of responsible connection were also made in respect to three other principals of Fresh Produce, Inc., i.e., E. Mason McGowin, III, Morris C. Lewis, III and Jonathan Scott Green. Mr. Green did not contest the determination against him. Messrs. McGowin and Lewis initially filed petitions for review, but their petitions were dismissed upon their own motions.

On January 11, 2006, I conducted an oral hearing in Atlanta, Georgia in respect to the one remaining proceeding, Mr. Cerniglia's petition for review of the PACA Chief's determination that he was responsibly connected with Fresh Produce, Inc. at the time of its violations of Section 2(4) of the PACA. Charles E. Spicknall, Esquire, Office of the General Counsel, USDA, Washington, D.C., represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In addition to the record of the proceeding conducted by the PACA Chief, respondent submitted exhibits at the hearing that were received in evidence and respondent's exhibits are designated (RX-__). Mr. Cerniglia testified and the hearing was transcribed (Tr.__). Exhibits submitted by Mr. Cerniglia and received at the hearing are designated (EX-__). Some of his exhibits, originally received as part of the Administrative Record, are designated as (PX-__). Both sides submitted post hearing briefs that have been considered in full, including Mr. Cerniglia's rebuttal brief that was received on April 14, 2006.

Findings of Fact

1. Joseph T. Cerniglia's current mailing address is 6730 Ulster Court, Alpharetta, Georgia 30005. (Tr. 18). Upon graduation from the University of West Georgia in 1972, with a degree in history and environmental science, Mr. Cerniglia joined his father's produce business, Cerniglia Produce Co., Inc. He worked there until 1989 when that corporation's PACA license was revoked for failing to pay sellers

for their produce. (Tr. 54; Tr. 58; and *In re Cerniglia Produce Co., Inc.*, 48 Agric Dec. 1133 (1989)). From 1989 through 1991, Mr. Cerniglia was employed by Collins Brothers, a produce company. In 1990 or 1991, he was determined to be responsibly connected to Cerniglia Produce Co., Inc., and disqualified from employment in the produce industry for two years. (Tr. 59).

2. In 1993, Mr. Cerniglia returned to the produce industry as a sole proprietorship. He incorporated his business in 1994, and first obtained a PACA license for the business in or about 1995. (Tr. 18). In 1995, Jonathan Scott Green and John Green joined Mr. Cerniglia as owners of the business. (Tr. 89-96). The business was incorporated and, in 1996, was renamed Fresh Solutions, Inc. (Tr. 18; Tr. 59-61; EX-5, at 3). The corporation's stock ledger shows that, on July 2, 1996, Mr. Cerniglia, Jonathan Scott Green, and John Green, together with Mr. Cerniglia's father, Joseph Cerniglia, Sr, and Windsor Jordan, each owned twenty percent of the shares of the corporation. (PX-8). The minutes of the annual meeting of the shareholders and directors of Fresh Solutions, Inc. held on July 2, 1998, show that on that date, the authorized shares of stock in the company were increased and re-distributed so that of the total outstanding shares, Mr. Cerniglia owned 45%; Jonathan Scott Green owned 33%; John Green owned 20%; and Windsor Jordan owned 2%. (EX-1). In 2000-2001, transfers of outstanding shares in the corporation were made to two investors, Morris Lewis and Mason McGowin, resulting in each of them owning 20% of the total outstanding shares and decreasing Mr. Cerniglia's stock ownership to 29%. (PX-8; EX-2; RX-1, at 4). Morris Lewis invested \$1 million dollars for his 667 shares that represented a 20% interest in the company. (RX-42, at 67).

3. The initial money to get the business going in 1993, came from a home equity loan Mr. Cerniglia obtained for a couple of thousand dollars, plus \$19,000.00 of his personal savings and \$30,000.00 from his wife's inheritance. (Tr. 65). He opened an account for Fresh Solutions at the Bank of America on September 26, 1994. (Tr. 66-67; RX-27). Through 2004, Mr. Cerniglia had exclusive signature authority over this account. (Tr. 69).

4. When Mr. Cerniglia started what would become Fresh Solutions, Inc., his concept was to help chain restaurants to better buy produce so

that each restaurant in a chain would obtain the same, right quality produce at the right price. (Tr. 60; Tr. 85). Initially, Mr. Cerniglia personally attended to all aspects of the business with some family help. He acted as a broker, recommending certain produce vendors for which his client chain restaurants would authorize the vendor to pay him 3 percent of the price of the purchased produce. (Tr. 83-84). After the Greens joined him, Jonathan Scott Green attended to the financial affairs of the company; John Green helped with sales to restaurants; and Mr. Cerniglia handled produce matters. (Tr. 95). Moreover, the Greens found new customers who desired a different business model from the pure commission one Mr. Cerniglia employed. Under the new model, Fresh Solutions, Inc. would take title to the selected produce and pay the distributors directly. Mr. Cerniglia acceded to adding this new business model, and Fresh Solutions, Inc. thereafter bought produce for various of its customers directly from 70 or 80 produce distributors. (Tr. 87-88). There was another change in the way Fresh Solutions serviced its customers. It undertook the development of hand-held computerized devices to allow chain restaurant customers to engage in on-line ordering of produce while checking on their inventories. (Tr. 115-116). These hand-held devices were discussed by Mr. Cerniglia with Morris Lewis at the time he contemplated investing in Fresh Solution, Inc. (Tr. 105). The tested models were sensitive to interference from microwaves and would not work in locations where there was a lot of metal. (Tr. 116). Fresh Solutions entered into expensive contracts with consultants to develop and correct the software. (Tr. 116-117).

5. The 2001 tax return filed for Fresh Solutions, Inc. shows it reported a net loss of \$2,267,291.00 for the year. (RX-24). By the end of 2001, its investors, namely, Mason McGowin and Morris Lewis had paid-in capital to the corporation of \$1,735,000.00 and an additional \$1 million had been received pursuant to a loan guaranteed by Morris Lewis. (RX-24, at 5). The return also shows that its two highest compensated officers were Mr. Cerniglia who received \$104,369.00 and J. Scott Green who received \$104,286.00. (RX-24, at 3; Tr. 254). Mr. Cerniglia and other first tier officers also had expense accounts covering their travel and meals, and a \$550.00 per month car allowance. (Tr. 256-257).

6. As a condition for continuing to fund the corporation, Morris Lewis required the other shareholders to sign their shares over to him,

relinquish their corporate offices and cease being directors, in order to convert Fresh Solutions, Inc. into a S-corporation allowing Morris Green to be its sole owner and entitled to personally take a tax loss in respect to the corporation's operations in 2002. (Tr. 154). Mr. Cerniglia understood that his shares of stock would be returned to him after the 2002 tax loss was taken. (Tr. 155). The S-corporation election was made and Morris Lewis was allowed by IRS to apply the \$3,494,112.00 that Fresh Solutions, Inc. lost in 2002 against his personal income taxes for that year when he received a huge signing bonus as a professional football player. (Tr. 248-249). The documents supporting the S-corporation election accepted by the Internal Revenue Service, included:

(a) The minutes of a Special Meeting of the Directors of Fresh Solutions, Inc. held on December 28, 2001 that was conducted by Jonathan Scott Green, Chairman of the Board and recorded by Joseph T. Cerniglia, Jr., the secretary of the corporation. The Chairman announced that the purpose of the meeting was the resignation of Joseph T. Cerniglia and Jonathan Scott Green, as officers and Directors effective midnight January 1, 2002. After discussion and upon motion duly made and seconded, the resignations were unanimously accepted. The minutes were signed by all three Directors, John Green, Joseph T. Cerniglia and Jonathan Scott Green. They were dated: December 28, 2001. (RX-8).

(b) The stock ledger of Fresh Solutions, Inc. where it was recorded that on January 1, 2002, all of the 2000 outstanding shares of stock issued to shareholders other than Morris Lewis, III were transferred to Morris Lewis, III. (PX-8).

(c) The individual stock certificates showing their transfer on January 1, 2002 to Morris Lewis, III. (RX-7, at 1-4).

7. In 2001, prior to his resignation, Mr. Cerniglia was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. (Tr. 229). Mr. Cerniglia also had the working title of Chief Operating Officer, and in corporate filings with the State of Georgia, was identified as Chief Financial Officer. (Tr. 229; RX-11, at 2). At that time, Jonathan Scott Green was the CEO and 31% shareholder. Morris Lewis was a Vice President and 20% shareholder. (Tr. 230).

8. The corporate by-laws of Fresh Solutions, Inc. provided for a Board of Directors consisting of not less than one nor more than five directors as fixed by resolution of the shareholders. (EX-4, at 4). The by-laws provided for officers consisting of a Chairman of the Board who is the chief executive officer of the corporation; a President if the Board

has not appointed a Chairman or if a President is needed for other designated circumstances; Vice Presidents and Assistant Vice Presidents; a Secretary; and a Treasurer. (EX-4, at 8-10). Any person was permitted to hold two or more offices and no officer needed to be a shareholder. (RX-4, at 8).

9. The State of Georgia requires annual filings from corporations in which corporate officers are categorized as: Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Secretary. See <http://www.sos.state.ga.us> (*Corporations-Annual Registration Q&A*). In the filings for Fresh Solutions, Inc., Joseph T. Cerniglia was identified as Chief Financial Officer and Jonathan S. Green as Chief Executive Officer; no one was identified in these filings as secretary. (RX-11, at 2).

10. On August 16, 2002, when Fresh Solutions, Inc. was found to have stopped fully paying for produce, Mr. Cerniglia did not own any shares of its stock, was no longer one of its directors and had resigned as Secretary and Treasurer. He continued, however, to be recognized as and actively used the title of Chief Operating Officer. In 2002, Mr. Cerniglia learned upon speaking with an unpaid produce distributor who the receptionist referred to him for assistance, that produce distributors were not being paid. (Tr. 31). His continued actions as the Chief Operating Officer included visiting produce distributors to see if their premises and trucks were clean, and if they had good data processing capability. (Tr. 128). It also included resolving customer problems and bringing customer concerns to produce distributors. (Tr. 128-129). Furthermore, it included speaking to unpaid produce distributors. (Tr. 131). In and for the year 2002, Mr. Cerniglia's salary was increased by \$13,000.00. (Tr. 255). In August, 2002, he also received a loan for \$40,000.00 in order to purchase a new home that he paid back in September, 2002. (Tr. 258-259).

11. On January 10, 2001, three bank accounts were opened for Fresh Solutions, Inc. with First Union Bank. The signature cards for these accounts were signed by: Jonathan S. Green CEO, Joseph T. Cerniglia COO, Shari Green, Director of Finance and John D. Green SUP. (RX-28; RX-29; RX-30; Tr. 263-264). One account was designated as "checking acct./operating". (RX-28). "COO" was used to identify Mr. Cerniglia on the signature cards as the corporation's Chief Operating Officer. (Tr. 72-73). Mr. Cerniglia has testified that he gave Jonathan

Scott Green a signature stamp that was available to be used as necessary. (Tr. 271-272). The stamp was used to sign checks to produce suppliers during the period of August 16, 2002 through April 29, 2003 when Fresh Solutions, Inc. has been found to have not fully paid produce sellers. (Tr. 272-273). Sometimes the stamp would be locked away and, when asked, he personally signed checks during that period. (Tr. 273). Just before the period when produce distributors went unpaid, a check for \$54,000.00, bearing Mr. Cerniglia's stamped signature, was issued on August 15, 2002, out of the operating account for paying suppliers at the First Union Bank, that was made out to Fresh Solutions, Inc. and then deposited into the Fresh Solutions, Inc. account at Bank of America where Mr. Cerniglia was the only authorized signatory. (Tr. 75-81; RX-19, at 22; RX-27). On July, 11, 2002, \$10,000.00 had been similarly transferred. (Tr. 78; RX-19, at 299; RX-27). On July 18, 2002, \$55,000.00 had also been similarly transferred. (Tr. 80-81; RX-19, 310; RX-27).

12. Mr. Cerniglia, on March 21, 2003, as Chief Operating Officer, "COO", signed service contracts for Fresh Solutions, Inc. with Automated Solutions Consulting Group, Inc. ("ASC"). (RX-32, at 5; RX-33, at 2; Tr. 122). The contract was to keep computers owned by Fresh Solutions, Inc. running. (Tr. 122). Mr. Cerniglia also signed checks to ASC on January 10, 2003 for \$5,000.00 (RX-19, at 105); on January 17, 2003 for \$2,000.00 (RX-19, at 107); and on January 31, 2003 for \$2,000.00 (RX-19, at 157). These transactions occurred during the period of time that produce distributors were not being paid. In February, 2004, following Mr. Cerniglia's resignation from Fresh Solutions, Inc., his wife together with the wife of the president of ASC started a new produce firm under the name Fresh Works. For a short time, Mr. Cerniglia worked for that firm. (Tr. 119-120).

13. Mr. Cerniglia never regained any of the shares of stock he transferred in 2002 to Morris Lewis. On May 16, 2003, Morris Lewis, as 100% Shareholder and Chairman, presided over a special meeting of the shareholders of Fresh Solutions, Inc. At the meeting, the then current Directors were removed; Morris Lewis was appointed Director of the corporation; and M. Darnell Jones was designated as secretary. Resolutions were also made to prohibit "the corporation, its Officers, Directors, Employees and/or agents" from entering into contracts, or hiring or employing anyone so as to create obligations or indebtedness.

(RX-36, at 1).

14. After May 16, 2003, M. Darnell Jones engaged a new payroll company and Mr. Cerniglia's salary was cut. Mr. Jones also withheld some payroll checks, and Mr. Cerniglia received salaried compensation in the high \$30's for the year instead of his agreed \$117,000.00 yearly salary. (Tr. 49-52). Mr. Cerniglia, together with Jonathan Scott Green, continued to represent Fresh Solutions, Inc. before the PACA Branch, and on October 2, 2003, they signed a letter to the PACA Branch advising that Fresh Solutions, Inc. was diligently working to pay and resolve the debts it owed to produce distributors. (EX-3, at 2). On a license application filed with the PACA Branch for Fresh Solutions, Inc. that Mr. Cerniglia admits he signed on October 8, 2003, he was identified as its Secretary, Treasurer, COO and 29% shareholder. (RX 2; Tr. 143-147). Mr. Cerniglia, Jonathan Scott Green and E. Mason McGowin did not notify the PACA Branch that there had been a change in ownership of Fresh Solutions, Inc. until May 2, 2004. (Tr. 259-260; RX-43).

15. On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions, Inc. and left its premises because he no longer had any hope that it was going to be saved and he had to feed his family. (RX-42, at 8-9; RX-42, at 33; Tr. 245).

16. On March 9, 2004, Fresh Solutions, Inc. by and through its sole shareholder, director and president, Morris C. Lewis, III, filed a voluntary petition under Chapter 7 for bankruptcy protection from its unpaid creditors that included produce sellers. (RX-17).

Conclusion

Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc. at the time it committed flagrant and repeated violations of section 2 of the PACA.

Mr. Cerniglia argues that there are two reasons why he cannot be determined to be "responsibly connected" with Fresh Solutions, Inc. at the time it violated the PACA. Firstly, when the violations took place, he was no longer a corporate officer, director or holder of the corporation's stock as required by the PACA because he had previously

resigned all offices and given up his shares of stock. Secondly, he was not actively involved in the violations themselves.

The first argument is his principal one. He contends that he does not qualify under the PACA's definition of responsibly connected as an individual who was at the time of the violations, "an officer, director or holder of...outstanding stock". (7 U.S.C. § 499a(b)(9)). This is because several months before the violations, he had resigned as secretary, treasurer and director and transferred all of the shares of stock he owned to Morris Lewis. This was done to facilitate the conversion of the corporation to an S-type owned by Mr. Lewis who then took a tax credit against a huge signing bonus he received as a professional football player. Although it was everyone's intention to return the transferred stock back to Mr. Cerniglia and the others who had developed and would continue to operate the corporation after Morris Lewis received his 2002 tax break, this never happened. Mr. Cerniglia never again was made a director of the corporation or an officer holding one of the titles listed in the corporation's by-laws. He did continue to file documents with the State of Georgia as the corporation's Chief Financial Officer, but that was a misnomer. He never controlled financial matters for Fresh Solutions, Inc. from the time Jonathan Scott Green joined the corporation. Whenever he signed checks for the corporation or allowed his signature to be used for that purpose, he did so as a matter of convenience and at the direction of others.

At first this argument appears compelling. Historically, the Department of Agriculture has employed a strict reading of the PACA's language to determine who is subject to its licensing and employment restrictions as a person "responsibly connected" to a licensee that violated section 2 of the PACA. When its determinations were appealed to United States Circuit Courts, the Department argued that the plain meaning of the statute was unambiguous, and it proposed a *per se* rule that was adopted by various circuits other than the District of Columbia Circuit. See *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966); and *Faour v. United States Dep't of Agric.*, 985 F.2d 217 (5th Cir. 1993). Under the *per se* rule, an individual was found to be responsibly connected if he fit one of the stated statutory categories. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C.Cir.1998). The District of Columbia Circuit, however, rejected this approach and determined that the language only created a rebuttable rather than an absolute presumption that an officer, director or holder of more than 10 per centum of the outstanding stock was responsibly connected to the

corporation. *Quinn v. Butz*, 510 F.2d 743, 751 (D.C.Cir.1975); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 409 (D.C.Cir.1983); *Bell v. Dep't of Agric.*, 39 F.3d 1199 (D.C.Cir.1994).

The circuit split existed until 1995 when the Congress amended the definition of responsibly connected to 'permit individuals who are responsibly connected ... the opportunity to demonstrate that they were not responsible for the specific violation,' Perishable Agriculture Commodities Act Amendments of 1995, H.R.Rep. No. 104-207, at 11 (1995) According to the amendment, Agriculture must first determine if an individual falls within one of the three statutory classifications. If so, the burden shifts to the individual to demonstrate that he was not actively involved and that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute. *Norinsberg, supra*, at 1197. The 1995 amendment not only resolved the circuit split, it negated the harshness of the Department's unwavering strict application of the PACA's responsibly connected definition to everyone who was unable to appeal an adverse Departmental determination to the District of Columbia Circuit. The Department's historically consistent use of a plain meaning *per se* interpretation of the PACA definition of responsibly connected gives strength to Mr. Cerniglia's argument that his resignation of all offices and his transfer of stock before the corporation's violations of the PACA, places him outside of all three classifications of an individual who may be determined to be responsibly connected.

However, in a recent case where an officer and director resigned and gave up his stock in a corporation prior to its violation of section 2 of the PACA, the Department nonetheless held that individual to be a responsibly connected officer on the basis that he had not effectively resigned as an officer in light of the actual duties he continued to perform. *Anthony L. Thomas*, 59 Agric. Dec. 367, 385-388 (2000).

The underlying Administrative Law Judge decision that the Judicial Officer affirmed, had found that although the petitioner described himself to be an employee with little or no responsibilities over the actions taken by the corporation and had, on January 10, 1997, resigned all corporate positions, returned his stock and assumed the duties of dock supervisor, he continued to appear on PACA records as president of the corporation, failed to inform the State corporations office or the PACA Branch that he had resigned as an officer and director, and performed duties far beyond that of a dock supervisor. The duties the petitioner performed after the date of his resignation through late June

1997 when he terminated his affiliation, included acting as president, signing an agreement to sell the corporation's accounts receivable in which he identified himself as president and secretary/treasurer and signing other significant corporate documents as president after the date of his resignation. In addition he continued to be involved in significant day-to-day operations of the corporation that included issuing checks, entering into contracts and dealing with produce sellers seeking payments. *Thomas, supra*, at 375-378. On the basis of these findings, the Administrative Law Judge found that the petitioner served as either *de facto* or *de jure* president of the corporation from December 31, 1995 to late June 1997 (*Thomas, supra*, at 379), and concluded that he was responsibly connected during the entire violation period. *Thomas, supra*, at 382.

On appeal, the Judicial Officer discussed the petitioner's resignation as an officer in the context of the Administrative Law Judge's finding that he was not a nominal officer. *Thomas, supra*, at 385-388. The Judicial Officer agreed that the petitioner was not nominal because he did not meet the test most recently enunciated in *Maldonado v. Dep't of Agric.*, 39 F.3d 1086, 1088 (9th Cir. 1998) of being a person who "did not have an actual, significant nexus with the violating company during the violation period and, therefore, neither knew nor should have known of the corporation's misdeeds". The Administrative Law Judge had concluded that the petitioner did not meet this test because he held 49 per centum of the outstanding stock prior to January 10, 1997, and was directly involved in the corporation's day-to-day operations, having engaged in significant corporate activities. As part of this discussion, the Judicial Officer noted that: "... the ALJ found that Petitioner did not effectively resign as an officer on January 10, 1997, but continued to serve as president until he left ... in late June 1997." The Judicial Officer then stated: "The ALJ's conclusion that Petitioner had an actual, significant nexus to ... (the corporation) during the entire violation period is correct."

Thomas, supra, at 386. Accordingly, the Department employs the same test for whether an officer is merely nominal to determine whether an individual's resignation as an officer is effective. It is not effective if he continued to have an actual and significant nexus to the corporation during the period it violated section 2 of the PACA. The danger in this two-fold use of the same test is that it could lead to confusion respecting burden of proof. On the one hand, an individual who has been established to be an officer has the burden of proving that he was only

a nominal officer who comes within the exception added to the PACA definition by the 1995 amendment. On the other hand, the initial and principal burden of proving an individual to be an officer who is subject to the PACA's responsibly connected provisions rest entirely with the Department.

The evidence in this case, however, clearly establishes that both before and after his resignation, Mr. Cerniglia held himself out to be and was in every sense the Chief Operating Officer of Fresh Solutions, Inc. As such he meets the test expressed in *Thomas, supra*, for an officer who, despite a tendered resignation, continues to be subject as a responsibly connected person, to the PACA's licensing and employment restrictions. Just as is the case when a petitioner argues that his officer status was only nominal, the activities performed and not the title held are controlling when deciding whether a petitioner effectively resigned as an officer and was no longer responsibly connected with an offending corporation.

As was the case in *Thomas, supra*, at 384-385, Mr. Cerniglia was in no sense like Mr. Maldonado who the Ninth Circuit found was not actively involved in his firm's failure to pay for produce. *Maldonado, supra*, 154 F.3d at 1088. Mr. Cerniglia did not lack either the education or the management experience to understand that the corporation, as a PACA licensee, was violating basic statutory requirements. He is a college graduate with a lifetime of experience in the produce industry. In 1993, Mr. Cerniglia founded the underlying firm that became Fresh Solutions, Inc. At the end of 2001, he was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. He headed all of the corporation's produce matters from its inception until he left the corporation on February 23, 2004. In less than two weeks after he left, a petition under Chapter 7 of the Bankruptcy Act was filed. Though Mr. Cerniglia, as of January 1, 2002, transferred away his stock and resigned as a director of the corporation, he never ceased being its Chief Operating Officer. As such he resolved customer complaints and brought customer concerns to produce distributors. He spoke to unpaid produce dealers who told him they were not being paid. But he did nothing to stop the dissipation of the corporation's funds through the issuance of checks to persons other than unpaid produce sellers. From his past experience with his father's corporation when its PACA license was revoked for failing to pay produce sellers, he had personal and painful knowledge that the failure to make full and timely payments to produce sellers was a violation of Section 2 of the PACA that can lead

to licensing and employment restrictions. But he did nothing to stop that from happening. Moreover, he continued to represent the corporation in official filings with the State of Georgia and the PACA Branch. He never advised either government entity that his status with the corporation had changed. He never advised produce sellers that there was any change in his status with Fresh Solutions, Inc. The corporate by-laws of Fresh Solutions, Inc. permit persons other than shareholders to be officers, and in most meaningful ways, Mr. Cerniglia continued to act as an officer after he transferred away his shares of stock and after his recorded resignation. He signed a significant contract as Chief Operating Officer with an outside consultant to maintain the corporation's computers. He continued to permit his signature stamp to be used on checks that went to entities other than unpaid produce distributors. When his stamp was locked away and not conveniently available, he at times personally signed checks. These checks included payments to ASC, the outside computer consultant, whose president's wife would later go into business with Mr. Cerniglia's wife; a business that for a time would employ Mr. Cerniglia. Just before the period when produce distributors would go unpaid, approximately \$129,000.00 was transferred out of the checking account used to pay their bills, and instead was put into another corporate bank account over which Mr. Cerniglia had exclusive control.

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. Under *Thomas*, he therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

For these same reasons, he was not a nominal officer as that term is used in the definition section of the PACA.

Mr. Cerniglia's second argument that he was not responsibly connected because he was not actively involved with Fresh Solutions, Inc. is likewise refuted by the activities he performed during the violation period as the corporation's Chief Operating Officer. His functions were in no sense "ministerial functions only" under the test the Department applies to determine whether an officer was "actively involved". *In re Norinsberg, final decision on remand*, 58 Agric, Dec. 604, 610-611 (1999). Again, as in *Thomas, supra*, at 382-384, the fact that someone else decided which, and how much, produce sellers are

paid does not mean an individual was not actively involved. Mr. Cerniglia was actively involved in that he executed significant contracts and was involved in other activities that enabled the corporation to buy produce from sellers who ultimately were not paid when he knew or should have known that their prompt and full payment was questionable.

The 1995 amendment to the PACA also allows an individual to defend against a responsibly connected determination on the basis that the offending corporation was in actuality another person's alter ego. Though Mr. Cerniglia has not raised this defense, respondent has addressed it. To be an alter ego of a corporation, a person must so dominate it as to negate its separate personality. *Thomas, supra*, at 391. Here, Morris Lewis, after becoming the 100% shareholder, still depended on Mr. Cerniglia and Jonathan Scott Green to run the corporation and his dependence continued throughout the violation period. Accordingly, Morris Lewis was not the corporation's alter ego. For these reasons, the following order is being issued.

ORDER

It is hereby found that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of section 2(4) of the PACA (7U.S.C. § 499b(4)).

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

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings, 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service.

Copies of this Decision and Order shall be served upon the parties.

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Decision and Order.
Filed June 2, 2006.

PACA – Perishable agricultural commodities – Bribery – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

590 PERISHABLE AGRICULTURAL COMMODITIES ACT

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's decision concluding KOAM Produce, Inc. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its employee, Marvin Friedman, paying bribes to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer rejected Respondent's contentions that: (1) Marvin Friedman's payments to the United States Department of Agriculture produce inspector were not bribes, but, instead, gratuities; (2) the United States Department of Agriculture had a conflict of interest in the proceeding; (3) Marvin Friedman was not acting within the scope of his employment when he paid the United States Department of Agriculture produce inspector; and (4) Respondent was not liable for Marvin Friedman's payments to the United States Department of Agriculture produce inspector because Respondent's officers and owners had no knowledge of the bribes. The Judicial Officer concluded that the ALJ's revocation of Respondent's PACA license was not an appropriate sanction because, 6 months prior to the ALJ's issuance of the Initial Decision, Respondent's PACA license had terminated due to Respondent's failure to pay the required annual PACA license renewal fee. The Judicial Officer ordered the publication of the facts and circumstances of Respondent's violations.

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.

Paul T. Gentile, New York, NY, for Respondent.

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

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

PROCEDURAL HISTORY

James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted this administrative proceeding by filing a Complaint on September 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). On May 3, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed an Amended Complaint.

Complainant alleges: (1) during the period April 1999 through July 1999, KOAM Produce, Inc. [hereinafter Respondent], through its employee, Marvin Friedman, made illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities which

Respondent purchased from 11 sellers in interstate or foreign commerce; (2) on September 20, 2000, the United States District Court for the Southern District of New York entered a judgment in which Marvin Friedman pled guilty to 10 counts of bribery of a public official, relating to the illegal payments to a United States Department of Agriculture produce inspector in connection with 42 federal inspections of perishable agricultural commodities; (3) Respondent made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions prior to April 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Amended Compl. ¶¶ III-VI). On July 29, 2002, Respondent filed an “Answer to Amended Complaint” denying the material allegations of the Amended Complaint.

On March 25, 2003, and November 17 and 18, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, LLP, New York, New York, represented Respondent. Complainant called three witnesses and submitted 19 exhibits, marked CX 1 through CX 19. Respondent called one witness and submitted four exhibits, marked RX 1 through RX 4. All the exhibits were admitted into evidence. Complainant’s exhibits are designated in this Decision and Order by “CX.” Transcript references are designated in this Decision and Order by “Tr.”

On April 18, 2005, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a Decision and Order. On June 1, 2005, Respondent filed a “Petition to Rehear and Reargue,” and on July 1, 2005, Complainant filed “Complainant’s Response to Respondent’s Petition to Rehear and Reargue.” On January 6, 2006, the ALJ issued a Decision and Order Following Reargument [hereinafter Initial Decision], which supercedes the ALJ’s April 18, 2005, Decision and Order. The ALJ: (1) concluded, during the period April 1999 through July 1999, Respondent, through its employee and agent, paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with 42 federal inspections

of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce; (2) concluded Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; and (3) revoked Respondent's PACA license (Initial Decision at 25-27).

On March 30, 2006, Respondent appealed to the Judicial Officer, and on April 18, 2006, Complainant filed "Complainant's Response to Appeal Petition." On April 19, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision, except that I disagree with the sanction imposed on Respondent by the ALJ. Therefore, except for the sanction imposed by the ALJ, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499b. Unfair conduct

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

....

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

commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; 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.

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

....

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

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

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

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

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

....

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

(b) Whoever—

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

selected to be a public official to give anything of value to any other person or entity, with intent—
(A) to influence any official act[.]

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

18 U.S.C. § 201(a)(1), (3), (b)(1)(A).

DECISION

Decision Summary

Respondent, during the period April 1999 through July 1999, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), at the Hunts Point Terminal Market in the Bronx, New York, New York. Under the PACA, the act of an employee, within the scope of his or her employment, is deemed to be the act of the employer. Respondent's violations of the PACA were committed when its employee, Marvin Friedman, made 42 illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin, in connection with federal inspections of perishable agricultural commodities which Respondent received or accepted in interstate or foreign commerce from 11 sellers. Respondent is responsible under the PACA for the conduct of its employee, Marvin Friedman, who, within the scope of his employment, paid bribes to the United States Department of Agriculture produce inspector, even if everyone at Respondent, except Marvin Friedman, was ignorant of Marvin Friedman's actions. Making illegal payments to a United States Department of Agriculture produce inspector was an egregious failure by Respondent to perform its duty under the PACA to maintain fair trade practices. The sanction of publication of the facts and circumstances of Respondent's violations is commensurate with the seriousness of Respondent's violations.

Findings Of Fact

1. I find credible the testimony of William Cashin, Sherry Thackeray, Basil W. Coale, Jr., and Jung Yong "C.J." Park.

2. Respondent is a New York corporation, incorporated on or about June 18, 1996, with an address of 238-241 Hunts Point Terminal Market, Bronx, New York, New York 10474 (CX 1).

3. On June 27, 1996, the Secretary of Agriculture issued Respondent PACA license number 961890. Respondent held PACA license number 961890 from June 27, 1996, until June 27, 2005, when it was terminated due to Respondent's failure to pay the required annual PACA license renewal fee. (CX 1; Complainant's unopposed Motion for Technical Amendment at 1.)

4. Respondent began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, in about January 1997 (Tr. 270).

5. At all times material to this proceeding, and particularly in 1999, Jung Yong "C.J." Park and his wife, Kimberly S. Park, each owned 50 percent of Respondent (CX 1; Tr. 269, 283-84).

6. At all times material to this proceeding, and particularly in 1999, Jung Yong "C.J." Park was Respondent's vice president and secretary, Kimberly S. Park was Respondent's president and treasurer, and Respondent's only two directors were Jung Yong "C.J." Park and Kimberly S. Park (CX 1; Tr. 269, 283-84).

7. Respondent hired Marvin Friedman, also known as Marvin Steven Friedman, in about May 1998 to work as night produce salesman. Marvin Friedman became a produce buyer in October 1998. Marvin Friedman continued to work for Respondent at all times material to this proceeding, and particularly in 1999. (Tr. 270-71, 274.)

8. Marvin Friedman was arrested on or about October 27, 1999, for illegally paying money to a United States Department of Agriculture produce inspector (Tr. 271-72).

9. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Marvin Friedman with 10 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b). The indictment charges that Marvin Friedman:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, MARVIN FRIEDMAN, the defendant, made cash payments to a United

States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at KOAM Produce, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	4/6/99	\$250
TWO	4/9/99	\$100
THREE	4/15/99	\$100
FOUR	4/30/99	\$250
FIVE	6/3/99	\$200
SIX	6/4/99	\$350
SEVEN	6/15/99	\$200
EIGHT	6/24/99	\$50
NINE	6/28/99	\$300
TEN	7/1/99	\$300

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 3.

The bribes charged in the indictment cover the payments Marvin Friedman made to William Cashin in connection with the 42 inspections of perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (CX 6-CX 15).

10. On February 25, 2000, Marvin Friedman pled guilty to, and was convicted of, each count of the 10-count indictment in *United States v. Friedman*, 99 Crim. 1095 (S.D.N.Y. 2000) (CX 3, CX 18).

11. On September 20, 2000, Marvin Friedman was found to have paid \$29,550¹ in bribes to a United States Department of Agriculture produce inspector at the Hunts Point Terminal Market and was sentenced to the custody of the Bureau of Prisons for 12 months plus 1 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 count, for a total of \$3,000; plus a \$100 special assessment on each count, for a total of \$1,000 (CX 4, CX 19).

¹The \$29,550 in bribes paid by Marvin Friedman was determined through the sentencing process (CX 4 at 9, CX 19 at 20); the bribes specified in the indictment totaled \$2,100 (CX 3).

12. The 10 counts of bribery of a public official from April 6, 1999, through July 1, 1999, of which Marvin Friedman was convicted, were based on the undercover work of William Cashin (CX 4; Tr. 115-97).

13. William Cashin was a United States Department of Agriculture agricultural commodities grader, also called produce inspector, at the Hunts Point Terminal Market from July 1979 until August 1999. For about 19 of those 20 years (from 1980 through August 1999), William Cashin, in the course of his United States Department of Agriculture work, accepted unlawful bribes and gratuities from many produce workers. (Tr. 115, 177-78, 192.)

14. William Cashin had agreed, immediately after having been arrested himself on March 23, 1999, to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture produce inspectors, by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 133-34; CX 16).

15. Beginning on March 23, 1999, William Cashin no longer kept the unlawful bribes and gratuities that were given to him, but instead gave them to law enforcement authorities at the end of each work day (Tr. 194).

16. More than half (approximately seven to eight) of the approximately 12 to 13 United States Department of Agriculture agricultural commodities graders who were working at the Hunts Point Terminal Market in March or April 1999, were convicted of taking bribes (including William Cashin) (Tr. 161-62).

17. In response to William Cashin's daily reports to the Federal Bureau of Investigation, the Federal Bureau of Investigation prepared FD-302 forms summarizing William Cashin's daily reports. (See CX 17.) The portions of the FD-302s which correlate to the bribes William Cashin received from Marvin Friedman are organized for each count of the indictment in *United States v. Friedman*, 99 Crim. 1095 (S.D.N.Y. 2000), together with applicable United States Department of Agriculture inspection certificates, which show Respondent as having applied for the inspections (Tr. 136-97; CX 6-CX 15).

18. Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent each time he paid a bribe to William Cashin, as reported in CX 6 through CX 15 and reflected in each of the 10 counts of which Marvin Friedman was convicted, regardless of whether anyone at Respondent 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. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 178-80, 184-86, 193).

19. Factors which show that Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent, when he paid the bribes, include the following: (a) Marvin Friedman paid the bribes while performing, or in connection with, his job responsibilities; (b) the bribes were incorporated into Marvin Friedman's regular work routine for Respondent; (c) Marvin Friedman was at his regular work place at Respondent's premises when he paid the bribes; (d) Marvin Friedman paid the bribes during his regular work hours for Respondent; (e) Marvin Friedman paid the bribes on a regular basis; (f) Marvin Friedman appeared to be acting on behalf of his employer, Respondent; and (g) the bribes could have benefited Respondent (Tr. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 307; CX 19 at 15-17).

20. There is no evidence that Marvin Friedman or anyone else at Respondent was intimidated or coerced into making the unlawful payments. The only evidence on that issue came from William Cashin, who testified that he never specified a payment amount and never pressured anyone at Respondent to pay. William Cashin testified he kept Marvin Friedman apprised of the number of inspections he had performed, and Marvin Friedman gave him \$50 for each inspection. (Tr. 163-64, 178-80, 184-86, 193.)

Discussion

The record establishes that Respondent's employee, Marvin Friedman, paid bribes to United States Department of Agriculture produce inspector William Cashin during the period April 6, 1999, through July 1, 1999, in connection with produce inspections requested by Respondent. The only question is whether what Marvin Friedman did, causes his employer to suffer the consequences under the PACA.

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

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licensee and the PACA licensee's agents and employees.

Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Sixth Circuit have affirmed use of the PACA's principal-agency provision under circumstances like those in the instant proceeding.² William Cashin, the United States Department of Agriculture produce inspector, testified about the circumstances under which Marvin Friedman made payments to him, as follows:

[MR. YOUNG-MORALES:]

Q. Did you know Marvin Friedman before Koam?

[MR. CASHIN:]

A. Yes, I did.

Q. And before Koam, did Marvin Friedman ever give you any money in connection with any of your inspections?

A. No, he did not.

Q. While he was at Koam, as an employee, did Marvin Friedman ever give you any money in connection with any of your inspections?

A. Yes, he did.

Q. Was the money that he gave you in payment of your normal inspection fee?

A. No.

Q. That you have described?

A. Not at all. By the time Marvin came along, Koam had already established an account, and their billing -- they were on

²*Post & Taback, Inc. v. United States Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

the billing system.

Q. Were the payments made by Marvin Friedman, that you've described, done in connection with each inspection?

A. Yes, they were.

Q. How much were those payments per each inspection?

A. Fifty dollars per inspection.

Q. And approximately what year was it that Marvin Friedman started making payments to you?

A. Marvin came along, to the best of my recollection, about 1996 or '97.

Q. Just to back up very quickly, do you know, do you remember when Ralph died?

A. It wasn't long after the Company opened. It was some time in late '96 or early '97, as I recall.

Q. To your knowledge, were Ralph and Marvin Friedman at Koam at the same time ever?

A. No. Not that I was aware of.

Q. How would -- were payments give[n] you in connection with every inspection that you made?

A. Yes.

Q. Okay. How would Marvin Friedman go about making the payments to you?

A. After I was finished examining all the products, I used to write the inspections in the office upstairs. Marvin sat in the office all the way in the back. You go through the door, there's a few other offices, and he was in the back. And there was an

extra desk there, and it was warm and it was dry, and I would sit there at the desk and I would write -- and he would ask me how many and I would tell him, and he would count the money and hand it to me.

Q. Was anyone else ever present during that transaction that you've described?

A. No.

Q. What was your understanding as to why you were receiving payments in connection with your inspections at Koam?

A. I was helping Marvin.

Q. When you say help, what was your understanding of the meaning of help? What do you mean by help? In connection with an inspection.

A. Helping in connection with an inspection came in any one of three ways. Altering the percentage of defects, especially the condition defects, in such a way that it was over the good delivery marks. Frequently, someone like Marvin and Ralph, too, would examine product, see a few decayed specimens in a box or a couple of boxes, and then call an inspection, and want that particular load of product -- produce, written so that the percentage of defects, especially decay, was over the good delivery mark.

Another way of help was the number of containers. Frequently, the amount that was inside -- the amount present at the time when I would arrive to do the inspection was less than what it originally was unloaded or came in as, and they would want the number of containers increased so it more closely matched the manifest.

The other way was to alter the temperatures. They would want the temperatures recorded on, or written on the certificate to be of a more acceptable level so it would lend legitimacy to the certificate.

....

Q. Okay. How would Marvin Friedman have let you know that he wanted help, any kind of help, on a particular load?

A. It was our, it was my policy with Marvin that when I arrived at Koam, I would find him, talk to him. Sometimes he was downstairs. Sometimes he was upstairs. And then we would discuss the various loads. And he would tell me I need a little help with this one. This one shows problems; you'll see it. This one -- and he and I would discuss the different things and he would tell me he needed help on things and what he needed help on.

Q. Were the figures that you had put down on an inspection, on an inspection certificate, when you gave help, an accurate reflection of the produce you were actually inspecting?

A. No.

....

Q. If you -- and on what percentage of the loads that you inspected at Koam would you actually give help?

A. I would estimate 75 to 80 percent.

Q. If you did state the results inaccurately on any particular inspection back then, can you state today why you would have done so?

A. Yes, I can.

Q. Why?

A. It goes back to the original deal of help in any one of the three ways, help meaning the number of containers, help meaning to raise the percentage of defects, or to put down the temperatures at the correct level.

Q. In the event that -- well, even if the inspection certificates that you prepared were accurate, did you still get paid by Marvin Friedman?

A. Yes, I did.

Q. What was your understanding as to why that would occur?

A. I -- my understanding in that sense was either he was just saying thank you for helping in general, and also, it was my understanding that he was possibly paying for future help, just in general.

Tr. 123-26, 128-29, 131-32.

I find the testimony of William Cashin (Tr. 115-97) credible. There are factors that could impeach William Cashin's credibility. William Cashin is a convicted felon (convicted of taking bribes such as those at issue in the instant proceeding) and William Cashin admits to a 19-year history of taking unlawful bribes and gratuities (the last 5 months was for the benefit of the investigation of bribery at the Hunts Point Terminal Market by the Federal Bureau of Investigation) (Tr. 177-78, 192). William Cashin's taking of unlawful bribes and gratuities demonstrates a disregard for honesty and truthfulness in the past. Nevertheless, the ALJ found that William Cashin appeared to be truthful when he testified.

The incentives that motivated William Cashin to cooperate in the investigation and then to testify may well have included the hope of a lenient sentence (which he got) and favorable treatment from the United States Department of Agriculture (which he got). William Cashin did not need to report or testify untruthfully to receive the benefits of cooperating; he could receive the benefits of cooperating by reporting truthfully and testifying truthfully. There would have been no greater gain and thus, there was no incentive, to report or testify untruthfully.

Most persuasively, William Cashin's testimony was essentially consistent with all of the other evidence,³ including the in-court

³There is one discrepancy between William Cashin's testimony and other evidence. William Cashin testified, when Marvin Friedman paid him, there was never anyone else from Respondent present (Tr. 166-67). William Cashin's testimony appears to conflict (continued...)

assertions of Marvin Friedman and his lawyer and the other documentary evidence, and the testimony of Jung Yong “C.J.” Park and the other witnesses.

Marvin Friedman paid the bribes within the scope of his employment as Respondent’s produce buyer. Marvin Friedman paid the bribes while performing, or in connection with, his job responsibilities;⁴ Marvin Friedman’s bribes were incorporated into his regular work routine for Respondent; Marvin Friedman was at his regular work place on Respondent’s premises when he paid the bribes; Marvin Friedman paid the bribes during his regular work hours for Respondent; Marvin Friedman paid the bribes on a regular basis; Marvin Friedman appeared to be acting on behalf of Respondent when he paid the bribes; and Marvin Friedman’s bribes could have benefited Respondent. These factors show that Marvin Friedman was acting within the scope of his employment as a produce buyer for Respondent, when he paid the bribes. (Tr. 120-24, 128-29, 131-32, 146-47, 152-53, 155-56, 163-67, 307; CX 19 at 15-17.)

Marvin Friedman was acting within the scope of his employment when he paid the bribes, even if Respondent did not authorize or direct him to do so and even if Respondent was unaware of his doing so. *H.C. MacClaren, Inc. v. United States Dep’t of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

Respondent argues that such criminal activity of an employee should not be imputed to his employer; that Marvin Friedman’s criminal activity cannot have been within the scope of his employment and cannot become Respondent’s violations of the PACA. Respondent’s argument has already been addressed by the United States Court of Appeals for the District of Columbia Circuit, as follows:

Post & Taback’s argument that the Secretary should have looked to New York Penal Law § 20.20 to determine “when ... a

³(...continued)

with one of the Federal Bureau of Investigation form FD-302s, which suggests that “C.J.,” last name unknown, was present, or at least nearby, when Marvin Friedman paid William Cashin \$300, on June 28, 1999 (CX 14 at 2). I find William Cashin’s testimony reliable, despite the apparent conflict.

⁴Rarely will an employee’s or agent’s egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee’s or agent’s egregious act was committed while performing, or in connection with, his or her job responsibilities.

criminal act [is] within the scope of employment such that the corporate entity may be held vicariously liable” is contrary to precedent. Brief of Petitioner at 13. When the Congress uses a common law concept, such as “the scope of employment,” the Supreme Court has directed that we rely “on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Moreover, even were it proper to incorporate New York law, it would not be the provision Post & Taback advances, as the proceedings before the Secretary were part of a regulatory licensing scheme rather than a criminal prosecution.

Post & Taback, Inc. v. United States Dep’t of Agric., 123 F. App’x 406, 408 (D.C. Cir. 2005).

Respondent is responsible under the PACA for the bribes Marvin Friedman paid in connection with the produce inspections ordered by Respondent.⁵

After careful review of the evidence, I am unable to determine whether anyone at Respondent besides Marvin Friedman was involved in making the unlawful payments to William Cashin. I find it difficult to believe that Marvin Friedman paid the bribes out of his own pocket, even if he was the most highly compensated employee at Respondent, at about \$50,000 per year (CX 5). He apparently received no bonuses in addition to his wages (Tr. 274-75). The evidence fails to prove whether the money Marvin Friedman gave unlawfully to a United States Department of Agriculture produce inspector was his own money, Respondent’s money, Jung Yong “C.J.” Park’s money, Kimberly S. Park’s money, or money from some other source.

Jung Yong “C.J.” Park testified that neither he nor Kimberly S. Park, to his knowledge, at any time, authorized or directed Marvin Friedman to pay United States Department of Agriculture produce inspectors (Tr. 286). Jung Yong “C.J.” Park testified that he had not known that Marvin Friedman was paying money to a United States Department of Agriculture produce inspector until after Marvin 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 Federal Bureau

⁵See 7 U.S.C. § 499p.

of Investigation form FD-302 (CX 14 at 2); and that he was unaware that Marvin Friedman's attorney represented to the United States District Court for the Southern District of New York, during Marvin Friedman's 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 Respondent argues, Marvin Friedman implicated his employer in an attempt to be sentenced more leniently. The prosecutor in the criminal case asserted to the United States District Court for the Southern District of New York that there was no factual support in the record that Marvin Friedman's employer directed the bribery (Tr. 328-29; CX 19 at 15-17).

Marvin Friedman was not a witness in this proceeding. The hearsay evidence, suggesting that someone at Respondent besides Marvin Friedman may have been involved in paying the bribes, is not sufficiently reliable. The evidence fails to prove Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent knew Marvin Friedman was illegally paying money to a United States Department of Agriculture produce inspector. During Marvin Friedman's September 20, 2000, sentencing hearing, the prosecutor addressed the issue of the involvement of persons other than Marvin Friedman in the bribery of William Cashin, as follows:

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 at 15-17.

Whether Marvin Friedman's unlawful payments were, or were not, being made with Jung Yong "C.J." Park's or Kimberly S. Park's involvement or awareness, would make no difference in the sanction recommended by Complainant. Mr. Basil W. Coale, Jr., who was Complainant's sanction witness, testified, as follows:

[MR. GENTILE:]

Q. Now the -- you've recommended on behalf of the Agency that the license for Koam, that it should be revoked; is that correct?

[MR. COALE:]

A. Correct.

Q. In doing so, have you taken into consideration the employment sanctions that follow such a sanction?

A. Yes.

Q. So it's your understanding that should the sanction be granted as you requested, that those responsibly connected with Koam Produce would not be permitted to be employed within the industry for at least a year; is that correct?

A. Correct.

Q. And that would include, by obvious definition, the active owners such as C.J. Park; is that correct?

A. Correct.

Q. And does that seem appropriate to you if Mr. Park was not aware, did not have knowledge of what Mr. Friedman was doing?

A. Under the Act, that's how it's written.

Q. But you've said you've taken into consideration that there is a sanction. Is it part of your consideration that he should, based upon your recommendation, not be permitted to work in this industry, even though he didn't know what was going on? Is that part of your recommendation?

A. The recommendation is that, based on the violations, that the license should be revoked, and now the sanctions are defined by the statute and flow from that finding.

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Q. And if the sanction was a civil penalty, a fine, some sort of suspension, that would have a different effect on Mr. Park and anyone else responsibly connected; is that correct?

A. Correct.

Q. As part of your recommendation, have you taken into consideration whether or not Koam should lose its license or not based upon the actual knowledge of the owners of the Company?

A. The, that issue, we believe, was -- is dealt with in Section 16, is that the actions of the employees and the scope of their employment are the actions of the licensee.

Q. I understand what the section says. I've asked you whether or not you've taken into consideration whether or not the actual knowledge by the owner is a factor to be considered?

A. I guess you could say it's what we would recognize could be the position of someone, but it's not a driving factor that's considered, whether or not the principals knew or whether it's necessary to prove that the principals knew. It's that the actions of the employee and the scope of the employment are the actions of the licensee.

Q. Would you say, based upon what you just said, that it's the Agency's position that it's irrelevant as to whether or not there was actual knowledge by the owners?

A. I can't argue with that word.

Q. Does that mean yes or no? Does that mean you agree that it's the Agency's position that it's irrelevant --

A. Yes.

Q. -- as to whether or not the owners actually knew?

A. Yes.

Tr. 319-22.

Basil W. Coale, Jr., had previously testified to explain the seriousness of Respondent's violations and the appropriateness of a severe sanction, as follows:

[MR. YOUNG-MORALES:]

Q. Are you aware of the sanction recommendation that Complainant recommends in this case?

[MR. COALE:]

A. Yes, I am.

Q. How are you aware of the sanctions?

A. I participated in the development of the recommendation.

Q. And what is the recommendation in this case?

A. The revocation of PACA license.

Q. What's the basis for your sanction recommendation?

A. There are several factors that were considered. One is the evidence of paying as part of the criminal investigation conducted by the FBI in the 42 different inspection certificates involved with the bribery.

As an aggravating factor, there is William Cashin's testimony that the bribes were paid for a period much longer than that that is documented by the criminal investigation.

There is the factor to consider of the impact to the industry of bribes. The potential impact is very great. The fresh products branch of the Agricultural Marketing Services issues approximately 150,000 inspection certificates in a year. This come out to average out to hundreds a day. Shippers, growers, brokers, carriers, all use the results of those certificates to resolve

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their disputes, to evidence that they met their contract terms or to document the condition of product or products.

Paying bribes to an inspector undermines the credibility of the entire inspection process, and can impact how these traders resolve their disputes.

In addition, there's the fact of in a competitive market, especially like Hunt's Point, if one firm would know, would be paying bribes and another firm finds out, a competitive firm, they may feel to [sic] need to pay bribes just to compete.

And then, in addition, there's the deterrent effect. The Agency wants to not only deter with sanctions, this individual from repeating, this respondent from repeating its violations, but, in addition, deter any other firms who may be considering similar violations.

Q. Now in this case, Complainant's intention is that the payment of bribes to William Cashin were a violation. Does the fact that Mr. Cashin would -- excuse me. Does the fact that Mr. Cashin was a USDA employee have any effect on Complainant's sanction recommendations?

A. No, it does not.

Q. Why doesn't it?

A. Paying a bribe is a very serious violation of the PACA. Whether the bribe is paid to another industry member, another trader, or to a USDA employee such as an inspector, the fact that the bribes in this case were paid to -- excuse me, to a USDA produce inspector, does not excuse the fact that the bribes were paid.

Q. Does Complainant recommend any kind of civil penalty in this case as an alternative, possible alternative, to license revocation? And this is based on your sanction recommendation and on what you've heard in the court case so far.

A. No, it does not believe that a monetary penalty would be appropriate in this situation.

Q. Why not?

A. Paying bribes is a very serious violation of PACA, and in this specific instance, it went on for a long period of time. There's a great potential for damage to the industry in the way it does business, and this calls for the, only the most severe sanction, and that sanction is revocation of PACA license.

Q. In the course of the proceedings as a whole, have you heard anything with respect to Marvin Friedman paying bribes for expedited access to inspectors?

A. Not that I recall.

Q. Are you aware that it's a potential defense of the Respondent in this case?

A. Yes, I am.

Q. And, Mr. Coale, with that potential defense in mind, have you reviewed CX-18? And do you have a copy in front of you?

A. I have the official copy right here.

Q. Have you read it in its entirety?

A. Yes, I have.

Q. Could I direct you to page 17 of that document? Well, first of all, what is this document?

A. This is a copy of the February -- a transcript of the February 25th proceeding involving United States of America v. Marvin Steven Friedman.

Q. Would this be the plea agreement transcript, so to speak?

A. Where Mr. Friedman entered his pleas to the criminal proceeding?

Q. Uh-huh.

A. Yes.

Q. If I could direct you to page 17. Well, excuse me. Let me direct you to page 16. Could I ask you -- and you may have to familiarize yourself with it again, but could I ask you who Mr. Krantz is in this transcript?

A. It is my understanding that he is Mr. Friedman's counsel.

Q. All right. And on line 19 -- excuse me, line 17, could you read the question by the Court?

A. The Court says, "Mr. Krantz, do you know of any valid defense that would prevail at a trial of Mr. Friedman?"

Q. And what is Mr. Krantz's response?

A. "No, Your Honor."

Q. And the Court's question?

A. The next question is, "Do you know any reason why Mr. Friedman should not be permitted to plead guilty?"

Q. And the answer?

A. "No."

Q. And the next question, and I'll stop there.

A. It appears that the Court says, "Mr. Friedman, tell me in your own words what you did in connection with the crime to which you are entering a plea of guilty?"

Q. Could you please read his answer on the next page?

A. "The defendant: On approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at Koam Produce, Inc., located in the Bronx. I was an employee of Koam at the time. I acted knowingly and intentionally, and I knew the payments were unlawful."

Q. And do you remember, ultimately, what Mr. Friedman pled guilty to when this transcript was all said and done? If not, I --

A. I believe it was 10 counts of bribery.

Thank you, Your Honor. I have no further questions. Well, I may have -- well, yes.

Q. Even absent this, the evidence in this transcript, or the information contained in this transcript, and absent the evidence that we have heard, much of the evidence that we've heard so far, if Respondent were to have shown that Marvin Friedman paid bribes to William Cashin for expedited inspections, would that change, do you think, your recommended sanction today?

A. No.

Q. Why?

A. Illegal payments made to a produce inspector undermine the credibility of the inspection process and therefore that could lead to industry-wide impact. And, in addition, even if the inspections themselves are not fraudulent factually, times, dates, temperatures, count, all that is still correct, it's still not a fair trading practice because other competitors on the market, then someone is moved getting moved to the back of the line and somebody else is moving to the front to get expedited treatment. So that's an unfair advantage as well.

Tr. 309-15.

Conclusions of Law

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1. Marvin Friedman, an employee of Respondent, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

2. Marvin Friedman was acting as Respondent's agent, when he paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

3. Marvin Friedman was acting within the scope of his employment, when he paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce (7 U.S.C. § 499p).

4. Marvin Friedman's willful violations of the PACA are deemed to be Respondent'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).

5. Respondent, through its employee and agent, Marvin Friedman, paid bribes to a United States Department of Agriculture produce inspector, during the period April 1999 through July 1999, in connection with 42 federal inspections covering perishable agricultural commodities which Respondent received or accepted from 11 sellers in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Under the PACA, Respondent is responsible for Marvin Friedman's bribery of the United States Department of Agriculture produce inspector, even if ignorant of the bribery. *Post & Taback, Inc. v. United States Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005).

7. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) 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)).

8. Respondent's violations of the PACA were egregious, requiring the sanction of publication of the facts and circumstances of Respondent's PACA violations.

9. Publication of the facts and circumstances of Respondent's PACA violations is commensurate with the seriousness of Respondent's violations of the PACA. Respondent's violations were so egregious as to warrant publication of the facts and circumstances of Respondent's PACA violations whether Marvin Friedman's unlawful cash payments (a) were a bribe or were a gratuity; (b) were associated with United States Department of Agriculture inspection certificates that were falsified or with United States Department of Agriculture inspection certificates that were accurate; (c) were or were not paid in response to intimidation or coercion (and the evidence in this proceeding fails to prove intimidation or coercion); and (d) were or were not known to Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent (and the evidence in this proceeding fails to prove that Jung Yong "C.J." Park, Kimberly S. Park, or anyone else at Respondent knew Marvin Friedman was illegally paying money to a United States Department of Agriculture produce inspector).

10. Any lesser sanction than publication of the facts and circumstances of Respondent's violations would not be commensurate with the seriousness of Respondent's violations, even though many of Respondent's competitors were committing like violations and even though the United States Department of Agriculture produce inspectors who took the bribes and gratuities were arguably more culpable than those that paid them.

Respondent's Appeal Petition

Respondent raises four issues in Respondent's Appeal Petition.⁶ First, Respondent contends the ALJ erroneously omitted material findings of fact. Specifically, Respondent asserts the record supports the following findings of fact: (1) William Cashin was unable to identify which United States Department of Agriculture inspection certificates

⁶Respondent appeals the ALJ's April 18, 2005, Decision and Order (Respondent's Appeal Pet. at 1). However, on January 6, 2006, the ALJ issued the Initial Decision, which supercedes the ALJ's April 18, 2005, Decision and Order. Based on the record before me, I find Respondent's appeal of the ALJ's April 18, 2005, Decision and Order is inadvertent error and Respondent intends to appeal the ALJ's January 6, 2006, Initial Decision.

he falsified for Respondent; (2) when William Cashin inspected produce at Respondent's premises, Marvin Friedman made payments to William Cashin even on occasions in which Marvin Friedman had not requested inspection; (3) William Cashin received gifts from wholesalers for his birthday, for Christmas, and upon leaving the Hunts Point Terminal Market; (4) William Cashin spent large sums of money on a car, care for his 19 cats, payments to his supervisor, and gifts for his girlfriend and sister; (5) William Cashin accepted money from wholesalers during his entire 20-year career as a United States Department of Agriculture produce inspector; (6) the United States Department of Agriculture permitted William Cashin to retire with a pension; and (7) William Cashin is a felon (Respondent's Appeal Pet. at 3-4).

Respondent fails to cite the portions of the record that support Respondent's listed findings of fact. Even if I were to conclude each of Respondent's listed findings of fact is supported by the record, that conclusion would not alter the disposition of this proceeding. Therefore, I find the issue of whether the ALJ should have included Respondent's listed findings of fact in the Initial Decision, moot.

Second, Respondent contends the United States Department of Agriculture permitted William Cashin to receive payments and make false inspection reports; thus, the United States Department of Agriculture acted in complicity with William Cashin and has a conflict of interest in this proceeding (Respondent's Appeal Pet. at 4).

After having been arrested, William Cashin agreed to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture produce inspectors at the Hunts Point Terminal Market by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 133-34, 169-70; CX 16). The record does not show that Marvin Friedman was induced to make unlawful payments by the United States Department of Agriculture or that he was doing anything that he had not been doing before William Cashin agreed to cooperate with law enforcement officials. William Cashin testified that he had been receiving illegal payments from Marvin Friedman on a regular basis from the time Marvin Friedman began to work for Respondent (Tr. 121-24). During the investigation of wholesalers and inspectors at the Hunts Point Terminal Market by the Federal Bureau of Investigation, William Cashin continued to do what he had previously been doing, collecting bribes from Respondent in connection with his inspection of produce on Respondent's premises. I do not find the United States Department of Agriculture has a conflict

of interest in this proceeding merely because William Cashin was allowed to continue to act as he had prior to his arrest in order to obtain evidence of bribery in the Hunts Point Terminal Market.

Third, Respondent contends Complainant did not prove Marvin Friedman bribed William Cashin. Respondent asserts Marvin Friedman's payments to William Cashin were nothing more than solicited gratuities given for the purpose of receiving prompt inspections. (Respondent's Appeal Pet. at 5.)

I disagree with Respondent's contention that Complainant did not prove Marvin Friedman bribed William Cashin. The only testimony as to the reason for Marvin Friedman's payments to William Cashin is the testimony of William Cashin that he was being paid bribes to provide Respondent "help" with respect to the inspections. William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to help Respondent with respect to 75 percent to 80 percent of the inspections he conducted for Respondent (Tr. 125-32). Marvin Friedman, the person who actually made the payments, did not testify to contradict William Cashin. Moreover, Marvin Friedman pled guilty to 10 counts of bribery in connection with his payments to William Cashin for inspections of Respondent's produce (CX 4, CX 18).

Even if I were to find Marvin Friedman's payments to William Cashin were gratuities paid to obtain prompt inspection of Respondent's produce, I would conclude Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). A commission merchant's, dealer's, or broker's payment of gratuities to a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain

prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes and gratuities to United States Department of Agriculture produce inspectors.⁷

Fourth, Respondent contends, as Marvin Friedman's payments to William Cashin were only gratuities, only a civil penalty is warranted in this proceeding (Respondent's Appeal Pet. at 6).

As discussed in this Decision and Order, *supra*, Complainant proved that Marvin Friedman's payments to William Cashin were bribes. However, even if I were to find Marvin Friedman's payments to William Cashin were gratuities, I would order the publication of the facts and circumstances of Respondent's violations. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.⁸ While sanctions in similar cases are not required to be uniform,⁹ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

The ALJ's Revocation of Respondent's PACA License

⁷*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁹*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

The ALJ revoked Respondent's PACA license (Initial Decision at 27); however, more than 6 months prior to the ALJ's issuance of the Initial Decision, Respondent's PACA license had terminated due to Respondent's failure to pay the required annual PACA license renewal fee (Complainant's unopposed Motion for Technical Amendment at 1). As Respondent's PACA license had terminated prior to the issuance of the ALJ's Initial Decision, revocation of Respondent's non-existent PACA license was not an appropriate sanction.

Nonetheless, I agree with the ALJ's conclusion that a severe sanction is justified by the facts. Publication of the facts and circumstances of Respondent's violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent's PACA license;¹⁰ therefore, I order the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Respondent must seek judicial review within 60 days after entry of the Order issued in this Decision and Order.¹¹ The date of entry of the Order in this Decision and Order is June 2, 2006.

¹⁰*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1902 (2005); *In re JSG Trading Corp.* (Ruling as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion to Stay; and (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 424-27 (2002).

¹¹See 28 U.S.C. § 2344.

**In re: PHILIP J. MARGIOTTA.
PACA-APP Docket No. 03-0007.
Decision and Order.
Filed June 21, 2006.**

PACA – Perishable agricultural commodities – Responsibly connected – Actively involved in activities resulting in violation – Nominal officer – Alter ego – Right to engage in occupation – APA right to notice and opportunity to achieve compliance – Purpose of PACA’s responsibly connected provisions.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton’s decision concluding Philip J. Margiotta (Petitioner) was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. The Judicial Officer found M. Trombetta & Sons, Inc., during the period April 1999 through July 1999, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). During the violation period, Petitioner was the secretary of M. Trombetta & Sons, Inc. The Judicial Officer stated the burden was on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with M. Trombetta & Sons, Inc., despite his being the secretary of M. Trombetta & Sons, Inc. The PACA provides a two-prong test which a petitioner must meet in order to demonstrate he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-prong test. The Judicial Officer also held: (1) employment restrictions in 7 U.S.C. § 499h(b) imposed on a responsibly connected person do not violate the constitutional right to engage in a particular occupation; (2) the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is not applicable to responsibly connected proceedings under the PACA; (3) Petitioner was not irrebuttably presumed to be responsibly connected with M. Trombetta & Sons, Inc.; and (4) imposing employment sanctions on Petitioner carries out the purpose of the Perishable Agricultural Commodities Act.

Andrew Y. Stanton for Respondent.
Mark C. H. Mandell, Annandale, NJ, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 11, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Philip James Margiotta [hereinafter Petitioner] was responsibly connected with M. Trombetta & Sons, Inc., during the period April 20, 1999, through July 7, 1999, when M. Trombetta & Sons, Inc., violated the PACA.¹ On March 20, 2003, Petitioner filed a "Petition for Review of Chief's Determination" pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc.

On April 15, 2003, and May 6, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] consolidated for hearing the instant proceeding with three related proceedings, a disciplinary proceeding, *In re M. Trombetta & Sons, Inc.*, PACA Docket No. D-02-0025, and two responsibly connected proceedings, *In re Stephen Trombetta*, PACA-APP Docket No. 03-0008, and *In re P.J. Margiotta*, PACA-APP Docket No. 03-0012.² On July 14 through July 18, 2003, July 21 through July 23, 2003, and August 21, 2003, the ALJ presided over a hearing in New York, New York. Mark C. H. Mandell, Law Firm of Mark C. H. Mandell, Annandale, New Jersey, represented Petitioner. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Respondent.³

¹During the period April 20, 1999, through July 7, 1999, M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, made seven illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

²Order Consolidating Cases for Hearing, and Amending Case Caption filed April 15, 2003, and Order Consolidating Cases for Hearing, and Amending Case Caption filed May 6, 2003.

³On January 31, 2005, Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, entered an appearance on behalf of Respondent, replacing David A. Richman as counsel for Respondent (Notice of Appearance filed January 31, 2005).

(continued...)

Petitioner and M. Trombetta & Sons, Inc., submitted 22 exhibits, RX A through RX V. Petitioner and M. Trombetta & Sons, Inc., called 11 witnesses: (1) Petitioner (Tr. 498-551, 574-851, 996-1163, 1338-81, 1390-1408, 1535-45); (2) Peter Silverstein (Tr. 872-924); (3) Max Montalvo (Tr. 932-74); (4) Frank Falletta (Tr. 1199-1221); (5) Matthew John Andras (Tr. 1221-65); (6) Harlow E. Woodward, III (Tr. 1266-1300); (7) Stephen Trombetta (Tr. 1311-36); (8) Martin A. Shankman (Tr. 1412-23); (9) Patricia Baptiste (Tr. 1424-33); (10) Philip Lucks (Tr. 1616-38); and (11) Philip Joseph Margiotta (Tr. 1651-81).

Respondent submitted the exhibits in the certified agency record upon which Respondent based his February 11, 2003, determination, CARX, and 13 additional exhibits, CX 1 through CX 10, AX 1, AX 2, and AX 3. Respondent called three witnesses: (1) Joan Marie Colson (Tr. 25-127); (2) William J. Cashin (Tr. 127-60, 172-358); and (3) John Aloysius Koller (Tr. 359-71, 378-495, 1441-1532, 1546-96, 1683-1725). The ALJ admitted into evidence all of the parties' exhibits and also ALJX 1.

On May 11, 2005, the ALJ severed the four proceedings from one another.⁴ On January 31, 2006, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA (Initial Decision at 1, 11-12).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 27, 2006, Respondent filed a response to Petitioner's appeal petition. On June 7, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's conclusion that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; however, I disagree with the ALJ's conclusion that Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Petitioner's exhibits are designated by "RX." Respondent's exhibits are designated by "CX" and "AX." Exhibits in the agency record upon which Respondent based his February 11, 2003, responsibly connected

³(...continued)

⁴Order Severing Cases filed May 11, 2005.

determination as to Petitioner, which is part of the record in this proceeding,⁵ are designated by “CARX.” The Administrative Law Judge’s exhibit is designated “ALJX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

⁵7 C.F.R. § 1.136(a).

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

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

by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

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

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

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

. . . .

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

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

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

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

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

Except with the approval of the Secretary, no licensee shall

employ any person, or any person who is or has been responsibly connected with any person—

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

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

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

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

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

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

DECISION

Decision Summary

I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Findings of Fact

1. After careful consideration of all the evidence, I find credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Petitioner; Peter Silverstein; Max Montalvo; Frank Falletta; Matthew John Andras; Harlow E. Woodward, III; Stephen Trombetta; Martin A. Shankman; Patricia Baptiste; Philip Lucks; and Philip Joseph Margiotta.

2. Petitioner is an individual who was born on August 13, 1949, and whose mailing address was, at all times material to this proceeding, 41 Bellain Avenue, Harrison, New York 10528 (Tr. 498-500, 1607-08, 1684; CARX 3; AX 1).

3. M. Trombetta & Sons, Inc., was started in the 1890s, and the fifth generation of the family is now in the business. M. Trombetta & Sons, Inc., has two facilities, one at the Hunts Point Terminal Market, New York, New York, and the other at the Bronx Terminal Market, New York, New York. At all times material to this proceeding, Petitioner was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Hunts Point Terminal Market, and Stephen Trombetta was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Bronx Terminal Market. (Tr. 499-500, 504, 1338, 1342, 1677.)

4. At all times material to this proceeding, Philip Joseph Margiotta was the holder of 60 percent of the stock of M. Trombetta & Sons, Inc.; Stephen Trombetta was the holder of 40 percent of the stock of M. Trombetta & Sons, Inc.; and Petitioner was not a holder of stock of M. Trombetta & Sons, Inc. (Tr. 1676-77).

5. At all times material to this proceeding, Philip Joseph Margiotta was the president and treasurer of M. Trombetta & Sons, Inc.; Stephen Trombetta was the vice president of M. Trombetta & Sons, Inc.; and Petitioner was the secretary of M. Trombetta & Sons, Inc. (CX 1; CARX 1; Tr. 499, 1338, 1662, 1679).

6. Philip Joseph Margiotta retired from active participation in M. Trombetta & Sons, Inc., in 1993. At the time of the hearing, Philip Joseph Margiotta had not drawn a salary from M. Trombetta & Sons, Inc., for more than 10 years. Stephen Trombetta had visited M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. (Tr. 1312, 1653, 1672, 1680.)

7. M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility during the period April 1999 through July 1999 (CX 4, CX 6-CX 9; RX N; ALJX 1).⁶

8. Joseph Auricchio was acting in the scope of his employment as M. Trombetta & Sons, Inc.'s produce salesperson when he paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector. Mr. Auricchio's payments of bribes and gratuities to a United States Department of Agriculture produce inspector are deemed to be M. Trombetta & Sons, Inc.'s willful,

⁶*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005).

flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).⁷ (Tr. 363-65.)

9. M. Trombetta & Sons, Inc., was 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 a United States Department of Agriculture produce inspector in connection with federal inspections of perishable agricultural commodities.⁸

10. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and, after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

11. Petitioner observed the work of the foreman (who watches the porters) and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s purchases and sales were properly recorded. Petitioner hired the sales staff, including Joseph Auricchio. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

12. Joseph Auricchio was one of M. Trombetta & Sons, Inc.'s employees monitored by Petitioner. Petitioner was not aware that Mr. Auricchio paid bribes to a United States Department of Agriculture produce inspector until Mr. Auricchio pled guilty to bribery in 2000. (Tr. 508, 525-30, 550, 1358; ALJX 1.)

13. Petitioner worked through the union to terminate two employees

⁷*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1892 (2005). See *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

⁸*Post & Taback, Inc. v. Department of Agric.*, 123 F. App'x 406 (D.C. Cir. 2005).

of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Petitioner learned that Mr. Auricchio pled guilty to paying bribes to a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

14. Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1 at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63).

15. Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.)

16. Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

17. On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998, through April 30, 1999, and May 1, 1999, through April 30, 2000 (CARX 6).

18. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 9).

Discussion

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁹ The record establishes Petitioner was the secretary of M. Trombetta & Sons, Inc., during the period April 1999 through July 1999, when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not

⁹7 U.S.C. § 499a(b)(9).

responsibly connected with M. Trombetta & Sons, Inc., despite his being an officer of M. Trombetta & Sons, Inc.

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

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

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

I find Petitioner carried his burden of proof that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Petitioner failed to carry his burden of proof that he was only nominally an officer of M. Trombetta & Sons, Inc. Further, while Petitioner demonstrated he was not an owner of M. Trombetta & Sons, Inc., he did not demonstrate that M. Trombetta & Sons, Inc., was the alter ego of its two owners, Philip

Joseph Margiotta and Stephen Trombetta.

In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.¹⁰

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. Petitioner actively managed M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and, after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

Petitioner observed the work of the foreman and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s transactions were properly recorded. Petitioner hired the sales staff. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

Petitioner worked through the union to terminate two employees of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner also

¹⁰*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Mr. Auricchio pled guilty to bribing a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1 at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63). Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.) Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998, through April 30, 1999, and May 1, 1999, through April 30, 2000. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 6, CARX 9.)

Under the statutory definition of the term *responsibly connected*, the fact that Petitioner was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA does not exonerate him unless he also proves by a preponderance of the evidence that his position at M. Trombetta & Sons, Inc., was nominal. Petitioner has not demonstrated by a preponderance of the evidence that he was only the nominal secretary of M. Trombetta & Sons, Inc.

Petitioner's Appeal Petition

Petitioner raises seven issues in "Petitioner's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145 From the Decision of the Hon. Jill S. Clifton, A.L.J., Dated January 31, 2006" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the ALJ erroneously found Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA (Petitioner's Appeal Pet. at 2-3).

I agree with Petitioner's contention that the ALJ erroneously found

Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA. Petitioner demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

M. Trombetta & Sons, Inc.'s former employee, Joseph Auricchio, acted alone in paying the unlawful bribes and gratuities to a United States Department of Agriculture produce inspector. There is no evidence suggesting that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, was involved in paying the unlawful bribes and gratuities. Mr. Auricchio did not implicate Petitioner (RX N; ALJX 1). The evidence does not prove that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, knew Mr. Auricchio was illegally paying money to a United States Department of Agriculture produce inspector.

A determination from the related disciplinary case, which was consolidated with the instant proceeding for hearing, refers to the lack of culpability of anyone within M. Trombetta & Sons, Inc., except Joseph Auricchio, as follows:

Considering all of the evidence, [M. Trombetta & Sons, Inc.], but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within [M. Trombetta & Sons, Inc.,] other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at [M. Trombetta & Sons, Inc.'s] place of business for about 20 years, collected no bribes from [M. Trombetta & Sons, Inc.,] until Joseph Auricchio started to work as a salesperson for [M. Trombetta & Sons, Inc.,] in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for [M. Trombetta & Sons, Inc.] Nevertheless, I hold [M. Trombetta & Sons, Inc.,] responsible for the actions of Joseph Auricchio, just as if [M. Trombetta & Sons, Inc.,] itself had performed each of Mr. Auricchio's acts.

In re M. Trombetta & Sons, Inc., 64 Agric. Dec.1869, 1893 (2005).

The record contains no evidence that Petitioner knew of, or contributed to, the payment of unlawful bribes and gratuities by M. Trombetta & Sons, Inc.'s employee Joseph Auricchio (Tr. 1152-53, 1358, 1360). Moreover, when Mr. Auricchio suggested bribing a United States Department of Agriculture produce inspector in order to obtain expedited inspection of perishable agricultural commodities, Petitioner emphatically explained to Mr. Auricchio that M. Trombetta & Sons, Inc., did not engage in that behavior and, if Mr. Auricchio did engage in that behavior, his employment with M. Trombetta & Sons, Inc., would be terminated (Tr. 521, 524-25).

Joseph Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility (Tr. 509, 515, 1126, 1150, 1345, 1348). The record establishes that Petitioner monitored M. Trombetta & Sons, Inc.'s employees, including Joseph Auricchio, at the Hunts Point Terminal Market facility (Tr. 520-27, 1161, 1346-58). Nevertheless, Mr. Auricchio was able to pay unlawful bribes and gratuities to a United States Department of Agriculture produce inspector without being observed (Tr. 137-38, 538-39, 543-44, 549-51, 1114-31).

The activities that resulted in a violation of the PACA are not limited to Joseph Auricchio's activities of wrongdoing. Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner's management of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Second, Petitioner contends the record contains no evidence that M. Trombetta & Sons, Inc., "was operating as the alter-ego of Petitioner" (Petitioner's Appeal Pet. at 3).

I agree with Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego. However, I do not find Petitioner's contention relevant to this proceeding. The second prong of the two-prong responsibly connected test requires a petitioner to demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA

licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The record establishes that Philip Joseph Margiotta and Stephen Trombetta were the only owners of M. Trombetta & Sons, Inc. Therefore, Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego does not address the second alternative of the second prong of the responsibly connected test, and the issue of whether M. Trombetta & Sons, Inc., was Petitioner's alter ego is not relevant to this proceeding.

Third, Petitioner contends he was only a nominal officer of M. Trombetta & Sons, Inc. (Petitioner's Appeal Pet. at 4-5).

I disagree with Petitioner's contention that he was only a nominal officer of M. Trombetta & Sons, Inc. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.¹¹

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. As discussed in this Decision and Order, *supra*, at all times material to this proceeding, Petitioner managed M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility and executed numerous documents and issued numerous checks in his capacity as secretary of M. Trombetta & Sons, Inc. (Tr. 499, 505, 1152, 1338-40, 1342-47, 1362-63, 1369-70; CARX 1, CARX 5, CARX 6, CARX 8, CARX 9).

Fourth, Petitioner contends a finding that he is responsibly connected with M. Trombetta & Sons, Inc., would subject him to employment restrictions in violation of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States (Petitioner's Appeal Pet. at 6).

Individuals found to be responsibly connected with a commission

¹¹See note 10.

merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹²

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹³ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer may be deemed *responsibly connected* and subject to employment sanctions in the PACA.¹⁴ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Petitioner's due process rights by arbitrarily interfering with Petitioner's chosen occupation.

Contrary to Petitioner's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.¹⁵ A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals

¹²*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹³H.R. Rep. No. 1041 (1930).

¹⁴*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

¹⁵*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

found to be responsibly connected with PACA violators.¹⁶

Fifth, Petitioner asserts the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector, and, under this circumstance, the government of the United States was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to inform Petitioner of Mr. Auricchio's activities and to provide Petitioner with an opportunity to bring M. Trombetta & Sons, Inc., into compliance with the PACA (Petitioner's Appeal Pet. at 6-7).

As an initial matter, the record does not establish that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector. However, even if I found that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Mr. Auricchio's illegal payments, I would not conclude that the government was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to provide Petitioner with notice of facts which may warrant license revocation and an opportunity to achieve compliance with the PACA, as Petitioner asserts.

The Administrative Procedure Act provides, before institution of agency proceedings for the revocation of a license, the licensee must be given notice of the facts which may warrant revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

Petitioner is not a PACA licensee. This responsibly connected

¹⁶*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

proceeding concerns merely Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; it does not concern the revocation of a PACA license held by Petitioner. Therefore, with respect to this responsibly connected proceeding, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.¹⁷

Sixth, Petitioner asserts the irrebuttable presumption that he was responsibly connected with M. Trombetta & Sons, Inc., is unconstitutional (Petitioner's Appeal Pet. at 7-10).

I disagree with Petitioner's assertion that he is irrebuttably presumed to have been responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-prong test.

Seventh, Petitioner contends any sanction imposed on him for Joseph Auricchio's payments to a United States Department of Agriculture produce inspector violates the due process clause of the Fifth Amendment to the Constitution of the United States. Petitioner asserts Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm any of

¹⁷*In re Coosemans Specialties, Inc.*, __ Agric. Dec. __, slip op. at 39-40 (Apr. 20, 2006).

M. Trombetta & Sons, Inc.'s shippers. Petitioner contends, under these circumstances, finding Petitioner responsibly connected would not have any rational basis because it would be unrelated to the goal of the PACA to promote fair trade. (Petitioner's Appeal Pet. at 11-15.)

Even if Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm M. Trombetta & Sons, Inc.'s shippers, these circumstances would not be relevant to the determination of whether Petitioner was responsibly connected. While the overall purpose of the PACA is to suppress unfair and fraudulent practices in the produce industry,¹⁸ the purpose of the PACA responsibly connected provisions is to prevent circumvention of the sanctions imposed for violations of the PACA. The purpose of the responsibly connected provisions of the PACA was explained by the United States Court of Appeals for the District of Columbia Circuit, as follows:

As originally enacted in 1930, Section 8 empowered the Secretary to suspend or revoke the authority of a licensee to do business under the Act, but contained no provision enabling restrictions on future employment of those who were violators in an employee capacity. Thus, for example, a violator could circumvent the Act by the subterfuge of acting as an "employee" of a dummy corporation newly licensed. By enactment of what is now Section 8(b) in 1934 and amendment thereof in 1956, the Secretary was authorized to revoke a license when the licensee, after notice from the Secretary, continued to employ in a "responsible position" one whose own license had been revoked or suspended or one who had been "responsibly connected" with a licensee who incurred revocation or suspension. These charges, however, left to the Secretary the task of ascertaining what in the way of new employment constituted a "responsible position," and who in the way of old employment had been "responsibly connected" with a violating licensee.

It was to ameliorate the problems incidental to such determination that Congress in 1962 again amended Section 8(b). . . .

¹⁸*Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966).

....

Simultaneously with the 1962 amendment of Section 8(b), Congress added the present Section 1(9) as a new provision of the Act. The explanation for this addition was sparse. When the Committee reported the bill out favorably, it stated merely that Section 1(9) would give the term “responsibly connected” and others “specific meaning, thus avoiding possible confusion as to interpretations.”

Quinn v. Butz, 510 F.2d 743, 753-54 (D.C. Cir. 1975) (footnotes omitted).

Therefore, in determining whether a person is responsibly connected, the focus is on whether the person meets the criteria set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)). This approach is entirely consistent with the purpose of the responsibly connected provisions of the PACA, to prevent the partnership, corporation, or association that has violated the PACA from circumventing the suspension or revocation sanctions issued under the PACA by continuing to operate within the perishable agricultural commodities industry through individuals who were responsibly connected with the partnership, corporation, or association when the partnership, corporation, or association violated the PACA.

Petitioner contends that Congress, when it amended the PACA in 1995 by establishing the two-prong test in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), did not account for circumstances present in this case, where the violating employee acted without authorization and in a manner undetectable by the PACA licensee’s management. Petitioner asserts that, holding him responsibly connected under these circumstances “is therefore not rationally related to the [1995] amendment’s purpose of exonerating non-culpable corporate principals to find as responsibly connected the manager who, even with oversight, could not have uncovered and prevented the alleged violations.” (Petitioner’s Appeal Pet. at 13-14.)

I agree with Petitioner that section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995, establishing the two-prong responsibly connected test, did not specifically address the factual circumstances surrounding M. Trombetta & Sons, Inc.’s PACA violations. However, my agreement with Petitioner’s assertion does not

mean that holding Petitioner responsibly connected under the facts of this case would violate the purpose of the Perishable Agricultural Commodities Act Amendments of 1995, as the actual purpose of the Perishable Agricultural Commodities Act Amendments of 1995 differs from the purpose asserted by Petitioner. As noted in the section-by-section analysis of the relevant House Report, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is “to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.”¹⁹ The House Report includes the United States Department of Agriculture’s comments regarding the amendment to the definition of the term *responsibly connected*, as follows:

H.R. 1103, as amended, also would amend the current definition of “responsibly connected” in the Act to allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.

H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66. Thus, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is to provide each alleged responsibly connected person the opportunity to rebut the presumption of responsible connection based on his or her position with a violating company by meeting certain criteria. This responsibly connected proceeding has been conducted consistent with section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995.

Petitioner contends section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is unconstitutional if applied in the way urged by Respondent, as this would resurrect the “per se” rule (Petitioner’s Appeal Pet. at 15). However, the “per se” rule, which held that a person was automatically responsibly connected if he or she was a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the stock of a corporation or association, has not been in effect since enactment of the Perishable Agricultural Commodities Act Amendments of 1995. In accordance with the PACA and the Rules

¹⁹H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

of Practice, a person alleged to be responsibly connected has the right to a hearing to present evidence that he or she was not responsibly connected. Petitioner has fully availed himself of this right in the course of the instant proceeding. I find Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA because Petitioner has failed to present sufficient evidence to rebut the presumption of responsible connection stemming from his position as secretary of M. Trombetta & Sons, Inc., based on the criteria in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), not because Petitioner has been automatically considered responsibly connected under a “per se” rule.

Conclusions of Law

1. During the period April 1999 through July 1999, M. Trombetta & Sons, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to perform its duty to maintain fair trade practices required by the PACA.

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

3. During the period April 1999 through July 1999, Petitioner was the secretary of M. Trombetta & Sons, Inc. Petitioner failed to prove by a preponderance of the evidence that he was only a nominal officer of M. Trombetta & Sons, Inc.

4. Petitioner proved by a preponderance of the evidence that he was not an owner of M. Trombetta & Sons, Inc.

5. Petitioner failed to prove by a preponderance of the evidence that M. Trombetta & Sons, Inc., was the alter ego of its owners, Philip Joseph Margiotta and Stephen Trombetta.

6. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.²⁰ The date of entry of the Order in this Decision and Order is June 21, 2006.

²⁰See 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT
REPARATION DECISION

MAYOLI, INC. v. WEIS-BUY SERVICES, INC.
PACA Docket No. R-03-0090.
Decision and Order.
Filed January 18, 2006.

PACA --
Mayoli, Inc. v. Weis-Buy Services, Inc., PACA Docket No. R-03-0090

Meeting of the Minds

When the President of Complainant grower signed and faxed back Respondent grower's agent's written marketing agreement authorizing Respondent to sell Complainant's peppers, this was deemed to reflect a meeting of the minds regarding the contract terms and the written marketing agreement was found to constitute the contract between the parties, rather than the conditions orally conveyed by Complainant's President to Respondent's employee several days earlier.

Grower's Agent

While the terms of the written marketing agreement between Complainant grower and Respondent, the grower's agent, gave Respondent broad discretion to sell Complainant's peppers, Respondent was held to have acted negligently by making large price concessions purportedly based on condition problems without obtaining federal inspections. Regarding those sales in which Respondent did not act negligently, Respondent was held not to be required to obtain the prevailing market price for Complainant's peppers.

Fees and Expenses

Although Complainant was awarded only a small percentage of the damages claimed, Complainant prevailed on the issues upon which most time was spent at the oral hearing and was found to be the prevailing party in whose favor fees and expenses were awarded.

Paul Gentile, Michael Kriences, Allan Robert Kahan for Petitioner.
Michael Keaton for Respondent.
Presiding officer Andrew Stanton, Office of General counsel.
Decision and Order by Judicial Officer William R. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter, "PACA"). A timely informal complaint was filed with the Department in which Complainant sought a reparation award against Respondent in the amount of \$144,660.80, which was alleged to be past due and owing in connection with multiple shipments of green bell peppers handled by Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. Complainant filed a formal complaint, alleging damages of \$68,764.81. Complainant also requested an oral hearing. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant. Complainant subsequently moved to amend its complaint, alleging that its damages were either \$95,630.45 or \$206,378.45, depending on the method of calculation, and its motion to amend was granted.

The oral hearing was held in Fort Myers, Florida on May 19 through 21, 2004, and November 17 and 18, 2004. Complainant was initially represented by attorney Paul Gentile, Gentile and Dickler, New York, New York. Prior to the November portion of the hearing, Mr. Gentile was replaced by attorney Leonard Kreinces, Kreinces and Rosenberg, Westbury, New York. After the November portion of the hearing, Mr. Kreinces was replaced by attorney Allan Robert Kahan, Silver Spring, Maryland. Respondent was represented throughout the proceeding by Michael J. Keaton, Palatine, Illinois. Andrew Y. Stanton, attorney with the Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. Complainant submitted 21 exhibits into evidence and Respondent submitted 16 exhibits into evidence. Additional evidence is contained in the Department's Report of Investigation.

At the hearing, two witnesses testified for Complainant and three witnesses testified for Respondent. A transcript of the hearing was

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prepared¹. At the hearing, Complainant amended its claim for damages to \$144,660.80 (Tr. May, at 306-308).

Both parties filed briefs and claims for fees and expenses. In Complainant's brief, it amended its claim for damages to \$59,436.75. Respondent objected to Complainant's claim for fees and expenses and Complainant filed a Reply to Respondent's objection.

Findings of Fact

1. Complainant, Mayoli, Inc., is a corporation whose business address is 787 Washington Street, Newton, Massachusetts 02460. Complainant, in association with a related company, Bitt International Company, Inc., Newton, Massachusetts, grows and sells perishable agricultural commodities. Among the commodities grown by Complainant in 2001 was a field of green peppers located in Americus, Georgia. At the times of the transactions alleged in the complaint, Complainant was licensed under the PACA.

2. Respondent, Weis-Buy Services, Inc., is a corporation whose business address is 6225 Presidential Court Suite D, Fort Myers, Florida 33919. At the times of the transactions alleged in the complaint, Respondent was licensed under the PACA.

3. In approximately the third week of October 2001, Complainant's president, Mr. Arnon Blumenfeld, and Respondent's president, Mr. Charles Weisinger, had a telephone conversation in which they discussed the possibility of Respondent handling, as a grower's agent, a field of green peppers that Complainant owned, located in Americus, Georgia (Tr. May, at 21-22). Mr. Weisinger said that, before he would make any commitments, he would send an employee of Respondent, Hank Douglas, to examine the field of peppers (Tr. May, at 22).

4. Sometime during the last few days of October 2001, Mr. Douglas visited Americus, Georgia and, accompanied by Mr. Blumenfeld, examined Complainant's field of green peppers (Tr. May, at 22, 537).

¹The portion of the transcript covering the hearing dates of May 19, 20 and 21, 2004, bear page numbers 1-865 and will be referred to as "Tr. May, at ____". The portion of the transcript covering the hearing date of November 17, 2004, bears page numbers 1-186 and will be referred to as "Tr. Nov. 17, at ____". The portion of the transcript covering the hearing date of November 18, 2004, bears page numbers 1-217 and will be referred to as "Tr. Nov. 18, at ____".

Mr. Blumenfeld informed Mr. Douglas how the sale of the peppers should be handled. Mr. Blumenfeld said that wanted the prices to be f.o.b. Americus, Georgia, the buyers to be only those listed in the Red Book and Blue Book (two publications that contain information about produce companies), the buyers to have ratings of at least three stars, and payment to be made within 10 days after acceptance (Tr. May, at 23). Mr. Blumenfeld and Mr. Douglas also discussed how Respondent would handle Complainant's peppers (Tr. May, at 22-27, 539). Complainant would pick the peppers and bring them to the cooler, which was about six miles from the field (Tr. May, at 23-24). At night, Mr. Blumenfeld would send a fax to Respondent, indicating how much was picked during that day and stored in the cooler (Tr. May, at 24). The following day, Respondent would send Complainant a fax containing Respondent's purchase order for the peppers in the cooler, which were referenced in Complainant's fax the previous evening (Tr. May, at 25). Respondent's truck would then pick up the peppers from the cooler (Id.). Mr. Douglas made clear to Mr. Blumenfeld that Respondent's decision whether or not to handle Complainant's peppers would be made by Mr. Weisinger (Tr. May, at 28, 539).

5. The day after Mr. Douglas visited Complainant's field to examine the peppers, on approximately October 30, 2001, Mr. Weisinger called Mr. Blumenfeld and stated that Respondent would handle Complainant's peppers as a grower's agent (Tr. May, at 29-30).

6. On approximately November 1, 2001, Mr. Blumenfeld, who was then at the Atlanta airport, received a call on his cell phone from Mr. Douglas (Tr. May, at 34). Mr. Douglas indicated that Respondent would not be able to sell Complainant's peppers until the parties had a written marketing agreement (Id.). Respondent sent a proposed marketing agreement to Mr. Blumenfeld at a hotel at the Atlanta airport (Tr. May, at 35, 561-564). Mr. Blumenfeld reviewed the proposed marketing agreement, made a change in the payment terms from 60 days after shipment to 30 days, signed it, and faxed it back to Respondent (Tr. May, at 36, 276-277, 456-458) (RX 1-1 through RX 1-6).

7. The record contains three versions of a written market agreement (CX 23, RX 1-1 through 1-3, and RX 1-4 through 1-6). All three versions consist of Respondent's standard marketing agreement and contain the same printed terms, with blank spaces for handwritten inserts to be made. All three versions contain a handwritten change to the required time for payment in section III, from 60 days to 30 days

after the grower's shipment of the product. All three versions bear Mr. Blumenfeld's signature.

a. One version (RX 1-4 through 1-6) states that it is "made and entered into in Fort Myers, Florida, effective this 01 day of November, 2001 between Weis-Buy Services, Inc., a Florida corporation ("Agent") and Mayoli, Inc. ("grower")." The agreement also states that it is "executed this 01 day of November 2001, in the State of Georgia." The agreement is signed by Mr. Blumenfeld for Complainant (Tr. May, at 276). The sections for Respondent's name and signature are blank. Mr. Blumenfeld changed Paragraph III with a handwritten notation to reflect that payment is due the grower within 30 days, rather than 60 days (Tr. May, at 274). The document bears a printed notation at the top which indicates that it was faxed on November 2, 2001. The notation does not show who faxed the document.

b. Another version (RX 1-1 through 1-3) states that it is "made and entered into in Fort Myers, Florida, effective this 20 day of Nov., between Weis-Buy Services, Inc., a Florida corporation ("Agent") and Mayoli Inc ("grower")." The space for the year is left blank. The agreement also states that it is "executed this 2 day of November 2001, in the State of Georgia." This document is signed by Mr. Blumenfeld for Complainant (Tr. May, at 273) and Mr. Weisinger for Respondent (Tr. May, at 776) and also bears the handwritten alteration reflecting that payment is due the grower within 30 days, rather than 60 days, although the alteration appears to be in a different handwriting than the version at RX 1-4 through 1-6 and bears the initials "cw". This document bears a printed notation at the bottom which indicates that it was faxed from Respondent on November 2, 2001. Otherwise, this version is identical to the first version of the marketing agreement.

c. The third version of the marketing agreement (CX 23) appears to be a photocopy of RX 1-1 through 1-3, except that it does not bear the printed notation at the bottom found in RX 1-1 through 1-4 but instead bears a printed notation at the top which indicates that it was faxed from Respondent on December 5, 2001.

8. All three versions of the marketing agreement contain 11 paragraphs, including the following:

II. Services. Agent agrees to use its best efforts to market the Produce, arrange for its sale, arrange for shipping and recovery of the payment for the Produce sold by Grower to the buyer. Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the manner and

timing of the sales of the Produce, the price at which it is sold and the market or customer to which the Produce is sold.

III. Payment. Agent will tender full payment for any and all sales of Produce to the Grower promptly upon receipt of payments from the buyer of each such delivery, subject only to the terms and conditions as stated herein. In the absence of a negotiated price reduction due to arrival problems, Agent shall remit the buyer's payment to Grower no later than thirty (30) days following the Grower's shipment of the Produce and the buyer's acceptance of the Produce. Grower agrees and consents to Agent retaining its commission of eight percent (8%) out of the gross sale proceeds of any load of Produce, in addition to any and all expenses for such items as third party storage, freight and freight related expenses, handling fees or similar items.

IV. Quality on Arrival. The Grower shall, at all times relevant to this agreement, bear sole responsibility and accountability for the Produce meeting good arrival standards under each contract for the sale of Produce which Agent handles for the Grower. If any buyer questions the quality of the Produce upon arrival, Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the best manner in which to address and resolve the arrival problem. Such actions shall include, but are not limited to, Agent's election to have the buyer call for a USDA federal inspection, survey by an accredited body in the case of international shipments, or a negotiated credit or other unit price reduction on the Produce. All such negotiations shall be conducted by Agent in the Grower's name and shall be binding upon the Grower. Agent shall utilize its best efforts to promptly notify Grower of any such arrival problems, the status of negotiations over any proposed credits, the election to call for a USDA federal inspection or accredited body survey on any international shipments and, if so, the results of any such inspection or survey.

V. Risk of Loss. Grower shall remain obligated to honor any and all negotiated price reductions with the full understanding such reductions may result in a remittance back to the Grower of less than the full sales price. Grower also understands Agent may consent to such price reductions on behalf of the Grower with or without a USDA federal inspection or accredited body

survey on any international shipments. In the event the Produce sold under any transaction fails to meet good arrival standards in accordance with USDA-PACA Branch rules and regulations, the Grower shall remain liable for any and all expenses, costs or other losses incurred as a result of the Produce failing to meet the good arrival standards applicable to the given transaction.

9. Respondent picked up 32 loads of peppers from Complainant's cooler from October 30, 2001, through November 15, 2001 (CX 9).

10. On approximately November 14, 2001, Complainant's picking crew left (Tr. May, at 54-55). Complainant stopped irrigating the pepper field and turned off the cooler (Tr. May, at 56). However, there were additional peppers left in the field (Id.).

11. On approximately November 15, 2001, Mr. Blumenfeld and Respondent's salesman, Mr. Douglas, had a telephone conversation about Complainant's inability to pick any additional peppers since Complainant's picking crew had left (Tr. May, at 57, 552, 614-618). Mr. Douglas indicated that he might be able to find another picking crew and Mr. Blumenfeld said that this would be fine (Tr. May, at 57, 617-618). Respondent obtained Georgia Vegetable Company, Tifton, Georgia, to do the picking and either Mr. Douglas or Mr. Weisinger informed Mr. Blumenfeld of this (Tr. May, at 618).

12. Between November 15, 2001, and November 21, 2001, Respondent picked up approximately five loads of green peppers from Complainant's field.

13. Respondent made payments to Complainant by means of a check, dated November 7, 2001, for \$15,000 (RX 14-1); and by wire transfers on November 27, 2001, in the amount of \$15,000; December 7, 2001, in the amount of \$35,000; and December 19, 2001, in the amount of \$17,289.20 (RX 14-2 through 14-4), for total payments of \$82,289.20.

14. On December 26, 2001, Respondent sent Complainant a Grower Analysis, setting forth the results of Respondent's sales of Complainant's peppers (RX 9-1 through 9-2). Respondent's Grower Analysis showed that Respondent had sold 27,158 boxes of Complainant's peppers for net proceeds of \$82,289.20 and that Respondent had made payments to Complainant totaling \$82,289.20, leaving nothing additional that was due and owing to Complainant.

15. Complainant filed an informal complaint on March 11, 2002 (Report of Investigation, Ex. 4), which was within nine months from the time the alleged cause of action accrued.

16. An investigation of this matter was conducted by Ivelisse Valentin, Marketing Specialist with the Manassas, Virginia office of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service of the United States Department of Agriculture (Report of Investigation, EX 7, 8 and 9). The investigation took place between July 29, 2002, and August 5, 2002. Ms. Valentin utilized the contract terms found in the written marketing agreement (Report of Investigation, EX 7, pages 2-3). Ms. Valentin found as follows:

a. Respondent actually sold 26,960 boxes of Complainant's peppers, rather than the 27,158 boxes which Respondent had reported to Complainant. These 26,960 boxes generated gross returns of \$100,681.85 (Report of Investigation, EX 7, pages 5-6).

b. There was insufficient support for Respondent's returns of \$19,131.55 for 7,822 boxes of Complainant's peppers, due largely to the absence of inspection certificates (Report of Investigation, EX 7, pages 9-11). For these 7,822 boxes, Ms. Valentin calculated the returns which Respondent should have obtained by using the average sales prices of peppers sold by Respondent that were similar to those sold on behalf of Complainant, during the same period of time (Report of Investigation, EX 7, page 6). Using the average sales prices, Ms. Valentin found that the Respondent's returns should have been \$43,996.70, or \$24,865.15 more than the \$19,131.55 reported to Complainant by Respondent (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g), as set forth below:

(See Landscape oriented tables on following two pages -- Editor)

656 PERISHABLE AGRICULTURAL COMMODITIES ACT

Invoice No.	No. of Boxes and Size	Respondent's Returns Per Box	Respondent's Returns Per Lot	Reason Disallowed	Ave. Sales Price Per Box	Adjusted Returns Per Lot
27040	259 choice	\$2.50	\$647.50	Unjustified return - no inspection	\$6.5000	\$1,683.5000
27042	600 extra large	\$2.25	\$1,350.00	Unjustified return - inspection shows damage within tolerance	\$4.6021	\$2,761.2600
27043	230 large	\$0	\$0	Unjustified return - no inspection	\$4.6021	\$1,058.4830
27045	998 extra large	\$2.85	\$2,844.30	Unjustified return - no inspection	\$4.6021	\$4,592.8958
27087	300 choice	\$2.33	\$699.00	Unjustified return - no inspection	\$6.5000	\$1,950.0000
27096	1440 jumbo	\$2.00	\$2,880.00	Unjustified return - no inspection	\$7.1000	\$10,224.0000
27098	500 extra large	\$3.85	\$1,925.00	Unjustified return - no inspection	\$4.6021	\$2,301.0500
27162	360 extra large	\$2.80	\$1,008.00	Unjustified return - no inspection	\$4.6021	\$1,656.7560
27162	960 jumbo	\$2.80	\$2,688.00	Unjustified return - no inspection	\$7.1000	\$6,816.0000

Invoice No.	No. of Boxes and Size	Respondent's Returns Per Box	Respondent's Returns Per Lot	Reason Disallowed	Ave. Sales Price Per Box	Adjusted Returns Per Lot
27162	11 chopper	\$2.00	\$22.00	Unjustified return - no inspection	\$3.43	\$37,6937
27162	159 suntan	\$2.00	\$318.00	Unjustified return - no inspection	\$2.7500	\$437.2500
27187	600 jumbo	\$3.50	\$2,100.00	Unjustified return - no inspection	\$7.1000	\$4,260.0000
27268	77 suntan	\$0	\$0	Unjustified return - no inspection	\$2.7500	\$211.7500
27268	14 mixed red	\$0	\$0	Unjustified return - no inspection	\$2.7500	\$38.5000
27268	87 chopper	\$2.25	\$195.75	Unjustified return - no inspection	\$3.4267	\$298.1229
27353	1118 extra large	\$2.00	\$2,236.00	Product subjected to reworking - low return	\$4.6021	\$5,145.1478
27353	109 medium	\$2.00	\$218.00	Product subjected to reworking - low return	\$4.8100	\$524.2900
Totals	7,822		\$19,131.55			\$43,996.6992

Difference between \$19,131.55 and \$43,996.6992 = \$24,865.15.

c. Ms. Valentin added \$24,865.15 to Respondent's gross returns of \$100,681.85, resulting in adjusted gross returns of \$125,547.00. From this sum, Ms. Valentin deducted Respondent's commission of 8%, or \$10,043.76, and \$6,843.00 for repacking expenses, resulting in an adjusted net return of \$108,660.24. The difference between the adjusted net return of \$108,660.24 and the \$82,289.20 paid to Complainant by Respondent comes to \$26,371.00 (Report of Investigation, EX 7, page 6).

17. Complainant filed a formal complaint on January 17, 2003. Complainant also paid a handling fee of \$300.00 which is required to file a formal reparation complaint.

Conclusions

The dispute in this proceeding concerns Respondent's performance of its duties as a grower's agent for Complainant in marketing Complainant's peppers harvested from a field located in Americus, Georgia, during October and November of 2001. Complainant claims Respondent mishandled its sale of the peppers, in violation of the terms of their oral agreement, and returned less than it should have. Complainant has asserted several different amounts as its damages. Complainant initially claimed, in its formal complaint, that it incurred damages of \$68,764.81. Complainant subsequently moved to amend its formal complaint, increasing the amount of its claim to either \$95,630.45 or \$206,378.45, depending on the method of calculation, and its motion to amend was granted. At the hearing, Complainant changed the amount of its claimed damages to \$144,660.80 (Tr. May, at 306-308) and, in its brief, changed the amount of its claimed damages to \$59,436.75. Respondent denies breaching any of its duties as a grower's agent and asserts that it acted in conformity with the terms of a written marketing agreement which Respondent alleges was agreed to by both parties.

The Department's regulations, at 7 C.F.R. 46.32(a), state as follows, with regard to the duties of a grower's agent:

The duties, responsibilities, and extent of the authority of a grower's agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements

between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner.

The first issue to be resolved concerns the terms of the contract between the parties. Respondent claims that the parties entered into a written marketing agreement (Respondent's Brief, at page 6). Complainant claims that the written marketing agreement was not effectuated until December 5, 2001, after Respondent had picked up all of Complainant's peppers and, therefore, the proposed terms orally conveyed by Mr. Blumenfeld to Respondent's representatives were binding (Complainant's Brief, page 19).

A contract is not in effect unless and until there is a meeting of the minds as to the material contract terms. *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002 (1981); *Independent Grayse Distributors v. Barbera Packing Corp.*, 25 Agric. Dec. 1144 (1966). However, a literal and subjective meeting of the minds is not necessary to the formation of a contract. If it were, anyone could escape being bound by an agreement by claiming to have some unique understanding of otherwise unequivocal terminology. As stated in *M. Offutt Co., Inc. v. Caruso Produce Co., Inc.*, 49 Agric. Dec. 596, 606 (1990):

It follows from the principle that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, that a mistaken idea of one or both parties in regard to the meaning of an offer or acceptance will not prevent the formation of a contract. *Anonymous*, 8 Agric. Dec. 374 (1949).

Therefore, in order to determine whether there was a "manifested mutual assent" regarding the material contract terms, we must examine the interaction between the parties.

There is no dispute that, in approximately the third week of October 2001, Mr. Blumenfeld engaged in a telephone conversation with Respondent's president, Charles Weisinger, about the possibility of Respondent marketing Complainant's peppers, and that Mr. Weisinger stated that, before he would make any commitment, he

would send Respondent's salesman, Hank Douglas, to examine the field of peppers (Tr. May, at 22, 662). During the last few days of October 2001, Mr. Douglas visited to Americus, Georgia and, accompanied by Mr. Blumenfeld, examined Complainant's pepper field (Tr. May, at 22, 537). Mr. Blumenfeld testified concerning certain topics he discussed with Mr. Douglas at that time. Mr. Blumenfeld said he told Mr. Douglas that the price was to be f.o.b. Americus, Georgia (Tr. May, at 23), that the buyers should be those listed in the Red Book and Blue Book (two publications that contain information about produce companies), that the buyers should have ratings of at least three stars (Id.), and that payment should be made within 10 days after acceptance (Id.). Mr. Blumenfeld informed Mr. Douglas that Complainant would pick the peppers and bring them to the cooler, which was about six miles from the field (Tr. May, at 23-24). At night, Mr. Blumenfeld would send a fax to Respondent, indicating how much was picked during that day and stored in the cooler (Tr. May, at 24). The following day, Respondent would send Complainant a fax containing Respondent's purchase order for the peppers in the cooler, which were referenced in Complainant's fax the previous evening (Tr. May, at 25). Respondent's truck would then pick up the peppers from the cooler (Id.). Mr. Douglas told Mr. Blumenfeld that Respondent's decision whether or not to handle Complainant's peppers would be made by Mr. Weisinger (Tr. May, at 28-29, 539).

The parties also do not dispute that, the day after Mr. Douglas visited Complainant's field to examine the peppers, on approximately October 30, 2001, Mr. Weisinger called Mr. Blumenfeld and said that Respondent was "willing to go ahead" with the handling of Complainant's peppers as a grower's agent (Tr. May, at 29-31). Approximately at that time, Respondent began faxing purchase orders to Complainant (Tr. May, at 30) and Respondent's truck began picking up Complainant's peppers from the cooler (Tr. May, at 31). It is Complainant's position that Mr. Weisinger's agreement to proceed, and Respondent's actions in picking up the peppers, constituted an agreement by Respondent that the contract terms proposed by Mr. Blumenfeld to Mr. Douglas were to be in effect. We do not agree with Complainant, as the evidence reveals that, a day or two after Mr. Weisinger's October 30, 2001, telephone call to Mr. Blumenfeld, the parties agreed to the terms of a written contract. Mr. Blumenfeld testified that, on approximately November 1, 2001, he received a call on his cell phone from Mr. Douglas (Tr. May, at 34). Mr. Douglas indicated that Respondent would not be able to sell

Complainant's peppers until the parties had a written marketing agreement (Id.). Mr. Douglas then faxed a proposed marketing agreement to Mr. Blumenfeld at a hotel at the Atlanta airport (Tr. May, at 35, 561-564). Mr. Blumenfeld reviewed the proposed marketing agreement, made a change in the payment terms from 60 days after shipment to 30 days, signed it, and faxed it back to Respondent (Tr. May, at 36, 276-277, 456-458). Complainant contends that it never received copy of the marketing agreement, as revised by Mr. Blumenfeld, containing both the signatures of Mr. Blumenfeld and Mr. Weisinger, until December 5, 2001, after Respondent had picked up all of Complainant's peppers (Complainant's brief, at page 19) and, therefore, the written marketing agreement never went into effect.

The record contains three versions of a written market agreement between the parties (CX 23, RX 1-1 through 1-3, and RX 1-4 through 1-6). All three versions consist of Respondent's standard marketing agreement (Tr. May, at 663) and contain the same printed terms, with blank spaces for handwritten inserts to be made. All three versions contain a handwritten change to the required time for payment in section III, from 60 days to 30 days after the grower's shipment of the product. All three versions bear Mr. Blumenfeld's signature (Tr. May, at 273, 276). One version (RX 1-4 through 1-6), contains only the signature of Mr. Blumenfeld, states that it is effective on November 1, and contains a printed notation, at the top, that it was faxed on November 2, 2001, although there is no indication where the fax originated. Another version (RX 1-1 through 1-3) contains the signatures of both Mr. Weisinger and Mr. Blumenfeld, states that it is effective November 20, and contains a printed notation at the bottom indicating that it was faxed from Respondent on November 2, 2001. The third version (CX 23) appears to be a photocopy of RX 1-1 through 1-3, except that it bears a printed notation at the top that it was faxed from Respondent on December 5, 2001. While it is unclear which version is the actual document the parties agreed to, the fact that the three versions are virtually identical makes it unnecessary to make this determination. When Mr. Blumenfeld signed the written agreement faxed to him by Mr. Douglas on November 1, 2001, he expressed his intention that Complainant would be bound by the terms of the agreement, so long as the time for payment was 30 days after shipment, rather than 60 days. Respondent never made any objection to Mr. Blumenfeld's change from 30 to 60 days. Therefore, we conclude that the actions of the parties reflected a "manifested

mutual assent" to be bound by the terms of the written marketing agreement as changed by Mr. Blumenfeld.

The next issue is whether Respondent complied with the terms of the written marketing agreement. An investigation of Respondent's handling of Complainant's peppers was conducted by Ivelisse Valentin, Marketing Specialist with the Manassas, Virginia office of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service of the United States Department of Agriculture, between July 29, 2002, and August 5, 2002 (Report of Investigation, EX 7, 8 and 9). Ms. Valentin utilized the contract terms found in the written marketing agreement (Report of Investigation, EX 7, page 3) to determine that Respondent actually sold 26,960 boxes of Complainant's peppers, rather than the 27,158 boxes which Respondent had reported to Complainant, and that these 26,960 boxes generated gross returns of \$100,681.85 (Report of Investigation, EX 7, pages 5-6).

Ms. Valentin further determined that, for 7,822 of the 26,960 boxes sold by Respondent, the returns which Respondent reported to Complainant, \$19,131.55, were insufficient, due mostly to the absence of any inspection certificates justifying such low returns (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g). For 1,227 boxes of peppers in invoice number 27353, Ms. Valentin determined that the prices obtained by Respondent were excessively low because the original load of 1,516 boxes had been reworked, so that the remaining 1,227 boxes should have been in a condition that warranted a higher return. Ms. Valentin's conclusion is supported by the fact that the inspection certificate (CX 40, page 71) shows that the peppers were in the type of condition that did not justify granting a large price discount. Overall, for these 7,822 boxes, Ms. Valentin calculated the returns which Respondent should have obtained by using the average sales prices of peppers sold by Respondent, other than from Complainant, during the same time period as Respondent's sales of Complainant's peppers (Report of Investigation, EX 7, page 6). Using the average sales prices, Ms. Valentin found that the Respondent's returns should have been \$43,996.70, or \$24,865.15 more than the \$19,131.55 reported to Complainant by Respondent (Report of Investigation, EX 7, pages 11-12, EX 8f and g, EX 9f and g). Adding \$24,865.15 to Respondent's gross returns of \$100,681.85 results in adjusted gross returns of \$125,547.00. From this sum, Ms. Valentin deducted Respondent's commission of 8%, or \$10,043.76, and \$6,843.00 for legitimate repacking expenses, resulting in an adjusted net return of

\$108,660.24. The difference between the adjusted net return of \$108,660.24 and the \$82,289.20 paid to Complainant by Respondent comes to \$26,371.00, which Ms. Valentin determined to be the amount Respondent owed to Complainant (Report of Investigation, EX 7, page 6).

Respondent takes issue with Ms. Valentin's audit. Respondent claims that it had the authority, under sections II and V of its marketing agreement, to grant price reductions with or without an inspection (Respondent's Brief, pages 7-8). Respondent points to the following language in sections II and V:

[II] Grower hereby confers upon Agent all requisite authority, which shall be sole and exclusive, to determine the manner and timing of the sales of the Produce, the price at which it is sold and the market or customer to which the Produce is sold.

* * * *

[V] Grower shall remain obligated to honor any and all negotiated price reductions with the full understanding such reductions may result in a remittance back to the Grower of less than the full sales price. Grower also understands Agent may consent to such price reductions on behalf of the Grower with or without a USDA federal inspection or accredited body survey on any international shipments.

While the contractual language in sections II and V gives Respondent broad discretion to market Complainant's peppers and to grant price reductions without an inspection, it does not permit Respondent to act negligently. It has long been held that "[w]hile an agent does not insure the success of an undertaking or a guarantee against mistakes or errors of judgment, he may be liable to his principal for damages resulting from his failure to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties." *Akers Marketing Co., Inc. v. Anthony Lobue Packing Co.*, 39 Agric. Dec. 1184, 1189 (1980); *Mission Shippers, Inc. v. Edward Milton Hall, d/b/a Dixie Brokerage Co.*, 32 A.D. 1849, 1851 (1973). See also *Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc.*, 46 Agric. Dec. 709, 716 (1987).

The invoices noted by Ms. Valentin as lacking sufficient justification to warrant the sales prices of Complainant's peppers were those in which the prices per box were much less than the prices per box Respondent obtained from the contemporaneous sale of

similar peppers (see Finding of Fact 16b). While the language in sections II and V of the marketing agreement may have relieved Respondent of liability for any mistakes in judgment leading to adjustments in price or allowances, it would not relieve Respondent for any negligent actions it might have made. *Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc.*, supra at 716. It is our conclusion that, with respect to the invoices noted by Ms. Valentin for which she determined that there was insufficient objective evidence justifying the prices obtained by Respondent, such as a federal inspection, Respondent negligently handled Complainant's peppers.

Respondent puts forward several arguments why its actions regarding its sales of Complainant's peppers were not negligent. Respondent claims that Complainant's peppers were the "end of the crop" (Respondent's Brief, page 12) and notes Mr. Blumenfeld's admission that three brokers had sold peppers from Complainant's field prior to Complainant contacting Respondent (Tr. May, at 396-397). However, Respondent has not shown why the fact that three brokers had sold peppers from Complainant's field prior to Respondent justifies a lower sales price for the peppers sold by Respondent. Respondent states that Mr. Billy Thomas, president of Georgia Vegetable Company, which picked some of the peppers from Complainant's field, testified that the peppers were later pickings and, therefore, were smaller and brought less money (Respondent's Brief, page 13) (Tr. May, at 166-167). However, examination of Respondent's invoices to Complainant (CX 4) shows that most of the peppers harvested were extra large and jumbo. Therefore, we reject Respondent's contention that the low prices received for Complainant's peppers were justified because peppers had been harvested from the field prior to Respondent's involvement and that the remaining peppers were small.

Respondent claims that there were temperature-related problems, citing the testimony of its salesman, Mr. Douglas (Respondent's Brief, page 13) (Tr. May, at 540). Respondent also refers to the testimony of its president, Mr. Weisinger, that he had engaged in a conversation with a Mr. Buzz Miller, who Mr. Weisinger had asked to look at Complainant's pepper field (Respondent's Brief, page 13) (Tr. May at 724-726). Mr. Weisinger testified that Mr. Miller had told him that Complainant's peppers showed frost damage (Tr. May, at 725). Mr. Douglas and Mr. Weisinger, as Respondent's employees, are obviously not objective and their testimony cannot be given significant weight. Further, Mr. Weisinger's testimony about

his alleged conversation with Mr. Miller is hearsay and Respondent has not presented a good reason why Mr. Miller could not be present at the hearing to testify under oath and subject to cross examination. Respondent's counsel asserted at the hearing that Mr. Miller could not be present to testify because he was closing on the sale of his farm (Tr. May, at 727-728). However, the hearing lasted five days over a six month period, so there no good reason why Respondent could not have had Mr. Miller testify at some point during the course of the hearing.

Respondent alleges that, at the time it sold Complainant's peppers, there were peppers from other regions available that were larger and not subjected to bad weather, which depressed the price for Complainant's peppers (Respondent's Brief, page 13). Respondent's evidence to support these allegations consists solely of the testimony of Mr. Weisinger (Tr. May, at 733-736) and Mr. Douglas (Tr. May, at 639), who are not objective witnesses and whose testimony will not be given significant weight.

Respondent contends that Complainant's peppers could not be sold to chain stores or retail outlets because they were undersized (Respondent's Brief, pages 13-14). Respondent's only evidence in support of this contention consists of the testimony of Mr. Weisinger (Tr. May, at 737-743) and Mr. Douglas (Tr. May at 638-642), and will not be given significant weight.

Respondent has failed to provide credible, objective evidence to justify the low sales prices of Complainant's peppers in those invoices noted by PACA Marketing Specialist Ivelisse Valentin. Therefore, we conclude that Respondent's low returns for these invoices reflect negligent handling by Respondent and, therefore, these returns should be disallowed.

Complainant contends that Respondent's returns on virtually all of the peppers it handled for Complainant were excessively low, and argues that it should be awarded the difference between Respondent's returns and the prices for peppers that are shown in the appropriate Market News Service reports (Complainant's Brief, page 26 and Appendix A). Use of the Market News Service reports is appropriate when a seller sells produce to a buyer and the contract price has not been agreed to. However, in this case, Complainant did not sell its peppers to Respondent but agreed that Respondent would act as Complainant's agent. The marketing agreement did not specify that Respondent was required to obtain the market price for the peppers, as reflected by the Market News Service reports, but, as set forth in

paragraph II, that Respondent would “use its best efforts to market the Produce.” As Complainant knowingly selected Respondent to act as Complainant’s agent, Complainant must bear the risk of Respondent not being able to sell the peppers for the prices reflected by the Market News Service reports, so long as Respondent does not act negligently. *Bonanza Farms, Inc. a/t/a Bonanza Packing Co. v. Tom Lange Company, Inc. and/or Wm. Rosenstein & Sons Co.*, 51 Agric. Dec. 839, 847 (1992). See also *Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc.*, supra at 716. Therefore, use of the Market News Service reports to determine the prices Respondent should have obtained is not appropriate here.

Complainant also alleges that Respondent improperly arranged for Georgia Vegetable Company, Tifton, Georgia, to remove peppers from Complainant’s field (Complainant’s Brief, pages 24-25). However, the record does not indicate that Respondent’s actions were improper in any way. According to the testimony of both Mr. Blumenfeld and Mr. Douglas, on approximately November 15, 2001, Mr. Blumenfeld and Mr. Douglas had a telephone conversation about Complainant’s inability to pick any additional peppers since Complainant’s picking crew had recently left (Tr. May, at 57, 552, 614-618). Mr. Douglas indicated that he might be able to find another picking crew and Mr. Blumenfeld agreed that this would be fine (Tr. May, at 57, 617-618). Respondent obtained Georgia Vegetable Company to do the picking and either Mr. Douglas or Mr. Weisinger informed Mr. Blumenfeld of this (Tr. May, at 618). Even if Respondent exceeded its authority by arranging for Georgia Vegetable Company to pick additional peppers, Complainant has not alleged any damages specifically resulting from this action.

We conclude that Respondent failed to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties in handling Complainant’s peppers for the invoices documented in Ms. Valentin’s audit, and that Respondent is liable to Complainant in the amount found by Ms. Valentin of \$26,371.00. Respondent’s failure to pay this amount to Complainant is a violation of section 2 of the PACA (7 U.S.C. § 499b), for which reparation should be awarded. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) 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.” Since the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest at a reasonable rate as a part of each

reparation award.² We have determined that a reasonable rate is 10 percent per annum. Respondent is also required to reimburse Complainant for the \$300.00 handling fee Complainant paid to file its formal complaint, pursuant to section 5(a) of the PACA.

Section 7(a) of the PACA (7 U.S.C. § 499g(a)) states that, after an oral reparation hearing under the PACA, the “Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing.” We have decided that Complainant should be awarded \$26,371.00, which is approximately 28% and 13%, respectively, of the \$95,630.45 and \$206,378.45 claimed as alternative damages by Complainant in its amended complaint, and 18% of the \$144,660.80 alleged as damages by Complainant at the hearing (Tr. May, at 306-308). As we have awarded Complainant only a small percentage of the damages claimed, the first question we must answer is whether Complainant should still be considered “the prevailing party”.

The term “prevailing party” has been defined to be the party in whose favor judgment is entered whether or not the party has recovered its entire claim. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). However, there are circumstances in which the party against whom the reparation order is issued has been found to be the prevailing party. *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766, 1855 (1994), petition for reconsideration denied, 54 Agric. Dec. 1444 (1995). In determining the identity of the prevailing party, “the amount of effort put forth at the hearing in support of certain allegations is a significant factor.” *Anthony Vineyards v. Sun World International, Inc.*, 62 Agric. Dec. 342, 356 (2001).

We have rejected Complainant’s allegations that the parties had an oral contract, that Respondent improperly instructed Georgia Vegetable Company to harvest Complainant’s peppers and that Complainant’s damages should be calculated based on the Market News Service reports prices. However, these were relatively minor

² *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). See also *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).

issues at the hearing. The issues on which the parties spent most of the hearing time were whether Respondent had any limits on its authority to handle Complainant's peppers, what kind of limits did Respondent have, and whether Respondent failed to exercise ordinary and reasonable care, diligence, and skill. On these issues, we have decided in Complainant's favor. Therefore, we hold that Complainant was the prevailing party herein.

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, supra at 864; *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, supra at 715. Complainant has filed a claim for fees and expenses in the amount of \$57,641.70. These claims include expenses incurred in connection with the three attorneys which represented Complainant, Paul T. Gentile, Leonard Kreinces and Alan R. Kahan. Respondent objects to Complainant's claim for fees and expenses.

With respect to the \$25,304.79 claimed for the legal services of Mr. Gentile, Respondent contends that much of the charges was for work that was not done specifically in connection with the oral hearing. Expenses which would have been incurred in connection with a case if that case had been heard by the documentary procedure may not be awarded under section 7(a) of the Act. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, supra at 864. Mr. Gentile's invoices to Complainant reveal many charges for legal services that do not indicate that they specifically relate to his preparation for the hearing. Therefore, it will be assumed that all such charges prior to November 25, 2003, when Mr. Gentile agreed to a proposed hearing date, are for legal services that are not in connection with the hearing in this case, and will be disallowed. These charges total \$7,652.70. We will also disallow the charges for time spent traveling to and returning from the hearing, which amounts to 13 hours at \$300 per hour, or \$3,900.00, as it not our policy to include fees paid an attorney for time spent traveling to and from the hearing in an award of fees and expenses. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, supra at 865. Respondent contends that a \$216.88 charge for telephone calls between May 18, 2004 and May 21, 2004, is excessive, as Mr. Gentile was in the same hotel as Mr. Blumenfeld at the time. However, Mr. Gentile's invoice shows that, during the period May 18-21, 2004, he made telephone calls only on May 18, 2004, to "Mike at Chase", "Arnon [Mr. Blumenfeld] (2x)" and "Lynn Kelly (3x) re: Billy Thomas." The call to Mr. Blumenfeld may have been made prior to the time Mr. Gentile and Mr. Blumenfeld were both checked

into their hotel. While a charge of \$216.88 for these telephone calls seems high, the calls may have lasted several hours. Under the circumstances, the charge is considered reasonable and will be allowed. All other charges by Mr. Gentile are properly included in Complainant's claim. Thus, we will include attorney's fees to Mr. Gentile in the amount of \$25,304.79 less \$7,652.70 and \$3,900.00, or \$13,752.09.

Regarding the \$17,144.90 claimed for the legal services of Mr. Kreinces, Respondent contends that the only charges that relate to the oral hearing are for 16.5 hours on November 17, 2004, and November 18, 2004, when the second portion of the hearing took place. Respondent contends that all other charges concern the attorney's review of the first portion of the hearing in May 2004, which would not have been necessary but for Complainant's decision to change counsel. We agree with Respondent that charges connected with the review of documents or transcripts related to the first portion of the hearing should not be permitted, as such a review would probably not have been necessary had Complainant not elected to change counsel. Therefore, all of Mr. Kreinces' charges that include a review of documents or transcripts related to the first portion of the hearing will be disallowed. This totals 17.5 hours at \$300 per hour, or \$5,250. All other charges appear to be reasonable and will be permitted, which results in permissible attorney's fees of \$17,144.90 less \$5,250.00, or \$11,894.90.

With respect to the \$10,227.26 claimed for the legal services of Mr. Kahan, Respondent contends that all of these expenses relate to the preparation of Complainant's brief and claim for fees and expenses, which may not be awarded under existing case precedent. Respondent is correct, as expenses which would have been incurred under the documentary procedure are not recoverable under section 7(a) of the PACA, which would include proposed findings of fact, conclusions of law and post hearing briefs. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, supra at 865.

Complainant claims expenses of \$3,074.30 for preparing the transcript of the hearing and depositions taken in connection with the hearing, \$64.50 for copies of exhibits, \$1,256.26 for transportation to and from the hearing, \$549.02 for lodging in connection with the hearing, and \$20.67 for a federal express shipment. Respondent takes no position on the acceptability of these claims.

Complainant has submitted sufficient documentation supporting its claim of \$1,893.80 for preparation of the hearing transcript, which will be allowed. Complainant has also submitted documentation

supporting its claim of \$637.05 for the transcript of the deposition of Respondent's president, Mr. Weisinger, and \$543.45 for the transcripts of the depositions of Complainant's employee, Plez Hardin, and of the president of Georgia Vegetable Company, Mr. Thomas. Although the deposition of Mr. Hardin was submitted into evidence (RX 16), the depositions of Mr. Weisinger and Mr. Thomas never were. Complainant never made any attempt to utilize the deposition testimony to either impeach or refresh the recollections of Mr. Weisinger or Mr. Thomas when they testified at the hearing. Under these circumstances, awarding expenses to Complainant for the depositions of Mr. Weisinger and Mr. Thomas would not be reasonable. Therefore, only Complainant's expenses for preparing the transcript of Mr. Hardin's deposition will be allowed, which amounts to \$53.90. Complainant's claim of \$64.50 for copies of exhibits is unsupported by documentation and will not be allowed. With respect to Complainant's claim of transportation to and from the hearing in the amount of \$1,256.26, the only documents Complainant has submitted which cover transportation to and from the hearing consists of a bill for an airline ticket issued to Mr. Gentile on April 24, 2004, in the amount of \$141.00, and bills for airline tickets issued on November 18, 2004, to Mr. Blumenfeld in the amount of \$212.17 and to Mr. Kreinces in the amount of \$298.70, for a total of \$651.87. Complainant's award for transportation expenses in connection with the hearing will be limited to this sum. Regarding Complainant's claim for lodging in connection with the hearing of \$549.02, the only hotel bills submitted by Complainant that cover lodging for the hearing consists of a bill for Mr. Blumenfeld covering the period May 18-21, 2004, in the amount of \$191.63, and bills for Mr. Kreinces and Mr. Blumenfeld covering the period November 16-18, 2004, in the amount of \$141.43 each, for a total of \$474.49. Complainant's award for lodging in connection with the hearing will be limited to this sum. Complainant's claim for \$20.67 for federal express is supported by a bill dated July 19, 2004, which appears to be for shipment to Complainant of the May 18-21, 2004, transcript from R&S Typing Service, Gilmer, Texas. This expense is reasonable and in connection with the hearing, and will be awarded.

Therefore, the amount of fees and expenses which we will award Complainant consists of \$13,752.09 for the legal services of Mr. Gentile, \$11,894.90 for the legal services of Mr. Kreinces, \$1,893.80 for the transcript of the hearing, \$53.90 for the transcript of Mr. Hardin's deposition, \$651.87 for transportation to and from the hearing, \$474.49 for lodging in connection with the hearing, and

\$20.67 for federal express relating to shipment of the hearing transcript, for a total of \$28,741.72.

Order

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as reparation, \$26,371.00, with interest thereon at the rate of 10% per annum from January 1, 2002, until paid, plus \$300.00 as reimbursement for Complainant's handling fee.

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses, \$28,741.72, with interest thereon at the rate of 10% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

PGB INTERNATIONAL, LLC. CO v. BAYCHE COMPANIES, INC.

PACA Docket No. R-05-118.

Reparation Order on Reconsideration.

Filed February 21, 2006.

PACA -- Order on Reconsideration -- Interest rate -- Calculations.

Decision and Order by William G. Jensen, Judicial Officer

Decision

Reparation claimants before the Secretary seek damages suffered due to a violation of Section 2 of the PACA, a federal regulatory statute. By choosing to bring its claim before the Secretary, a complainant invokes the jurisdiction of a federal agency, and the matter is adjudicated in a federal administrative forum. There should be consistency in the rate of interest on monetary judgments awarded in all federal forums. Since the claim could have been brought in a federal district court, and since the decision of the Secretary is appealable to the federal district courts, it is appropriate for the Secretary to follow the federal statute for assessing interest on money judgments in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of

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Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims, as set forth in 28 U.S.C. § 1961.

Interest rate – avoid unjust enrichment

The award of interest in reparation cases is intended to make the injured party whole. In order to avoid unjustly enriching a complainant, interest should be based on the prevailing money market conditions on the date of issuance of the reparation award. The interest rate shall be calculated on the date of the Order, at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order, in accordance with 28 U.S.C. § 1961.

Preliminary Statement

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)(hereinafter “Act” or “PACA”), a Decision and Order was issued on November 14, 2005, in which Respondent was ordered to pay Complainant as reparation \$7,275.18, with interest thereon at the rate of 10% per annum from February 1, 2004, until paid, plus the amount of \$300.00. On December 2, 2005, the Department received from Respondent a Petition for Reconsideration of the Order. Respondent’s petition was served upon the Complainant, who filed a response in opposition to the petition.

In the petition, Respondent argues that the 10% interest rate applied to the award is inconsistent with 28 U.S.C. § 1961. Specifically, Respondent states that 28 U.S.C. § 1961 provides that interest shall be “calculated from the date of entry of the judgment, at a rate equal to the weekly average one year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week proceeding [sic] the date of the judgment.” While acknowledging that this is not a civil action, Respondent argues that the same analysis should apply. On this basis, Respondent argues that the interest applied to the award should not exceed 4.32%, which is the rate for one-year treasury constant maturities according to the Federal Reserve Statistical Release dated November 7, 2005.

28 U.S.C. § 1961 sets forth a uniform rate of interest on any monetary judgment in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims. Subsection (4) of 28 U.S.C. § 1961, states specifically that this section “shall not be construed to affect the interest on any judgment of any court not specified in this section.” Nevertheless, we conclude that we should follow the formula contained in 28 U.S.C. § 1961 to calculate the rate of interest to be assessed on reparation orders issued by the Secretary.

A person who believes that he or she has been injured by the violation of Section 2 of the Act by a commission merchant, dealer or broker may seek damages for such injury. Section 5(b) of the Act (7 U.S.C. § 499e(b)) provides that:

Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

The federal district courts are courts of competent jurisdiction under the PACA because both “can issue an enforceable award in money damages based upon breach of a contractual duty which runs against a party to the suit.”³ It is reasonable, then, to calculate the interest rate on a reparation award in the same way a federal district court would calculate the interest rate on a monetary award. In *Sherwood v. Madda Trading Co., and Christopher Jankowski*, 1979 WL 11487 (C.F.T.C.), the Commodity Futures Trading Commission, holding that it acts as a “virtual replacement of a federal district court in reparations cases,” stated:

Interest is nothing more than an adjunct to the award of damages, a differential paid to compensate for the loss of the use of a sum of money for a period of time. A complainant is no less damaged and suffers no less loss as the result of his

³ *Han Yang Trade Co., Inc. d/b/a H.Y. Produce Co. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765, 769 (1993).

claim having been made before the Commission, as opposed to a court.

Id., at *12.

Reparation claimants before the Secretary seek damages suffered due to a violation of Section 2 of the PACA, a federal regulatory statute. By choosing to bring its claim before the Secretary, a complainant invokes the jurisdiction of a federal agency, and the matter is adjudicated in a federal administrative forum. There should be consistency in the rate of interest on monetary judgments awarded in all federal forums. Since the claim could have been brought in a federal district court, and since the decision of the Secretary is appealable to the federal district courts, we find that it is appropriate for the Secretary to follow the procedural statute for assessing interest on money judgments in a civil case recovered in a district court, as well as final judgments against the United States in the United States Court of Appeals for the Federal circuit, and judgments of the United States Court of Federal Claims, as set forth in 28 U.S.C. § 1961.⁴

We also note that the Secretary's authority to award interest is incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."⁵ In other words, the award of interest is intended to make the injured party whole. Given the prevailing money market conditions on the date the Decision and Order was issued, November 14, 2005, the 10% interest rate applied to the award clearly exceeded that purpose. Therefore, in order to avoid unjustly enriching the Complainant in this case, we are granting Respondent's petition. Accordingly, the interest rate applicable to this award, and to all reparation awards issued subsequent to this Order, until such time as the Department publishes a Final Rule establishing a different methodology for awarding such interest, shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated on the date of the Order, at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the

⁴ Other federal agencies have also determined that it is appropriate to utilize the formula stated in 28 U.S.C. § 1961 to set the interest rate on monetary awards made in an administrative forum. See, e.g., *On behalf of Dionne Staples v. Michael P. Kelly and John T. Kelly*, 1994 WL 678738 (H.U.D.A.L.J.); *Leon Newman v. Bache Halsey Stuart Shield, Inc.*, et al., 1984 WL 48706 (C.F.T.C.).

⁵ 7 U.S.C. § 499e(a).

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Federal Reserve System, for the calendar week preceding the date of the Order. The interest rate on one-year constant maturity treasuries for the week ending November 11, 2005, was 4.35%. The Decision and Order issued November 14, 2005, should, therefore, be amended to award interest at a rate of 4.35%.

There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act.

Order

Within 30 days from the date of this Order Respondent shall pay Complainant as reparation \$7,275.18, with interest thereon at the rate of 4.35% per annum from February 1, 2004, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

**G.W. PALMER & CO., INC., V. SUN VALLEY POTATO
GROWERS, INC.
PACA Docket No. R-05-071.
Decision and Order.
Filed April 27, 2006.**

Requirements contract – definition.

A requirements contract is a contract which calls for one party to furnish materials or goods to another party to the extent of the latter's requirements in business. A buyer's contract to obtain its requirements from a seller is enforceable when the seller agrees to provide the buyer with a quantity based on a stated estimate or based on the prior requirements of the buyer. In a requirements contract, it is the seller's duty to provide the requirements of the buyer and it is the buyer's duty to obtain those requirements in good faith and according to commercial standards of fair dealing in the trade.

Requirements contract – minimum quantity not required.

A stated minimum is not required to enforce a requirements contract, because U.C.C. Sec. 2-306(1) allows a buyer to require a seller to provide a good faith quantity that is not unreasonably disproportionate to stated estimates. Reasonable elasticity in requirements contracts is permitted, even where a complete discontinuance may occur.

Requirements contract – formation.

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Where the oral contract called for Respondent to sell “up to” one truckload of 60 count cartons of Idaho Russet potatoes as Complainant required per week at a fixed price per-carton, such terms provide the basis of a requirements contract and were not too vague to be enforced. Because U.C.C. Sec. 2-306(1) permits all quantities that are not unreasonably disproportionate to stated estimates, the lack of a stated minimum quantity in the estimate did not prevent enforcement of the good faith requirements of the buyer.

Cover – expenses saved in consequence of breach.

Under U.C.C. Sec. 2-712, when a buyer obtains cover for a seller’s breach, the buyer may recover the difference between the cost of cover and the contract price together with any incidental or consequential damages but less expenses saved in consequence of the breach. Where Complainant purchased potatoes at a delivered price to cover for Respondent’s breach and the original contract was made at f.o.b. prices, Complainant’s \$2.75 per carton shipping cost for the f.o.b. contract was an expense Complainant saved in consequence of the breach. This expense was deducted from the cost of cover at the delivered price and the f.o.b. contract price.

Decision and Order by Judicial Officer, William G. Jenson

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“Act”). A timely complaint was filed with the Department within nine months from the accrual of the cause of action,¹ in which Complainant seeks a reparation award against Respondent in the amount of \$23,300.50 in connection with a contract for the sale and shipment of multiple truckloads of potatoes in interstate commerce.

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

Since the amount claimed in the formal Complaint does not exceed \$30,000.00, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department’s Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement

¹ The complaint was timely filed with respect to the majority of the amount claimed (see Finding of Fact 6).

in Reply. Respondent filed an Answering Statement. Respondent also submitted a Brief.

Findings of Fact

1. Complainant, G.W. Palmer & Co., Inc., is a corporation whose post office address is 1080 W. Rex Road, Suite 100, Memphis, Tennessee, 38119-3820.
2. Respondent, Sun Valley Potato Growers, Inc., is a corporation whose post office address is 375 W. 75th S., Rupert, Idaho, 83350. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. During the month of August 2003, Complainant and Respondent entered an oral contract whereby Respondent agreed to sell to Complainant multiple loads of U.S No. 1 Idaho Russet potatoes in 60-count cartons between September 1, 2003 and July 1, 2004 for \$7.25 per carton, less \$0.15 per carton for Complainant's brokerage, or a net amount of \$7.10 per carton. Complainant negotiated the purchase of the potatoes from Respondent while acting in the capacity of a buying broker on behalf of its customer, Sharon's Produce, of Jackson, Mississippi.
4. On August 15, 2003, Complainant's Mr. Parks Dixon sent Ms. Joyce Ainsworth, of Sharon's Produce, a fax message stating:

This is to confirm a contract price for the period between September 1st of 2003 and July 1st of 2004 with Sun Valley Potato. The 60 count russets will be \$7.25 FOB and freight @ \$2.75 (through Kevin at TNC). Other carton russets to fill the loads will be at the "mostly market." Thank you for your support. (See Report of Investigation Exhibit No. 3a).

5. Between August 25, 2003 and October 20, 2003, and between March 1, 2004 and June 23, 2004, Complainant purchased multiple truckloads of potatoes from Respondent in accordance with the parties' agreement. Between October 21, 2003 and March 1, 2004, when Respondent was unable to supply Complainant with 60-count cartons of Idaho Russet potatoes at the contract price, Complainant purchased nine partial truckloads of Idaho Russet potatoes in 60-count cartons from other suppliers to fulfill its commitment to Sharon's Produce. The prices paid by Complainant for these nine

truckloads of potatoes exceeded the contract price negotiated with Respondent by a total of \$27,130. On June 23, 2004, Complainant issued invoice number 29737A billing Respondent for \$23,300.50.

6. The informal complaint was filed on September 3, 2004, which is within nine months from the accrual of the cause of action for the six partial trucklots of potatoes purchased by Complainant between January 13, 2004 and March 1, 2004, involving a total of Complainant's claim for \$15,330.50. For the remaining three partial trucklots of potatoes that Complainant purchased in October of 2003, involving a total of Complainant's claim of \$7,970.00, the Complaint was not timely filed within nine months from the accrual of the cause of action.

Discussion

Complainant brings this action to recover \$23,300.50 from Respondent for the additional costs it incurred to purchase 60-count cartons of Idaho Russet potatoes to replace those that Respondent allegedly failed to supply in accordance with the parties' agreement.² Specifically, Complainant maintains that the oral contract negotiated with Respondent called for Respondent to supply Complainant with up to one truckload (approximately 840 cartons) weekly of U.S. No. 1 60-count Idaho baking potatoes at the agreed price of \$7.25 per 50-pound carton FOB, less \$0.15 per carton for Complainant's brokerage. Beginning in September of 2003, and continuing through the end of June 2004, Complainant states each truckload was to load every Monday at Respondent's facility in Rupert, Idaho, on a truck contracted by Complainant through the Northwest Connection, LLC, a trucking/truck brokerage company located in Twin Falls, Idaho. Complainant states the potatoes were to be delivered to Sharon's Produce ("Sharon's") in Jackson, Mississippi the following Thursday, thereby enabling the driver to re-load in Laurel, Mississippi, and return to Idaho for the next Monday's load. Per the agreement, Complainant states that if Sharon's did not need a full truckload of 60-count potatoes, the balance could be filled with potatoes of other sizes at the prevailing weekly market price, per Sharon's instructions. According to Complainant, Respondent failed to ship the potatoes called for in the contract on nine different occasions, so Complainant was forced to purchase 60-count cartons of Idaho Russet potatoes on the open market at higher prices.

² The Secretary's jurisdiction is limited to \$15,330.50 of this amount, as the complaint was not timely filed with respect to the remainder of Complainant's claim. See Finding of Fact 6, and this opinion's discussion of damages *infra*.

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In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it asserts first that Complainant fails to state a cause of action against Respondent upon which relief can be granted. However, the Complainant alleges a failure on the part of Respondent, without reasonable cause, to deliver potatoes in accordance with the terms of the contract. This failure would constitute a violation by Respondent of Section 2 of the Act. Moreover, Complainant has standing as a buying broker to pursue this claim against Respondent because Complainant negotiated the purchase of the potatoes in its own name and was responsible for payment of the purchase price to Respondent.³

In its defense, Respondent admits that it agreed to sell 60-count potatoes to Complainant during the period of September 2003, through June 2004, at \$7.25 per carton; however, Respondent states there was no quantity of potatoes or frequency of shipment agreed upon between the parties. Respondent states the contract was entered into prior to harvest, so Respondent did not know at that time what the volume and size profile of the crop would be. Respondent asserts that the agreement was that amount of potatoes supplied would be based on weekly discussions of what potatoes were available. (Answering Statement at 3.) In support of this assertion, Respondent notes that the written confirmation prepared by Complainant's Mr. Parks Dixon makes no mention of the quantity of potatoes to be supplied or the frequency of shipments. (See Finding of Fact 4.)

Complainant, as the party alleging that the contract called for Respondent to supply up to a truckload of 60-count cartons of Idaho Russet potatoes on a weekly basis during the contract period, has the burden to prove this allegation by a preponderance of the evidence. *See, e.g., Esch Farm v. Packers Canning Co.*, 50 Agric. Dec. 930, 933 (1991) ("The burden is on the moving party . . . to prove the contract terms by a preponderance of the evidence.") The most convincing evidence Complainant submitted is the sworn statements of Respondent's competitors: Ms. Kamille Klassen, of Sun River of Idaho, Inc., and Mr. Ryan Wahlen, of Pleasant Valley Potato, Inc.⁴ Ms. Klassen and Mr. Wahlen acted on behalf of their respective firms in negotiating with Complainant to supply potatoes during both the

³ See 7 C.F.R. § 46.28(c).

⁴ See Formal Complaint Exhibits 10 and 11.

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2002-2003 and 2003-2004 seasons. Ms. Klassen's statement reads, in pertinent part, as follows:

I was contacted by Mr. Parks Dixon of G. W. Palmer & Co., Inc. and asked if my company was interested in offering a season long FOB price for up to one load of sixty-count Idaho potatoes to be shipped weekly. Any shortage on the truck, should Sharon's not require all sixty-count, would be filled with other count cartons at the prevailing market price. Transportation was to be provided each Monday primarily by Mr. Charlie Scott, an independent trucker brokered by Mr. Kevin Adam of The Northwest Connection.

After some inter-office consultation an offer was tendered and ultimately accepted by Mr. Dixon over the phone on behalf of Sharon's Produce. Shipments began that first Monday in September of 2002 and continued weekly until June 30th of 2003. The contract terms, offer, and acceptance were confirmed verbally.

In August of 2003, I was again approached by Mr. Dixon to bid on the 2003-2004 Sharon's contract based on the same stipulated terms as the previous year. Mr. Scott was still to load each Monday and all other conditions were confirmed as being the same. I called Mr. Dixon with the offer from Sun River and was notified shortly thereafter that we were unsuccessful in winning the bid for that second season.

The second statement, from Mr. Ryan Wahlen, of Pleasant Valley Potato, Inc., reads, in pertinent part, as follows:

In the late summer of both 2002 and 2003, Parks Dixon of GWP contacted me by phone and related the particulars of a contract bid that he was shopping among various Idaho shippers. I was asked to give a firm, season long price (September 1st through June 30th of the next calendar year) for the weekly shipment of up to a truck load of sixty-count Idaho potatoes (eight hundred and forty boxes of truck capacity). Any room left on the truck, should Sharon's Produce not require all sixty-count, would be filled with other carton sizes at the prevailing market price. Transportation had been secured with a reliable trucker for loading on Monday of each week.

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These terms were clearly stated and unchanged from 2002 to 2003. After presenting my best offer verbally to Mr. Dixon, I was notified some time later that my offer had not been accepted by Sharon's Produce for that year.

As Respondent was bidding on the same contract as Sun River of Idaho, Inc. and Pleasant Valley Potato, Inc. for the 2003-2004 season, there is certainly strong evidence that the terms upon which Complainant negotiated with Respondent, other than price, were the same, or virtually the same, as the terms described in Ms. Klassen's and Mr. Wahlen's statements set forth above. Therefore, we find that Respondent orally contracted to sell up to one truckload per week of 60-count cartons of Idaho russet potatoes as Complainant required during the contract period, with assorted potatoes to fill the load at "mostly market."

Because this contract is an oral one, we must first address Respondent's claim in its Brief that under the U.C.C. § 2-201 (the U.C.C. Statute of Frauds) that enforcement of this contract is limited to the quantity of goods present in the confirmatory memorandum.⁵ In general, the Statute of Frauds only acts as a bar to reparations enforcement under the Act when the state Statute of Frauds in question is substantive, and not procedural, in nature. *See Hegel Branch v. Mission Shippers*, 35 Agric. Dec. 726 (1976). A Statute of Frauds is substantive when it would void or invalidate a contract, but it is procedural when it would simply prevent enforcement by a court. *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 527 (3d Cir. 1950). Reparations precedent presumes that the Statute of Frauds in the U.C.C. is procedural, and not substantive. *See Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 478-79 (2000); *Woods v. Conagra Inc.*, 50 Agric. Dec. 1018, 1021 (1991). Therefore U.C.C. § 2-201 does not prevent full enforcement of an otherwise valid contract

⁵ A Statute of Frauds merely requires that certain types of contracts be in writing to be enforced. "[T]he primary theory of statutes of frauds, past and present, is that they are a means to the end of preventing successful courtroom perjury. This means is simply the requirement of a writing signed by the party to be charged . . ." 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 2-8 (4th ed. 1995). Comment 4 to U.C.C. § 2-201 elaborates on this policy: "Failure to satisfy the requirements of this [Statute of Frauds] does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract."

under the Act. *See Faris Farms*, 59 Agric Dec. at 478-79. We have long held that “the [Act] intends to grant a new remedy which is not dependant upon . . . other remedies as may be available” in state laws. *Id.* (quoting *Hegel Branch*, 35 Agric. Dec. 726). However, Respondent may overcome the presumption when it can show that the state Statute of Frauds is substantive. *Id.*; *Woods*, 50 Agric. Dec. at 1021 (1991). In this case, we will enforce the oral agreement, because Respondent has failed to present any case law or other authority that the state Statute of Frauds is substantive.

Moreover, the lack of a specific quantity terms in the confirmatory memoranda, or in the oral communications between the parties, does not cause this contract to be too vague to be enforced. It appears from the evidence that the parties intended to make an oral requirements contract. The absence of a specific quantity term does not void a requirements contract.

As one court has succinctly described it: “A requirements contract is a contract which calls for one party to furnish materials or goods to another party to the extent of the latter’s requirements in business.” *Orchard Group v. Konica Medical Corp.*, 135 F.3d 421, (6th Cir. 1998). The U.C.C. § 2-311(1) allows contracts to “leave[] [the] particulars of performance to be specified by one of the parties.” The specification need only be “made in good faith and within limits set by commercial reasonableness.” The U.C.C. § 2-306(1) further describes this aspect of requirements contracts:

A term which measures the quantity by the output of the seller *or the requirements of the buyer* means such actual output or requirements as may occur in good faith, *except that no quantity unreasonably disproportionate to any stated estimate* or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (italics added)

Thus, a buyer’s contract to obtain its requirements from a seller is enforceable when the seller agrees to provide the buyer with a quantity based on either the prior requirements of the buyer, or a stated estimate. Under a requirements contract it is the seller’s duty to provide the requirements of the buyer, and the buyer’s duty to purchase those requirements “in good faith and according to commercial standards of fair dealing in the trade.” *See* U.C.C. § 2-306 Comment 2; *General Motors Corp. v. Paramount Metal Products Co.*, 90 F.Supp.2d 861, 873 (E.D. Mich. 2000).

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First, we reject the Respondent's implication that a stated minimum amount is necessary to enforce a requirements contract. (See Closing Brief at 7-8.) The clear language of U.C.C. § 2-306(1) allows a party to a requirements contract to fulfill the contract terms by requesting any quantity that is not unreasonably disproportionate to stated estimates. This view is supported by comment 2 to U.C.C. § 2-306 that specifically allows a reasonable elasticity in a requirements contract, even where a complete discontinuance may occur. For these reasons, no minimum amount needs to be stated in a requirements contract for a valid contract to exist.

Second, Respondent's statement that "it was unknown what percentage of the crop was going to have a large profile" (Answering Statement at 2) does not negate the evidence that the parties entered into a requirements contract. Complainant's purpose was to supply the volume needs of a client at a stable price, and in seeking to supply those needs, entered into a requirements contract to ensure supply regardless of fluctuations in crop yield. (See Opening Statement at 1.) If the crop percentages had been reversed, with an overabundance of 60-count potatoes, Complainant would have had to purchase its good faith requirements from the Respondent at a higher price than would have been available on the open market. Requirements contracts necessarily involve a risk that there will be fluctuation in supply which may cause a party to incur a loss.

Finally, we discount Respondent's assertions in the Answering Statement at pg. 3, that Respondent would provide as many 60 count boxes on the truck as Respondent had available; because this term is contrary to the evidence supporting Complainant's need for a requirements contract. The evidence indicates there would have been no agreement if Respondent had offered only to provide what it had available, because Complainant would not have obtained the requisite price stability throughout the season.

Based on the evidence considered above, Complainant has proved that there was a valid oral requirements contract.

Complainant alleges that Respondent breached the oral requirements contract. The parties agree that Respondent failed to supply some of the weekly shipments of 60-count cartons of Idaho Russet potatoes between October 20, 2003 and March 1, 2004. Respondent admitted that during the period that it did not produce 60-count potatoes, it did not supply Complainant with any potatoes.

(Answering Statement at 4.) Respondent's failures were a breach of its duty to deliver Complainant's requirements for that period.

Complainant timely filed the informal complaint for Respondent's breach of contract occurring in January through March of 2004, but not for those occurring in October 2003. The Act requires that reparations claims be made within nine months from the time that the cause of action accrues. 7 U.S.C. §§ 499f(a)(1). The filing of an informal complaint tolls the statute of limitations. *W.T. Holland & Sons, Inc. v. Clair Sensenig*, 52 Agric. Dec. 1705, 1707 (1993). "A cause of action accrues when judicial proceeding may first be legally instituted upon it." *Prime Commodities, Inc. v. J. V. Campisi, Inc.*, 59 Agric. Dec. 461, 464 (2000). Complainant would have been able to seek damages on each occasion on which Respondent informed Complainant that it would not make delivery as scheduled in the contract. Therefore, the cause of action accrued in each instance when Respondent breached the contract by failing to ship the potatoes and Complainant was forced to contract for delivery from other suppliers. Complainant has provided credible invoices for the potatoes that it ordered to cover Respondent's failures. (formal Complaint at Exhibits 1-9.) The informal complaint was filed on September 3, 2004, and thus any failure of Respondent to deliver occurring before December 2003, is barred by the statute of limitations. According to the summary invoice prepared by Complainant, (formal Complaint at Exhibit 12) and compared to the invoices from the suppliers, (formal Complaint at Exhibits 1-9) it appears that Complainant has claimed \$7,970.00 in damages for October cover invoices which must be excluded from the total amount of \$23,300.50 claimed in the Complaint. Therefore we consider only the claimed amount of \$15,330.50 for cover purchases made in January through March of 2004.

Concerning the specific amount of damages, U.C.C. § 2-711 allows buyers to "cover" losses when sellers fail to deliver. Under § 2-712(1), a buyer, without unreasonable delay, may make a good faith purchase to "cover" the cost of the seller's breach. When the buyer obtains "cover," the buyer may recover "the difference between the cost of cover and the contract price together with any incidental or consequential damages [as described in § 2-715] . . . but less expenses saved in consequence of the breach." U.C.C. § 2-712(2); *see also All Foods, Inc. v. Richard A. Shaw, Inc.*, 40 Agric. Dec. 1574, 1582 (1981).

Respondent argues in its Brief that the Complainant failed to mitigate damages by refusing to accept Colorado potatoes. (Closing Brief at 9-

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10.) The oral contract required Idaho potatoes and Respondent failed to deliver the specified type of potatoes. Respondent's remaining contentions in its Brief are also without merit.

After first contacting the Respondent to determine if Respondent could make delivery of Idaho 60-count russet potatoes and learning that Respondent could not do so,⁶ Complainant made the following purchases of potatoes as "cover" for Respondent's breach:⁷

Supplier	Quantity of Cartons	Total "Cover"	Date of Invoice
Garnand Marketing, LLC	630	\$6,457.50	37999
Garnand Marketing, LLC	630	\$7,087.50	38014
Garnand Marketing, LLC	714	\$7,389.90	38025
Garnand Marketing, LLC	756	\$10,281.60	38033
Garnand Marketing, LLC	588	\$8,364.30	38041
Pleasant Valley Potato	724	\$8,217.40	38046
Total:	4042	\$47,798.20	

The net contract price that would be paid to Respondent was \$7.10 per carton. (Finding of Fact 3.) Complainant would have paid \$28,698.20 (4042 cartons * \$7.10) for the same number of potatoes, had Respondent delivered them. The \$47,798.20 that Complainant paid in cover, minus the contract price of \$28,698.20, leaves a total of \$19,100.00 in total cost of cover. In addition, Complainant did not claim or present evidence of consequential damages which may have arisen because of Respondent's breach.

However, for two transactions, Complainant saved an "expense" in consequence of Respondent's breach: the expense of shipping costs to be paid to The Northwest Connection ("TNC") when Complainant entered into delivered transactions. See 1 White and Summers,

⁶ Opening Statement, at

⁷ Opening Statement, at 4; Opening Statement at Exhibit H; see also Complaint at Exhibits 4-9. The numbers in the table are taken from the sellers' invoices attached to the Opening Statement.

Uniform Commercial Code, § 6-3 (4th ed. 2006) (discussing damages in light of a breach in an f.o.b. shipping point contract and cover through an f.o.b. delivery point contract). The original contract was f.o.b., with Complainant incurring an expense of \$2.75 per carton in shipping that it paid to TNC. (See Finding of Fact 4.) For the first transaction, Garnand's invoice to Complainant, issued February 17, 2004, bills Complainant for a purchase of 756 cartons of U.S. No. 1 60-count russet potatoes at \$13.60 per carton delivered, or \$6.50 per carton more than Complainant would have paid Respondent pursuant to their contract. In that delivered transaction, the expense of \$2.75 Respondent would have incurred reduces the amount Complainant actually paid in cover by \$2,079.00 ($\2.75×756). For the second transaction, on Garand's invoice to Complainant, issued February 25, 2004, Complainant was billed for 588 cartons of 60-count potatoes at \$14.225 per carton delivered, or \$7.125 per carton over the contract price. Likewise, for that delivered transaction, Complainant did not incur the \$2.75 per carton shipping expense, and therefore the amount paid in cover is reduced by \$1,617.00 (2.75×588). In total, Complainant saved \$3,696 in shipping charges that it would have otherwise paid to TNC, reducing Complainant's total damages under UCC § 2-712 to \$15,404.00.

Further, there is no evidence that the cost of cover was unreasonable under U.C.C. § 2-712. When we compare the USDA Market News daily service reports⁸ for the Upper Valley Twin-Falls/Burley District of Idaho for shipping point potatoes on the shipment dates with Respondent's formal Complainant at Exhibit 12, it appears that the price per carton of 60-count potatoes that Complainant obtained was greater than the high market price only three times, the January 14, 2004 invoice (0.25 greater), the February 17, 2004 invoice (\$2.60 greater⁹), and the February 25, 2004 invoice (\$2.725 greater).¹⁰ On the remaining two shipments Complainant

⁸ The reports can be found at <<http://marketnews.usda.gov/portal/fv>> and we take judicial notice of them. See *Triton Imports, Inc. v. S. C. Distributing Co.*, 52 Agric. Dec. 1674, 1681 (1993); *Teixtra Farms, Inc. v. Community Suffolk, Inc.*, 52 Agric. Dec. 1696, 1699 (1993).

⁹ When the invoice price is compared to the market price of the closest corresponding date: Feb. 17, 2004.

¹⁰ In two of these instances, the Feb. 16 and the Feb. 23 invoices, the price was "delivered" and therefore some shipping cost was likely present in the invoice price. We have already reduced the damages in light of the shipping expenses saved in
(continued...)

purchased potatoes to cover at less than the market high price. Considering all of the circumstances, particularly that Complainant was under considerable time pressure due to the tight shipping schedule, and the high prices for 60-count Idaho Russet potatoes at the time, Complainant's cover was reasonable. *Cf. R&R Produce, Inc. v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1009-10 (1997) (discussing cover in light of the immediate need of a purchaser); *see also Feldman Brothers Produce Co. v. A. Pellegrino & Sons*, 32 Agric. Dec. 1845 (1973) (allowing reasonable cover when the contracted volume was not precise); *Produce Distributors v. Mutual Vegetable Sales*, 29 Agric. Dec. 1105, 1108 (1970) (finding a price greater than the cover price reasonable without reference to market price).

Ordinarily, the total amount we would award in damages would be \$15,404.00 according to the formula in U.C.C. § 2-712, but Complainant only sought damages of \$15,330.50. The difference of \$73.50 appears to be due to Complainant's miscalculation of the expense it saved in consequence of the breach. In the invoice Complainant issued to Respondent for the cost of its cover purchases, which is the basis of its claim (formal Complaint at Exhibit 12), Complainant shows an amount due for two of the cover purchases it made from Garnand Marketing, LLC, that are considerably lower than the cost listed on Garnand's invoices to Complainant, which are attached to Complainant's Opening Statement as Exhibit H, pages 5 and 6. As discussed above, both of those transactions were delivered and not f.o.b. as the parties' had agreed. First, Complainant's invoice to Respondent for the February 17 cover purchase shows the cost of cover as \$3.75 per carton. Subtracting the shipping expense of \$2.75 that Complainant saved by entering into the delivered transaction from the \$6.50 that was the amount over the original contract price invoiced from Garnand, results in the same price in cover as Complainant listed on its invoice to Respondent: \$3.75 per carton. However, on Garand's invoice to Complainant, issued February 25, 2004, Complainant was billed for 588 cartons of 60-count potatoes at \$7.125 per carton over the contract price. Subtracting the \$2.75 in shipping that was an expense that Complainant saved in consequence

¹⁰(...continued)

consequence of Respondent's breach on these two loads. Further, Complainant did not actually claim the full amount on the invoices, and chose instead to claim amounts that are below the market high prices.

of the breach, Complainant had \$4.375 per carton in damages on that load. On the other hand, Complainant's invoice to Respondent for this cover purchase shows the cost of cover as \$4.25 per carton. The difference is \$73.50 ($(\$ 4.375 - \$4.25) * 588$ cartons). This difference between the cover based on Garnand invoices to Complainant and the cover showed on Complainant's invoice to Respondent equals the difference between our calculation of damages of \$15,404.00, and the amount sought by Complaint of \$15,330.50. However, we can only award Complainant the amount of damages it sought in its formal Complaint, or \$15,330.50. See *Mendelson-Zeller Co. v. M.K. Hall Produce*, 28 Agric. Dec. 1169 (1969).

Respondent's failure to deliver the potatoes according to the contract terms is a violation of Section 2 of the Act. The total amount owed by Respondent for the 7 loads of potatoes that Complainant had to purchase to cover Respondent's breach is \$15,330.50. 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 Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. See *Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week ending prior to the date of the Order.

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

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, \$15,630.50 with interest thereon at the rate of **4.90%** per annum from March 1, 2004.

Copies of this Order shall be served upon the parties.

SOL FRESH PRODUCE, INC. v. LA REPACK, INC.
PACA Docket No. R-06-036.
Decision and Order.
Filed June 14, 2006.

PACA – Jurisdiction - Respondent unlicensed but Operating Subject to License.

Where it was established from evidence regarding the transactions that are the subject of the reparation complaint, along with evidence regarding transactions that are not the subject of the complaint, that Respondent was operating subject to license during the time period of the transactions contained in the complaint, Respondent held liable for the reasonable value of tomatoes received and sold on behalf of Complainant.

Decision and Order by William R. 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 \$15,087.15 in connection with two truckloads of tomatoes shipped in the course of interstate commerce.

A copy of the formal Complaint was served upon the Respondent, who was afforded twenty days from receipt of the formal Complaint to file an answer. After Respondent failed to submit an answer within the requisite period of time, a Default Order was issued on January 31, 2005, awarding Complainant the full amount of its claim. The Department subsequently received from Respondent a motion to vacate the Default Order because Respondent did not have notice of either the Complaint or the Default Order due to a wrongful eviction that prevented Respondent from accessing its business premises. Since service of the Complaint and the Default Order therefore was not completed, Respondent's motion was granted and the Default Order was vacated on June 9, 2005. Respondent thereafter submitted

an Answer to Complaint and Counterclaim. Respondent's Counterclaim was not, however, accompanied by the requisite \$300.00 handling fee. Respondent was afforded an opportunity to either submit the \$300.00 handling fee or resubmit its Answer, removing the Counterclaim. Respondent did neither, so the Answer to Complaint and Counterclaim was served upon Complainant, although Complainant was advised that only the Answer was being served, as the Counterclaim could not be considered absent the submission of the required \$300.00 handling fee.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Sol Fresh Produce, Inc., is a corporation whose post office address is 2300 Vo-Tech Drive, Weslaco, Texas, 78596-9025. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, LA Repack, Inc., is a corporation whose post office address is 1956 E. 20th Street, Los Angeles, California, 90058. At the time of the transactions involved herein, Respondent was not licensed but was operating subject to license under the Act.
3. On January 14, 2004, Complainant shipped from loading point in the state of Texas, to Respondent in Los Angeles, California, one truckload of tomatoes comprised of 435 cartons of extra large Roma tomatoes, 640 cartons of large Roma tomatoes, 305 cartons of medium Roma tomatoes, and 60 cartons of small Roma tomatoes.
4. On January 19, 2004, Complainant shipped from loading point in the state of Texas, to Respondent in Los Angeles, California, one truckload of tomatoes comprised of 398 cartons of extra large Roma tomatoes, 480 cartons of large Roma tomatoes, 251 cartons of medium Roma tomatoes, and 10 cartons of small Roma tomatoes.
5. On February 2, 2004, Complainant issued invoice number NS-0430 billing Respondent for the 1,440 cartons of tomatoes shipped on January 14, 2004 at \$5.85 per carton, for a total invoice price of

\$8,424.00. On the same date, Complainant issued invoice number NS-0475 billing Respondent for the 1,139 cartons of tomatoes shipped on January 19, 2004 at \$5.85 per carton, for a total invoice price of \$6,663.15. Respondent has not paid Complainant for either invoice.

6. The informal complaint was filed on November 10, 2004, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the invoice price for two truckloads of tomatoes allegedly sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed and refused to pay the agreed purchase prices totaling \$15,087.15. As evidence in support of this contention, Complainant attached to the formal Complaint copies of its invoices billing Respondent for the tomatoes.¹

In response to the complaint and evidence submitted by Complainant, Respondent filed a sworn Answer wherein it denies purchasing the tomatoes from Complainant and asserts that it merely agreed to store the tomatoes at its facility. Respondent states specifically that during the time period in question, Complainant caused produce to be delivered to the storage facility maintained by Respondent in Los Angeles. According to Respondent, the authorized representative of Complainant, Balthazar Valencia, explained to Respondent's Martin Maldonado that Complainant had been unable to sell the produce to the third party purchasers with whom it originally contracted due to the condition of the produce. Respondent states Mr. Valencia asked that Respondent unload the produce in question and store it at Respondent's facility, and agreed to pay Respondent's standard unloading and storage charges. After the produce was unloaded and stored, Respondent states that Complainant, through Balthazar Valencia, requested that Respondent maintain the produce at its facility and allow produce purchasers to come to the facility to purchase the produce on a salvage basis. Respondent states Mr. Valencia authorized Respondent to apply any sales proceeds to its unloading and storage charges, and requested that any balance be remitted to him for payment on behalf of

¹ See Formal Complaint, Exhibit No. 1.

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Complainant. Respondent states Martin Maldonado agreed to this arrangement but advised Mr. Valencia that no purchasers for the produce would be solicited. Subsequent to the agreement between Mr. Valencia and Mr. Maldonado, Respondent states limited sales of the produce delivered by Complainant took place and the proceeds were applied to Respondent's unloading and storage charges.

For its Opening Statement, Complainant submitted an affidavit from its Vice-President, Kathy DeBerry. In her affidavit, Ms. DeBerry explains that her responsibilities include the monitoring of the sale of perishable agricultural commodities, including those sales that are the subject of this dispute. Ms. DeBerry states that on January 27, 2004, she approved the sale of 1,440 cartons of various tomatoes to Respondent, all priced at \$5.85 per carton, for a total amount of \$8,424.00. Ms. DeBerry states further that the tomatoes were shipped to Respondent on February 2, 2004, and that true and correct copies of the invoice and bill of lading are attached to her affidavit as Exhibits 1 and 2. Upon review of these documents, however, we note that while the invoice lists a sale date of January 27, 2004, and a ship date of February 2, 2004, as stated by Ms. DeBerry in her affidavit, the bill of lading shows that the tomatoes were shipped from Complainant's place of business in Weslaco, Texas, on January 14, 2004. For the second shipment, we encounter a similar discrepancy. Ms. DeBerry states in her affidavit that on January 27, 2004, Complainant sold and delivered to Respondent 1,139 cartons of various tomatoes, all priced at \$5.85 per carton, for a total amount of \$6,663.15. Ms. DeBerry states further that true and correct copies of the invoice and bill of lading are attached to her affidavit as Exhibits 3 and 4. Review of these documents discloses, however, that the invoice lists a sale date of January 27, 2004, and a ship date of February 2, 2004, but the bill of lading shows that the tomatoes were shipped from Complainant's place of business in Weslaco, Texas, on January 19, 2004.

In response to the Opening Statement, Respondent submitted an affidavit from its President, Martin Maldonado, for its Answering Statement. In his affidavit, Mr. Maldonado explains that Respondent, which is no longer in business, was a corporation primarily engaged in the repackaging and storage of merchant goods and produce, and that Respondent was never involved in the purchase and sale of produce. Mr. Maldonado states that occasionally, at the request of a repackaging client, Respondent would facilitate a sale on behalf of the client. With respect to the two loads of tomatoes in question, Mr. Maldonado states that after the tomatoes were unloaded and stored,

Complainant's Balthazar Valencia instructed Mr. Maldonado to keep them there and allow any purchasers coming through Respondent's facility to make a salvage level purchase offer for them, and to apply anything received to Respondent's unloading and storage charges. In response, Mr. Maldonado states he told Mr. Valencia that he would not solicit any buyers but that he would tell anyone who inquired that the produce was available for sale and that an offer of purchase could be made. Mr. Maldonado states a few buyers bought a small amount of Complainant's produce, and that Respondent threw out what did not sell. According to Mr. Maldonado, Respondent received approximately \$5,000.00 to \$6,000.00 for the produce, which was slightly less than what Respondent was owed for its unloading and storage charges.

In response to the Answering Statement, Complainant submitted a second affidavit from Kathy DeBerry for its Statement in Reply. In this affidavit, Ms. DeBerry states she has reviewed the affidavit of Martin Maldonado, and that she denies his assertion that Respondent was not involved in the purchase and sale of produce. Ms. DeBerry also denies that Respondent merely agreed to store the subject tomatoes pursuant to an alleged agreement between a former representative of Complainant, Balthazar Valencia, and Mr. Maldonado. Ms. DeBerry states the invoices attached to her prior affidavit establish that Rodrigo Castro, not Balthazar Valencia, was the salesperson involved in the transactions at issue. We note, however, that while Ms. DeBerry's testimony concerning the invoices is correct, the bills of lading for the same shipments list the salesman as "Baltazar." Nevertheless, Ms. DeBerry states that neither Mr. Castro nor Mr. Valencia were authorized to enter into the storage agreement Mr. Maldonado describes, and denies that such an agreement was entered into. Ms. DeBerry asserts, to the contrary, that Respondent purchased the produce at issue, accepted delivery, exercised dominion and control over the product, and has failed to account for or remit any monies for the produce.

Upon review of the statements and other evidence presented, we find that Complainant has failed to sustain its burden to prove that Respondent agreed to purchase the subject tomatoes under the terms and at the prices asserted in the formal Complaint. The only evidence Complainant offers to prove the existence of such an agreement is the testimony of Kathy DeBerry, an individual who does not appear to have any firsthand knowledge of the negotiations that Respondent alleges took place between Complainant's Balthazar Valencia and

Respondent's Martin Maldonado concerning the subject tomatoes. Rather, Ms. DeBerry appears to have based her testimony upon the invoices prepared by Complainant, which were prepared well after the tomatoes were shipped, and which contain information that, as we already noted, conflicts with the information that appears on the bills of lading prepared at the time of shipment.

Although we have not found the existence of an agreement by Respondent to purchase the tomatoes under the terms and at the prices invoiced, it is apparent that Respondent did more than unload and store the tomatoes for Complainant. Respondent acknowledges that while the tomatoes were stored at its facility they were offered for sale. Moreover, Respondent does not allege that Complainant had an agent present at its facility to effect such sales. On the contrary, Respondent admits that it collected proceeds from the sale of the tomatoes on behalf of Complainant. While Respondent makes much of the fact that it did not solicit any sales, it makes no difference whether or not Respondent actively attempted to sell the tomatoes or not. The fact that sales were made and proceeds collected by Respondent on Complainant's behalf creates a sales agency relationship between the parties.

While Respondent was not licensed at the time of the transactions in question, it nevertheless appears that Respondent was operating subject to license under the Act. The Act defines the term "commission merchant" as meaning, "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, *or for or on behalf of another.*"² (emphasis supplied). **In addition to the two transactions at issue in this complaint, Respondent submitted evidence of two instances in March and April of 2004, when it received truckload quantities of tomatoes from Four Seasons Trading Co., Donna, Texas.³ Included in this evidence is a copy of an "Adjustment Memo" prepared by Four Seasons Trading Co. on April 3, 2004, that reads, "[p]lease bill L.A. Repack was rejected at Farmers Link will work for our account." On the basis of this and the other evidence submitted in connection with the transactions at issue in this dispute, we conclude that there is sufficient proof in the record to establish that Respondent was engaged in business as a commission merchant. Section 3(a) of**

² See 7 U.S.C. § 499a(5).

³ See Answering Statement, Exhibit A.

the Act states, “no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time.”⁴ Respondent was, therefore, operating subject to license under the Act.

A party who accepts goods for sale on behalf of another, *i.e.*, a consignee, has the duty to promptly and properly resell the goods, render an accounting and pay the net proceeds. *Stoops & Wilson, Inc. v. Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982); *Collins Bros. Produce Co. v. Dixieland Produce*, 38 Agric. Dec. 1031 (1979). In this regard, Respondent states the tomatoes sold for approximately \$5,000.00 to \$6,000.00, and that its storage and unloading expenses exceeded this amount. Respondent did not, however, submit an account of sales to substantiate this contention. In the absence of an accounting, we will refer to relevant USDA Market News reports to determine a reasonable value for the tomatoes that Respondent sold on Complainant’s behalf.

The Los Angeles Terminal Price Report for January 16, 2004, the date we estimate the first shipment of tomatoes was available for resale, shows that 25-pound cartons of loose Roma tomatoes originating from Mexico were selling for \$7.00 to \$10.00 per carton for extra large size; \$7.00 to \$9.00 per carton for large size; and \$6.50 to \$8.00 per carton for medium size. Since Complainant did not submit a statement from Balthazar Valencia to refute Martin Maldonado’s sworn contention that Mr. Valencia sent the tomatoes to Respondent’s facility to be sold on a salvage basis, we assume that the tomatoes in question were in less than average marketable condition.⁵ We will, therefore, use the lowest reported price for each size of tomato to determine their reasonable value. On this basis, we find that the 435 cartons of extra large tomatoes in this shipment had a reasonable value of \$7.00 per carton, or \$3,045.00; the 640 cartons of large tomatoes had a reasonable value of \$7.00 per carton, or \$4,480.00; and the 305 cartons of medium tomatoes had a reasonable value of \$6.50 per carton, or \$1,982.50.

The Market News report just referenced does not list prices for small Roma tomatoes originating from Mexico. We note, however, that the

⁴ 7 U.S.C. § 499c.

⁵ A sworn statement that has not been controverted must be taken as true in the absence of other persuasive evidence. See *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675 (1983); See, also, *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265 (1982).

shipping point price report issued by Market News for the date these tomatoes were shipped lists the same range of prices for both medium and small Roma tomatoes originating from Mexico.⁶ On this basis, we find that the terminal market prices listed for medium Roma tomatoes present the best available measure of the value of the small Roma tomatoes in this shipment. On this basis, we find that the 60 cartons of small Roma tomatoes in question had a reasonable value of \$6.50 per carton, or a total of \$390.00. The shipment of tomatoes as a whole, therefore, had a total reasonable value of \$9,897.50. From this amount, Respondent is entitled to deduct 15%, or \$1,484.63, for commission at the usual and customary rate. Respondent is not entitled to a deduction for its unloading and storage expenses because Respondent did not submit any evidence showing the amount of the expenses incurred, nor did Respondent allege that the parties agreed to a specific rate of recovery for these expenses. After deducting Respondent's commission from the reasonable value of the tomatoes, there remains an amount due Complainant from Respondent for this shipment of tomatoes of \$8,412.87.

For the tomatoes shipped January 19, 2004, we refer to the Los Angeles Terminal Report for January 21, 2004, the date we estimate that this shipment of tomatoes was available for resale. That report shows that 25-pound cartons of loose Roma tomatoes originating from Mexico were selling for \$7.00 to \$10.00 per carton for extra large size, \$7.00 to \$9.00 per carton for large size, and \$6.50 to \$8.00 per carton for medium size. Once again, we will use the lowest of the reported prices for each size of tomato to determine their reasonable value. On this basis, we find that the 398 cartons of extra large tomatoes in this shipment had a reasonable value of \$7.00 per carton, or \$2,786.00; the 480 cartons of large tomatoes had a reasonable value of \$7.00 per carton, or \$3,360.00; and the 251 cartons of medium tomatoes had a reasonable value of \$6.50 per carton, or \$1,631.50. Since the Market News report just referenced does not list prices for small Roma tomatoes originating from Mexico, we will, once again, use the prices listed for medium Roma tomatoes to determine the reasonable value of the small Roma tomatoes in this shipment. On this basis, we find that the 10 cartons of small Roma tomatoes in question had a reasonable value of \$6.50 per carton, or a total of \$65.00. The shipment of tomatoes as a whole, therefore, had

⁶ Recap of Available Vegetable Fobs for Wednesday, January 14, 2004, available on the Internet at <http://www.ams.usda.gov/mnarchive/2004/jan/01%2D14%2D2004/wa%5Ffv102.txt>.

a total reasonable value of \$7,842.50. From this amount, Respondent is entitled to deduct 15%, or \$1,176.38, for commission at the usual and customary rate. This leaves an amount due Complainant from Respondent for this shipment of tomatoes of \$6,666.12. This amount added to the amount due for the January 14, 2004 shipment of tomatoes results in a total amount due Complainant from Respondent for the two shipments of tomatoes in question of \$15,078.99.

Respondent's failure to pay Complainant \$15,078.99 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). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bache Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. ____ (2006).

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 \$15,078.99, with interest thereon at the rate of 5.04% per annum from March 1, 2004, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT**MISCELLANEOUS DECISIONS****In re: HUNTS POINT TOMATO CO., INC.****PACA Docket No. D-03-0014.****Order Denying Petition to Reconsider.****Filed January 9, 2006.****PACA – Perishable agricultural commodities – Failure to pay – Exact amount owed – Burden of proof – Preponderance of the evidence – Settlement offers – Publication of facts and circumstances.**

The Judicial Officer denied Respondent's petition to reconsider *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). The Judicial Officer rejected: (1) Respondent's contention that the finding that Respondent violated 7 U.S.C. § 499b(4) was not supported by the evidence; (2) Respondent's contention that the Judicial Officer's conclusion that Chief Administrative Law Judge Marc R. Hillson was not required to determine the exact amount of money Respondent failed to pay its produce sellers in accordance with the PACA, was error; (3) Respondent's assertion that the Judicial Officer imposed employment restrictions against Respondent in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005); (4) Respondent's contention that it cannot be found to have violated the prompt payment provision of the PACA because its produce sellers and the United States District Court for the Southern District of New York determined the timing and the amount of Respondent's payments for produce; (5) Respondent's suggestion that Complainant was required to accept Respondent's settlement offer; and (6) Respondent's suggestion that the Judicial Officer has authority under the Rules of Practice to direct a party to accept another party's settlement offer.

Andrew Y. Stanton, for Complainant.

Paul T. Gentile, New York, NY, for Respondent.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 31, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by

the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Hunts Point Tomato Co., Inc. [hereinafter Respondent], during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On August 7, 2003, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On August 10, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On October 15, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on November 17, 2004, Respondent filed Respondent's Proposed Findings of Fact and Law. On December 6, 2004, Complainant filed Complainant's Reply Brief.

On April 21, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations (Initial Decision at 7-8, 12).

On October 7, 2005, Respondent appealed to the Judicial Officer. On October 17, 2005, Complainant filed Complainant's response to Respondent's appeal petition. On October 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On November 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and

(2) ordering the publication of the facts and circumstances of Respondent's violations.¹

On December 12, 2005, Respondent filed a Petition to Reconsider *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). On January 3, 2006, Complainant filed Complainant's Response to Petition to Reconsider. On January 5, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. Based upon a careful consideration of the record, I deny Respondent's Petition to Reconsider.

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

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

.....

(b) Definitions

For purposes of this chapter:

.....

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a

¹*In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1934 (2005).

preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....
§ 499b. Unfair conduct

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

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

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

(a) Authority of Secretary

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

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except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

....

(e) Alternative civil penalties

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

....

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

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

7 U.S.C. §§ 499a(b)(9), 499b(4), 499h(a), (e), 499p.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

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

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

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

DEFINITIONS

.....
§ 46.2 Definitions.

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

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

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

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

7 C.F.R. § 46.2(aa)(5), (11).

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

Respondent raises five issues in Respondent's Petition to Reconsider. First, Respondent contends the finding that Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is not supported by the evidence (Respondent's Pet. to Reconsider at 2).

Complainant conducted an investigation of Respondent after Complainant received at least 10 complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director for the Perishable Agricultural Commodities Branch, United States Department of Agriculture, went to Respondent's place of business on July 24, 2002. Wayne Shelby and Timothy Swainhart met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files. (Tr. 23-24, 27-28, 31-35.)

The accounts payable files, which Respondent provided to Complainant, indicate that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (CX 3-CX 35; Tr. 37-49). At an exit conference on August 7, 2002, Respondent's president, sole director, and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than \$1,000,000 for produce purchased and received, some of which was not in interstate or foreign commerce (Tr. 46).

Respondent did not rebut the evidence introduced by Complainant to prove that Respondent violated the prompt payment provision of the PACA. Therefore, I reject Respondent's contention that the finding that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not supported by the evidence. Instead, I find Complainant proved by a preponderance of the evidence² that, during

²Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative (continued...)

the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and

²(...continued)

Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, Respondent contends the Judicial Officer's conclusion that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, is error (Respondent's Pet. to Reconsider at 3).

The Chief ALJ found, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 produce sellers of the agreed purchase prices in a total amount "over \$795,000" for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (Initial Decision at 7-8). Since this finding alone is sufficient to conclude that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and \$795,000 is more than a de minimis amount of money, I reject Respondent's contention that my conclusion that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the PACA, is error.³

Third, Respondent asserts the sanction in this proceeding involves severe employment restrictions. Respondent contends, in order to justify severe employment restrictions, Complainant must prove the amount of money Respondent failed to pay produce sellers in accordance with the PACA is not de minimis and a person responsibly connected with Respondent caused Respondent's failure to comply with the PACA. (Respondent's Pet. to Reconsider at 3.)

I disagree with Respondent's assertion that I imposed employment restrictions in this proceeding. Based on my conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), I ordered the publication of the facts and circumstances of Respondent's violations. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1934 (2005). Moreover, Complainant proved by a preponderance of the evidence⁴ that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the

³I also note, while the Chief ALJ did not find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, I found Respondent failed to make full payment to 33 sellers of the agreed purchase prices in the total amount of exactly \$795,878.80. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1920, 1923, 1931-32 (2005).

⁴See note 2.

agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce. I find \$795,878.80 is not a de minimis amount of money. Finally, PACA does not require that a responsibly connected⁵ person cause the PACA licensee to violate the PACA. Section 16 of the PACA (7 U.S.C. § 499p) explicitly provides that a PACA licensee is liable for the acts or omissions of any agent, officer, or other person acting for, or employed by, the PACA licensee.

Fourth, Respondent asserts it cannot be found to have violated the prompt payment provision of the PACA because Respondent's creditors and the United States District Court for the Southern District of New York determined the timing and the amount of Respondent's payment for produce (Respondent's Pet. to Reconsider at 3).

On May 31, 2002, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust. On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2).

On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies. The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the

⁵The term "responsibly connected" is defined in 7 U.S.C. § 499a(b)(9).

injunction is not a defense to Respondent's failures to comply with the prompt payment provision of the PACA. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action as a defense to Respondent's failures to comply with the prompt payment provision of the PACA would be counter to the clear purposes of the PACA.

Fifth, Respondent asserts it offered to make full payment to its produce sellers to resolve this proceeding. Respondent further asserts Complainant's failure to accept Respondent's settlement offer "defied common sense" and "is 'arbitrary and capricious.'" Respondent also asserts, by affirming Complainant's failure to accept Respondent's settlement offer, the Judicial Officer "failed to breathe life into a rule that is as rigid as a corpse" and "decided that he and the case law surrounding the Rules of Practice are powerless to prevent 'arbitrary and capricious' behavior." (Respondent's Pet. to Reconsider at 4.)

Voluntary settlements are highly favored in proceedings under the Rules of Practice.⁶ However, the Rules of Practice do not require a party to accept a settlement offer made by another party, as Respondent suggests. Complainant had complete discretion to accept or reject Respondent's settlement offer. Respondent's assertion that Complainant's failure to accept Respondent's settlement offer defied common sense and is arbitrary and capricious, is without merit.

Moreover, the Judicial Officer has no authority under the Rules of Practice to direct a party to accept another party's settlement offer. Therefore, even if I were to find that Complainant's failure to accept Respondent's settlement offer defied common sense and was arbitrary and capricious (which I do not so find), I would have no authority to require Complainant to accept Respondent's settlement offer.

For the foregoing reasons and the reasons set forth in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order

⁶*In re Gwain Wilson*, 64 Agric. Dec. 1696, 1698 (2005) (Remand Order as to John R. LeGate, Sr.); *In re Gwain Wilson*, 64 Agric. Dec. 1693, 1695 (2005) (Remand Order as to William Russell Hyneman).

in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.⁷ The date of entry of the Order in this Order Denying Petition to Reconsider is January 9, 2006.

In re: CHARLES R. BRACKETT AND TOM D. OLIVER.
PACA Docket No. APP-03-0004.
Ruling on Respondent's Appeal Limited to Procedural Issue.
Filed April 4, 2006.

PACA-APP – Perishable agricultural commodities – Responsibly connected – Disciplinary proceeding – Joinder – Due process.

The Judicial Officer vacated Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) ruling providing Petitioners an opportunity to raise defenses to the Perishable Agricultural Commodities Act (PACA) violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003). The Judicial Officer rejected the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA, the Rules of Practice, and Petitioners' due process rights.

⁷See 28 U.S.C. § 2344.

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Andrew Y. Stanton for Respondent.

Andrew M. Greene, Atlanta, GA, for Petitioners.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued determinations that Charles R. Brackett and Tom D. Oliver [hereinafter Petitioners] were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]. On March 13, 2003, Petitioners filed a Petition For Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co.

On September 30, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] held a conference call with Petitioners and Respondent. During the conference call Petitioners requested an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA as alleged in a complaint filed in the disciplinary administrative proceeding instituted against Atlanta Egg & Produce Co. on October 23, 2002, and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA. On October 2, 2003, the Chief ALJ ordered that Petitioners and Respondent submit briefs regarding Petitioners' request.

After Petitioners and Respondent submitted briefs,¹ the Chief ALJ: (1) issued a decision in *In re Atlanta Egg & Produce Co.*, 63 Agric.

¹“Brief of the PACA Branch Regarding Petitioners’ Request to Assert the Alleged Defenses of Atlanta Egg & Produce Co., Inc.,” filed by Respondent on October 15, 2003; “Reply Brief of Charles R. Brackett and Tom D. Oliver to Complainant’s Response in Opposition to Petitioners’ Request to Intervene in the Matter of Atlanta Egg & Produce Co., Inc.,” filed by Petitioners on October 30, 2003; “Notice of Errors in Petitioners’ Reply Brief,” filed by Respondent on November 3, 2003; and “Response of Charles R. Brackett and Tom D. Oliver to Complainant’s Notice of Errors in Petitioner’s Reply Brief,” filed by Petitioners on November 5, 2003.

Dec. 459 (2003), concluding Atlanta Egg & Produce Co. failed to make full payment promptly to 80 sellers of the agreed purchase prices in the total amount of \$923,475.96 for 683 lots of perishable agricultural commodities in violation of the PACA; and (2) granted Petitioners' request for an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA.²

On June 30, 2004, the Chief ALJ conducted an oral hearing in Atlanta, Georgia. Andrew M. Greene, Troutman Sanders, LLP, Atlanta, Georgia, represented Petitioners. Andrew Y. Stanton, Office of the General Counsel, Washington, DC, represented Respondent. On March 17, 2005, after Petitioners and Respondent filed post-hearing briefs, the Chief ALJ filed a Decision: (1) concluding Petitioners were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the PACA; and (2) ruling Petitioners have the right to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA (Chief ALJ's Decision at 11-12, 23-24).

On April 13, 2005, Respondent appealed to the Judicial Officer, but limited the appeal to the Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003). Petitioners did not file a response to Respondent's appeal petition, and on July 14, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling.

Exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Charles R. Brackett, which is part of the record in this proceeding,³ are designated "BCRX"; and exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Tom D. Oliver, which is part of the record in this proceeding,⁴ are designated "OCRX."

²"Three Rulings," filed by the Chief ALJ on December 5, 2003.

³See 7 C.F.R. § 1.136(a).

⁴See note 3.

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APPLICABLE STATUTORY PROVISION

7 U.S.C.:

TITLE 7—AGRICULTURE

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

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

.....
(b) Definitions

For purposes of this chapter:

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

7 U.S.C. § 499a(b)(9).

RESPONDENT’S APPEAL PETITION

Respondent contends the Chief ALJ erroneously provided Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003) (Respondent’s Appeal Pet. Limited to Procedural Issue).

The Chief ALJ permitted Petitioners to introduce evidence contesting the PACA violations previously found to have been committed by Atlanta Egg & Produce Co. (Chief ALJ’s Decision at 2). However, the Chief ALJ concluded the issue of whether

Petitioners should be allowed to introduce evidence that Atlanta Egg & Produce Co. did not violate the PACA is largely moot, since Petitioners failed to introduce evidence establishing that Atlanta Egg & Produce Co. did not violate the PACA (Chief ALJ's Decision at 7, 11). I agree with the Chief ALJ's conclusion that the issue is moot. However, this issue has come before me in the recent past,⁵ and the issue may arise in future PACA responsibly connected proceedings. Therefore, despite my agreement with the Chief ALJ that the issue is moot, I briefly address the issue.

The Chief ALJ states denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA, the Rules of Practice, and Petitioners' due process rights (Chief ALJ's Decision at 11-12).

I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA. The Chief ALJ does not cite and I cannot locate any provision of the PACA that provides a person alleged to have been responsibly connected with a commission merchant, dealer, or broker, which has previously been found to have violated the PACA, an opportunity to introduce evidence in the responsibly connected proceeding that the commission merchant, dealer, or broker has not violated the PACA. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as a person affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. The burden is on a petitioner, who is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association to demonstrate by a preponderance of the evidence that he or she was not responsibly connected with the commission merchant, dealer, or broker, despite his or her position at, or ownership of, the commission merchant, dealer, or broker.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to

⁵See *In re Glenn Mealman*, 64 Agric. Dec. 1802 (2005).

demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The only issue in a responsibly connected proceeding in which the petitioner admits that he or she is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association, is whether the petitioner has met his or her burden, as set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), to rebut the determination that the petitioner was responsibly connected.

I also disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the Rules of Practice. The Chief ALJ cites section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) as the basis for his conclusion.

Section 1.137(b) of the Rules of Practice requires joinder of pending responsibly connected proceedings and any related pending PACA disciplinary proceeding instituted against a commission merchant, dealer, or broker alleged to have violated the PACA, as follows:

§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

....
 (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(b)(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). The Chief ALJ filed his Decision in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), on December 5, 2003, and the Chief ALJ's Decision became final and effective in January 2004. Therefore, at the time of the hearing in the instant responsibly connected proceeding, *In re Atlanta Egg & Produce Co.* was not pending and section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) requiring joinder of a pending disciplinary proceeding with related responsibly connected proceedings is not applicable. Thus, section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) provides no basis for the Chief ALJ's ruling permitting Petitioners to raise defenses to Atlanta Egg & Produce Co.'s PACA violations.

Finally, I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with Petitioners' due process rights.

Atlanta Egg & Produce Co. and Petitioners were afforded due process. The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted the disciplinary administrative proceeding against Atlanta Egg & Produce Co. by filing a complaint on October 23, 2002. The Hearing Clerk served Atlanta Egg & Produce Co. with the complaint, but Atlanta Egg & Produce Co. elected not to file an answer resulting in the Chief ALJ's filing a decision without hearing by reason of default on December 5, 2003. Atlanta Egg & Produce Co. did not appeal the Chief ALJ's December 5, 2003, Decision and the Chief ALJ's Decision became final and effective in January 2004.

On October 29, 2002, Bruce W. Summers, Assistant Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued initial determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA and provided Petitioners the opportunity to request determinations by Respondent (BCRX 6; OCRX 6). Petitioners requested determinations by Respondent, who, on

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February 12, 2003, issued determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA. Respondent informed Petitioners in the February 12, 2003, determination letters that they had the right to file petitions for review (BCRX; OCRX). On March 13, 2003, Petitioners filed a Petition For Review pursuant to the Rules of Practice seeking reversal of Respondent's February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co. Thereafter, Petitioners fully participated in a responsibly connected proceeding conducted by the Chief ALJ in accordance with the Rules of Practice. Even if the Chief ALJ had not afforded Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co., Petitioners would have been afforded due process in accordance with the Constitution of the United States. A responsibly connected proceeding is not the proper forum to relitigate factual or legal issues resolved in an earlier PACA disciplinary proceeding and the denial of a petitioner's request to relitigate issues resolved in an earlier PACA disciplinary proceeding does not violate that petitioner's right to due process.

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

RULING

The Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), is vacated.

In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.

PACA Docket No. D-05-0001

PACA Docket No. D-05-0002

PACA Docket No. D-05-0003

PACA APP Docket No. 05-0010

PACA APP Docket No. 05-0011

PACA APP Docket No. 05-0012

PACA APP Docket No. 05-0013

PACA APP Docket No. 05-0014

**PACA APP Docket No. 05-0015
and
JAIME O. ROVELO; JEFFREY LON DUNCAN; and
THOMAS BENNETT.
Order.
Filed April 19, 2006.**

PACA - APP – Service.

Christopher Young-Morales, for Complainant.
Jaime Rovelo and Douglas B. Kerr and Christopher F. Bryan, for Respondent.
Order by Administrative Law Judge Peter M. Davenport.

ORDER

These three disciplinary proceedings were brought by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture alleging willful, flagrant and repeated violations of the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereafter “PACA”) and the regulations promulgated thereunder (7 C.F.R. § 46.1 *et seq.*) (hereafter “Regulations”). Subsequent to the filing of the three disciplinary complaints, the Chief of the PACA Branch determined that the three individual Petitioners, Jaime Rovelo, Thomas Bennett and Jeffrey Duncan, were “responsibly connected” to one or more of the Perfectly Fresh entities.¹ The three individuals have contested those determinations and filed petitions for review in each instance. As the corporations all appeared inter-related,² I consolidated the disciplinary case in which the service deficiency had been detected with the six responsibly connected cases.

¹ Jaime Rovelo was found to be responsibly connected to all three of the entities; Thomas Bennett was found to be responsibly connected to Perfectly Fresh Farms, Inc.; and Jeffrey Duncan was found to be responsibly connected to Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc.

² Each of the corporations had the same address as well as some commonality of officers and or directors. The extent to which the corporations were inter-related appears to have been an issue before the bankruptcy court.

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Review of the records in each of the disciplinary cases however reflects that in each case, service was attempted by certified mail and the certified mail was returned as other than unclaimed or refused. Notwithstanding this deficiency, in error, default decisions were entered by me in Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc. My error in entering decisions in those two cases will now be corrected and those decisions will be vacated as part of this Order.

Counsel for the Complainant in the disciplinary cases has argued that service of the disciplinary complaint upon the individuals in the responsibly connected proceedings by means "other than by mail" should be considered as service in the disciplinary cases. I rejected that argument in my Order of March 10, 2006 and directed the Complainant to show cause why the disciplinary case should not be dismissed for failure to effect service and for failure to comply with the Order of August 22, 2005 directing exchange of witness and exhibit lists.³

A Response to the Show Cause Order (which was entered on March 10, 2006) was filed on April 17, 2006 with the explanation that counsel failed to receive a copy of the Order and was unaware of its existence until April 6, 2006. While the record does contain a Document Distribution Form indicating that a copy of the order was sent to counsel by Inter-Office Mail, counsel's representation that he did not receive his copy will be accepted.

As counsel for the Complaint in each of the disciplinary cases has proposed to re-serve the disciplinary complaints, leave will be granted to allow him to do so, notwithstanding the unopposed general stay of proceedings entered as part of the Order of March 10, 2006.⁴

Being sufficiently advised, it is **ORDERED** as follows:

1. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Consolidation, Inc.*, PACA Docket NO. D-05-0002 is **VACATED**.

³ Although the Response filed on April 17, 2006 now indicates a willingness to file at least a partial exhibit and witness list, the Complainant/Respondent to date has not complied with the Order entered on August 22, 2005 concerning exchange of witness and exhibit lists.

⁴ Although counsel in his Response to the Show Cause Order indicated that he had intended to contest the Stay sought by the Petitioners, no pleading was ever filed setting forth the Complainant/Respondent position.

2. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Specialties, Inc.*, PACA Docket No. D-05-0003 is **VACATED**.

3. So much of the general stay that was entered on March 10, 2006 is **LIFTED** for the limited purpose of effecting service of the complaint in *In re Perfectly Fresh Farms, Inc.*, PACA Docket No. D-05-0001, but otherwise shall remain in full force and effect, until an appropriate Motion is filed requesting its relief.

4. Counsel for the parties are directed to consult with each other and in the event a Joint Status Report cannot be agreed to, each is directed to file a Status Report on or before June 1, 2006.

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

In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Stay Order.
Filed May 15, 2006.

PACA – Perishable agricultural commodities – Stay order.

Christopher Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On September 2, 2005, I issued a Decision and Order concluding Baiardi Chain Food Corp. [hereinafter Respondent] violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Respondent's violations.¹ On October 21, 2005, Respondent filed a petition for reconsideration, which I denied.²

On January 11, 2006, Respondent filed a petition for review of *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), with the United States Court of Appeals

¹*In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832, 1835, 1839 (2005).

²*In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.).

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for the Third Circuit. On May 12, 2005, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for a Stay Order as to Respondent Baiardi Food Chain Corp." [hereinafter Motion for Stay] requesting a stay of the Orders in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), pending the outcome of proceedings for judicial review. On May 12, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant's Motion for Stay.

In accordance with 5 U.S.C. § 705, Complainant's Motion for Stay is granted.

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

ORDER

The Orders in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1994 (2005) (Order Denying Pet. for Recons.), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: DAL-DON PRODUCE.
PACA Docket D-04-0026.
Order Vacating Finding.
Filed June 1, 2006.

PACA – Publication of PACA violations – Satisfaction of Consent Order conditions.

Charles Kendall for Complainant.
Respondent, Pro se.
Ruling by Administrative Law Judge Victor W. Palmer.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) ("the Act") and the regulations issued thereunder (7 C.F.R. Part 46)("the Regulations"), instituted by a Complaint filed on September 29, 2004

by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleged that Respondent Dal-Don Produce Co., Inc. (hereinafter "Respondent") failed to make full payment promptly in the total amount of \$46,644.55 to seven (7) sellers for 19 lots of perishable agricultural commodities which it purchased, received, and accepted in or in contemplation of interstate commerce during the period January 15, 2003 through January 30, 2003, and that Respondent, while acting as a growers' agent, failed to remit net proceeds in the total amount of \$511,272.14 to nine (9) growers for 203 lots of watermelons which it received, accepted, and sold in interstate commerce or in contemplation of interstate commerce during the period August 20, 2003 through December 26, 2003.

Complainant requested that the Administrative Law Judge find that Respondent has wilfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of these violations be published.

The parties agreed to the entry of a Decision Without Hearing by Reason of Consent, and a Decision was issued by Administrative Law Judge (ALJ) Victor W. Palmer on February 10, 2006. The Decision found that Respondent engaged in repeated and flagrant violations of section 2(4) of the PACA; however, that finding and the publication of the facts and circumstances of the violations were held in abeyance in accordance with the terms of the Understanding Regarding the Consent Decision (hereinafter "Understanding") entered into between Complainant and Respondent. The Decision also found that Respondent completed making full payment to the sellers and growers listed in the Complaint on February 3, 2006.

Respondent having satisfied the terms of the Understanding, Complainant requests that the Administrative Law Judge issue an order, effective immediately, vacating the finding and publication which were held in abeyance. Therefore, the Order below is issued.

Order

The finding that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b) is hereby vacated.

This order shall take effect immediately.

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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: KLEIMAN & HOCHBERG, INC.

PACA Docket No. D-02-0021.

In re: MICHAEL H. HIRSCH.

PACA Docket No. APP-03-0005.

In re: BARRY J. HIRSCH.

PACA Docket No. APP-03-0006.

Order Denying Petition to Reconsider.

Filed June 2, 2006.

PACA – Perishable agricultural commodities – Liability of PACA licensee for officer’s acts – Ability to control acts of an officer – Responsibly connected – Right to engage in occupation.

The Judicial Officer denied Kleiman & Hochberg, Inc.’s, Michael H. Hirsch’s, and Barry J. Hirsch’s petition to reconsider. The Judicial Officer rejected Kleiman & Hochberg, Inc.’s, Michael H. Hirsch’s, and Barry J. Hirsch’s contentions that: (1) Kleiman & Hochberg, Inc., did not violate the PACA when John Thomas paid a United States Department of Agriculture produce inspector because Kleiman & Hochberg, Inc., had no means to control John Thomas’ payments to the United States Department of Agriculture produce inspector; and (2) the imposition of employment sanctions on Michael H. Hirsch and Barry J. Hirsch unconstitutionally violates their right to engage in their chosen occupation.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service and the Chief of the PACA Branch.

Mark C.H. Mandell, Annandale, NJ, and David H. Gendelman, New York, NY, for Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a

Complaint on July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch and Barry J. Hirsch each filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York.

Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a \$180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding Michael H. Hirsch and Brian J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) revoking Kleiman & Hochberg, Inc.'s PACA license.¹

¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___, slip op. at 22-23, 55-56 (Apr. 5, 2006).

On April 24, 2006, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed "Respondent's and Petitioners' Joint Petition Under § 1.146(a) for Reconsideration of the Decision and Order of the Judicial Officer Dated April 5, 2006" [hereinafter Petition to Reconsider] and requested oral argument before the Judicial Officer. On May 12, 2006, the Agricultural Marketing Service and the Chief filed a response to the Petition to Reconsider. On May 26, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider.

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

**Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's,
and Barry J. Hirsch's
Request for Oral Argument**

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer is denied because the issues are not complex and oral argument would appear to serve no useful purpose.

**Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's,
and Barry J. Hirsch's
Petition to Reconsider**

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise two issues in the Petition to Reconsider. First, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) because Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to a United States Department of Agriculture produce inspector (Pet. to Reconsider at 2-5).

The relationship between a PACA licensee and persons acting for, or employed by, the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for, or employed by, a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be

deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed a United States Department of Agriculture produce inspector. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of the corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The

MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

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

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

Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker" 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

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

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to a United States Department of Agriculture produce inspector. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer

and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend, since Michael H. Hirsch and Barry J. Hirsch had no ability to obtain knowledge of or to control John Thomas' payments to a United States Department of Agriculture produce inspector, they cannot be found to be responsibly connected with Kleiman & Hochberg, Inc., without violating their constitutional right to engage in their chosen occupation (Pet. to Reconsider at 6-14).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.²

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.³ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of growers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to the employment sanctions in the PACA.⁴ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose

²*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

³H.R. Rep. No. 1041 (1930).

⁴*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.⁵ A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.⁶

For the foregoing reasons and the reasons set forth in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006), Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider was timely filed and automatically stayed *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ____ (Apr. 5, 2006). Therefore, since Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order

⁵*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

⁶*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee that has committed violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee that failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

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in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. ___ (Apr. 5, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch 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)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch 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)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Order

Denying Petition to Reconsider.⁷ The date of entry of the Order in this Order Denying Petition to Reconsider is June 2, 2006.

In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.
Stay Order.
Filed June 2, 2006.

PACA – Perishable agricultural commodities – Stay order.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On November 2, 2005, I issued a Decision and Order concluding Hunts Point Tomato Co., Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Respondent's violations.¹ On December 13, 2005, Respondent filed a "Petition to Reconsider," which I denied.²

On March 8, 2006, Respondent filed a petition for review of *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ____ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the Second Circuit. On May 31, 2006, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for a Stay Order" requesting a stay of the Orders in *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ____ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review. On June 1, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant's Motion for a Stay Order.

⁷See 28 U.S.C. § 2344.

¹*In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914, 1919-20, 1934 (2005).

²*In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ____ (Jan. 9, 2006) (Order Denying Pet. to Reconsider).

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In accordance with 5 U.S.C. § 705, Complainant's Motion for a Stay Order is granted.

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

ORDER

The Orders in *In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co., Inc.*, 65 Agric. Dec. ____ (Jan. 9, 2006) (Order Denying Pet. to Reconsider), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.

AND JAIME O.ROVELO; JEFFREY LON DUNCAN; AND THOMAS BENNETT.

PACA Docket No. D-05-0001.

PACA Docket No. D-05-0002.

PACA Docket No. D-05-0003.

PACA APP Docket No. 05-0010.

PACA APP Docket No. 05-0011.

PACA APP Docket No. 05-0012.

PACA APP Docket No. 05-0013.

PACA APP Docket No. 05-0014.

PACA APP Docket No. 05-0015.

Ruling.

Filed June 4, 2006.

PACA -- Responsibility Connected.

Christopher Young-Morales for Complainant
Jaime Rovelo, Douglas B. Kerr, Christopher F. Bryan for Respondent(s).
Ruling by Administrative Law Judge Peter M. Davenport.

ORDER

These three disciplinary proceedings were brought by the Associate Deputy Administrator, Fruit and Vegetable Programs,

Agricultural Marketing Service, United States Department of Agriculture alleging willful, flagrant and repeated violations of the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereafter "PACA") and the regulations promulgated thereunder (7 C.F.R. § 46.1 *et seq.*) (hereafter "Regulations"). Subsequent to the filing of the three disciplinary complaints, the Chief of the PACA Branch determined that the three individual Petitioners, Jaime Rovelo, Thomas Bennett and Jeffrey Duncan, were "responsibly connected" to one or more of the Perfectly Fresh entities.¹ The three individuals have contested those determinations and filed petitions for review in each instance. As the corporations all appeared inter-related,² I consolidated the disciplinary case in which the service deficiency had been detected with the six responsibly connected cases.

Review of the records in each of the disciplinary cases however reflects that in each case, service was attempted by certified mail and the certified mail was returned as other than unclaimed or refused. Notwithstanding this deficiency, in error, default decisions were entered by me in Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc. My error in entering decisions in those two cases will now be corrected and those decisions will be vacated as part of this Order.

Counsel for the Complainant in the disciplinary cases has argued that service of the disciplinary complaint upon the individuals in the responsibly connected proceedings by means "other than by mail" should be considered as service in the disciplinary cases. I rejected that argument in my Order of March 10, 2006 and directed the Complainant to show cause why the disciplinary case should not be dismissed for failure to effect service and for failure to comply with the Order of August 22, 2005 directing exchange of witness and exhibit lists.³

¹ Jaime Rovelo was found to be responsibly connected to all three of the entities; Thomas Bennett was found to be responsibly connected to Perfectly Fresh Farms, Inc.; and Jeffrey Duncan was found to be responsibly connected to Perfectly Fresh Consolidations, Inc. and Perfectly Fresh Specialties, Inc.

² Each of the corporations had the same address as well as some commonality of officers and or directors. The extent to which the corporations were inter-related appears to have been an issue before the bankruptcy court.

³ Although the Response filed on April 17, 2006 now indicates a willingness to file at least a partial exhibit and witness list, the Complainant/Respondent to date has not
(continued...)

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A Response to the Show Cause Order (which was entered on March 10, 2006) was filed on April 17, 2006 with the explanation that counsel failed to receive a copy of the Order and was unaware of its existence until April 6, 2006. While the record does contain a Document Distribution Form indicating that a copy of the order was sent to counsel by Inter-Office Mail, counsel's representation that he did not receive his copy will be accepted.

As counsel for the Complaint in each of the disciplinary cases has proposed to re-serve the disciplinary complaints, leave will be granted to allow him to do so, notwithstanding the unopposed general stay of proceedings entered as part of the Order of March 10, 2006.⁴

Being sufficiently advised, it is **ORDERED** as follows:

1. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Consolidation, Inc.*, PACA Docket NO. D-05-0002 is **VACATED**.

2. The Default Decision entered on March 31, 2005 in the case of *In re Perfectly Fresh Specialties, Inc.*, PACA Docket No. D-05-0003 is **VACATED**.

3. So much of the general stay that was entered on March 10, 2006 is **LIFTED** for the limited purpose of effecting service of the complaint in *In re Perfectly Fresh Farms, Inc.*, PACA Docket No. D-05-0001, but otherwise shall remain in full force and effect, until an appropriate Motion is filed requesting its relief.

4. Counsel for the parties are directed to consult with each other and in the event a Joint Status Report cannot be agreed to, each is directed to file a Status Report on or before June 1, 2006.

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

³(...continued)
complied with the Order entered on August 22, 2005 concerning exchange of witness and exhibit lists.

⁴ Although counsel in his Response to the Show Cause Order indicated that he had intended to contest the Stay sought by the Petitioners, no pleading was ever filed setting forth the Complainant/Respondent position.

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DEFAULT DECISIONS

**In re: HALE-HALSELL COMPANY.
PACA Docket No. 05-0019.
Decision Without Hearing By Reason of Default.
Filed January 30, 2006.**

PACA -- Default.

Ruben Rudolph for Complainant.
Respondent, Pro se.

Decision and Order 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 referred to as the "Act"], instituted by a complaint filed on August 16, 2005, 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 August 6, 2003, through February 12, 2004, Respondent Hale-Halsell Company, [hereinafter the "Respondent"], failed to make full payment promptly to fourteen (14) sellers of the agreed purchase prices in the total amount of \$412,968.87 for 113 lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the complaint filed on August 16, 2005, was sent to the Respondent at 9111 E. Pine Street, Tulsa, Oklahoma 74115, and its mailing address of P.O. Box 52898, Tulsa, Oklahoma 74158-2898, by certified mail. The complaint was received by the Respondent, and signed for, at both addresses on August 23, 2005. No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139).

Findings of Fact

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1. The Respondent is a corporation organized and existing under the laws of the State of Oklahoma. Respondent's business address is 9111 E. Pine Street, Tulsa, Oklahoma 74115. Respondent's mailing address is P.O. Box 52898, Tulsa, Oklahoma 74158-2898.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 19990802 was issued to Respondent on March 31, 1999. This license terminated on March 31, 2005 when Respondent failed to pay the required annual fee as required by section 4(a) of the Act (7 USC § 499d(a)).

3. As more fully set forth in paragraph III of the complaint, during the period August 6, 2003, through February 12, 2004, the Respondent purchased, received and accepted in interstate commerce, from fourteen (14) sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$412,968.87.

Conclusions

The Respondent's failure to make full payment promptly with respect to the 113 transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

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

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

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

Copies hereof shall be served upon the parties.

**In re: PENN PRODUCE, INC.
PACA Docket No. D-05-0025.
Default Decision.
Filed February 2, 2006.**

PACA -- Default.

Gary F. Ball for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S Clifton.

Decision and Order by Reason of Default

Procedural History

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently, “the PACA” or the “Act”), by a Complaint filed on September 30, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, “AMS” or “Complainant”), is represented by Gary F. Ball, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The Complaint alleges, among other things, that during October 2004 through March 2005, Penn Produce, Inc. (herein frequently “Penn Produce” or “Respondent”) failed to make full payment promptly of the agreed purchase prices totaling \$274,037.51, to 35 sellers of perishable agricultural commodities in 239 lots, which Respondent purchased, received, and accepted in the course of interstate or foreign commerce.

A copy of the Complaint was sent to Penn Produce, Inc. at 7168 Daniels Drive, Fogelsville, Pennsylvania 18051 by certified mail on October 3, 2005. The Complaint was delivered and signed for on October 6, 2005. No answer to the Complaint has been received. The time for filing an answer expired on October 26, 2005.

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The Complainant's Motion for the issuance of a decision by reason of default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

Accordingly, the material allegations in the Complaint, which are admitted by Penn Produce'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.*

Findings of Fact

1. Penn Produce, Inc. is a Pennsylvania corporation with a business and mailing address of 7168 Daniels Drive, Fogelsville, Pennsylvania 18051.

2. Penn Produce, Inc. was licensed under the provisions of the PACA at all times material to the allegations of the Complaint. License number 1985-0367 was issued to Penn Produce, Inc. on December 17, 1984. This license has been renewed annually and was last subject to renewal by December 17, 2005.

3. Penn Produce, Inc., during October 2004 through March 2005, failed to make full payment promptly to 35 sellers of the agreed purchase prices in the amount of \$274,037.51 for 239 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate or foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Penn Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of \$274,037.51, for 239 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate or foreign commerce during October 2004 through March 2005.

Order

1. Penn 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 its PACA license, number 1985-0367 issued December 17, 1984, is revoked.

2. In the alternative, in the event Penn Produce, Inc. failed to renew its license, the facts and circumstances of Penn Produce's PACA violations shall be published.

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

Finality

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 with the Hearing Clerk 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.

* * *

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

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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: MIEZE JET AIR SALES, INC.
PACA Docket No. D-05-0007.
Decision Without Hearing by Reason of Default.
Filed February 2, 2006.

PACA -- Default.

Chris Young-Morales for Complainant.
Respondent, Pro se..
Decision and Order filed by Chief Administrative Law Judge Marc R. Hillson.

DEFAULT DECISION

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 3, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period October 6, 2003 through May 10, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 41 sellers, 376 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,263,527.13.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on July 14, 2005, and was signed for by Respondent's representative on July 18, 2005. Therefore, the Hearing Clerk 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 July 18, 2005. 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 the complaint 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 Pennsylvania. Its business mailing address is 21 Smallman Street, Pittsburgh Terminal Produce Market, Pittsburgh, PA15222.

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 20010366 was issued to Respondent on December 5, 2000. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on December 5, 2005.

3. During the period October 6, 2003 through May 10, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 41 sellers, 376 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,263,527.13.

Conclusions

Respondent's failure to make full payment promptly with respect to the 376 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.

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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: RAWLS BROKERAGE, INC.
PACA Docket No. D-05-0006.
Decision and Order by Reason of Default.
Filed February 3, 2006.

PACA -- Default.

Chris Young-Morales for Complainant.

Respondent, Pro se.

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

Procedural History

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently, “the PACA” or “the Act”), by a Complaint filed on March 4, 2005. The Complaint alleges, among other things, that during September 2003 through February 2004, Respondent Rawls Brokerage, Inc., failed to make full payment promptly to 100 sellers of the agreed purchase prices, totaling \$2,082,245.93 for 786 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

The Complainant is the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, “AMS” or “Complainant”). AMS is represented by Christopher Young-Morales, Esq., 202/720-5191, Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

Respondent Rawls Brokerage, Inc. (herein frequently, "Rawls Brokerage" or "Respondent"), is an Alabama corporation, formerly doing business at 3057 Lorna Road, Suite 210, Birmingham, Alabama 35216. Rawls Brokerage is represented by Lewis B. Hickman, Jr., Esq., 334/264-1441, 915 S. Hull St., Montgomery, Alabama 36104.

The Complaint was served upon Rawls Brokerage on May 20, 2005.¹ No answer to the Complaint has been received. The time for filing an answer expired on June 9, 2005. 7 C.F.R. § 1.136(a).

On August 30, 2005, this case was assigned to me, Jill S. Clifton, United States Administrative Law Judge.

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. AMS filed a Motion for a Decision Without Hearing by Reason of Default on July 22, 2005.

AMS claims that Rawls Brokerage's failure to pay promptly the agreed purchase prices of perishable agricultural commodities in the transactions set forth in the Complaint constitutes willful, flagrant, and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)). AMS requests that a finding be made that Rawls Brokerage has committed willful, flagrant, and repeated violations of the PACA, and that an order be entered that the facts and circumstances of the violations be published, pursuant to the authority of Section 8(a) of the Act (7 U.S.C. § 499h(a)).

Rawls Brokerage filed an Objection on August 22, 2005, and had previously filed a letter dated August 1, 2005, on August 9, 2005. In response to my Request, Rawls Brokerage filed a letter dated January 23, 2006, on January 30, 2006. These documents filed by Rawls

¹ On March 7, 2005, the Hearing Clerk sent to Rawls Brokerage, Inc., by certified mail, return receipt requested, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Rawls Brokerage was informed in the service letter and in the Complaint that an answer to the Complaint should be filed in accordance with the Rules of Practice within 20 days and that failure to answer any allegation in the Complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136. The envelope containing these items was returned to the Hearing Clerk's Office on April 26, 2005, marked "Return to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on May 20, 2005, sent the copy of the Complaint with accompanying documents to Rawls Brokerage via ordinary mail. The Complaint was thereby deemed to have been received by Rawls Brokerage on May 20, 2005. 7 C.F.R. § 1.137.

Brokerage show Rawls Brokerage PACA Trust Account Payments in 2004 totaling approximately \$1,250,100.00, largely pursuant to an Order for an Interim Distribution in the pending PACA litigation in the U.S. District Court for the Northern District of Alabama. (Nearly all those disbursements were dated September 29, 2004, with the exception of \$21,105.38 dated November 3, 2004.) The Rawls Brokerage filings indicate that another \$430,000.00 in funds on deposit awaits the next Order for distribution, and that Rawls Brokerage continues its efforts to collect additional money.

The Complaint incorporates Exhibit A, which details the \$2,082,245.93 "Past Due & Unpaid" by Rawls Brokerage. Exhibit A fails to show the date on which those outstanding balances were tallied, except that it was prior to the filing of the Complaint (March 4, 2005). The last payment due date shown on Exhibit A is 02/09/04, so the \$2,082,245.93 was tallied after that date. Even if I were to assume that the \$2,082,245.93 was tallied before the \$1,250,100.00 was disbursed, and I were consequently to credit the \$1,250,100.00 against the \$2,082,245.93, I would find that the Sellers identified on Exhibit A still were not fully paid, and the Sellers identified on Exhibit A still were not promptly paid.

Also, Rawls Brokerage failed to come into full compliance with the PACA within 120 days after the Complaint was served. The date by which Rawls Brokerage would have had to be in full compliance with the PACA, to be regarded as "slow pay" instead of "no pay," was September 17, 2005. That date was four months ago.

Findings of Fact

1. Rawls Brokerage, Inc. is an Alabama corporation, formerly doing business at 3057 Lorna Road, Suite 210, Birmingham, Alabama 35216.

2. Rawls Brokerage, Inc. was licensed under the provisions of the PACA at all times material to the allegations of the Complaint. PACA license number 1979-0084 was issued to Rawls Brokerage, Inc. on October 12, 1978. This license was terminated on October 12, 2004, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when Rawls Brokerage failed to pay its required annual license renewal fee.

3. Rawls Brokerage, Inc., during September 2003 through February 2004, failed to make full payment promptly to 100 sellers of the agreed purchase prices in the total amount of \$2,082,245.93, or

balances thereof, for 786 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Rawls Brokerage, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 100 sellers of the agreed purchase prices totaling \$2,082,245.93, or balances thereof, for 786 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during September 2003 through February 2004.

Order

1. Rawls Brokerage, 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 September 2003 through February 2004, and the facts and circumstances of the violations shall be published.

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

Finality

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 with the Hearing Clerk 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.

In re: INDIAN ROCK PRODUCE INC.

PACA Docket No. D-05-0020.

Default Decision.

Filed February 10, 2006.

PACA -- Default.

Tonya Keusseyan for Complainant.

Respondent, Pro se.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing by Reason of Default

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 29, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period October 2002 through December 2003, Respondent Indian Rock Produce Inc., (hereinafter "Respondent") failed to make full payment promptly to 27 sellers of the agreed purchase prices in the total amount of \$267,931.65 for 313 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

On August 29, 2005, a copy of the Complaint was mailed to Respondent via certified mail to its business mailing address. The Complaint was received on September 6, 2005 and signed for by LuAnn Buehrer who was then an officer of Respondent. 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 Delaware. Its business mailing address is 530 California Road, P.O. Box 317, Quakertown, Pennsylvania 18951.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 19871403 was issued to Respondent on June 9, 1987. That license terminated on June 9, 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 October 2002 through December 2003, Respondent purchased, received and accepted in interstate commerce from 27 sellers, 313 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$267,931.65.

Conclusions

Respondent's failure to make full payment promptly with respect to the 313 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: SOUTH PEAK PRODUCE, INC.
PACA Docket No. D-05 - 0017.
Decision Without Hearing by Reason of Default.
Filed March 27, 2006.

PACA – Default.

Charles Kendall 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 Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (the "Act"), instituted by a Complaint filed on July 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period February 3, 2002 through May 24, 2004, Respondent South Peak Produce, Inc. (hereinafter "Respondent") failed to make full payment promptly to seven (7) sellers of the agreed purchase prices, or balances thereof, in the total amount of \$188,552.73 for 92 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

A copy of the Complaint was mailed to Respondent by certified mail at its last known principal place of business, its PACA address of record (see 7 CFR § 46.1 3(a)(1)) on July 22, 2005, and was returned by the Postal Service to the Department of Agriculture on August 8, 2005 marked "Undeliverable as Addressed".

Research of Auto Track Corporate Records by the PACA Branch of the Fruit and Vegetable Programs, Agricultural Marketing Service indicated that the registered agent for Respondent is Respondent's president, Steven R. Lewandowski (Attachment A). The records further indicated that Mr. Lewandowski's address is 1 Pennwood Lane, Greenville, South Carolina (Attachment B). On September 9, 2005, counsel for Complainant notified the Hearing Clerk of the address of Respondent's registered agent (Attachment C), and the Hearing Clerk sent a copy of the Complaint to that address by certified mail.

The Postal Service returned the certified mailing addressed to Respondent's registered agent to the Department of Agriculture marked "Return to Sender" and "Unclaimed". The Hearing Clerk remailed a copy of the Complaint to Respondent's registered agent at the same address by ordinary mail on December 7, 2005 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §1.130 et seq., hereinafter "Rules of Practice") (Attachment D). Respondent has not answered the Complaint. The

time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a corporation incorporated in the state of South Carolina. Its business mailing address is 1354 Rutherford Road, Greenville, South Carolina 29609.
2. Respondent is not, and has never been, licensed under the PACA. At all times material herein, Respondent has conducted business subject to the PACA.
3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.
4. As set forth in paragraph III of the Complaint, during the period February 3, 2002 through May 24, 2004, Respondent purchased, received, and accepted in interstate commerce, from seven (7) sellers, 92 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$188,552.73.

Conclusions

Respondent's failure to make full payment promptly with respect to the 92 lots set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

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

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

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

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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: SUPERIOR PRODUCE EXCHANGE, LLC.
PACA Docket. D-04-0023.
Decision Without Hearing by Reason of Default.
Filed May 24, 2006.**

PACA -- Default.

Charles Kendall 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 Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)(the "Act"), 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 during the period June 17, 2002 through May 7, 2003, Respondent Superior Produce Exchange, LLC (hereinafter "Respondent") failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$668,311.27 for 248 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce.

In accordance with the Order issued by Administrative Law Judge Peter M. Davenport on February 17, 2006 and the previous orders referenced therein, a copy of the Complaint with a cover letter from the Hearing Clerk and a copy 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") was delivered to Respondent's registered agent, Tawab Nassery, by Federal Express (See Attachment A) on February 20, 2006. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following

Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent is a limited liability company organized in the state of New Jersey on May 8,2001. Its business mailing address is 4 Dundee Avenue, Paterson, New Jersey 07503-1206. The address of its registered agent is 46 Highview Avenue, Totowa, New Jersey 07512.

2. At all times material to the allegations in the complaint, Respondent was licensed under the PACA. License number 2002045 1 was issued to Respondent on January 1 1,2002. This license terminated on January 11,2004, 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. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. During the period June 17,2002 through May 7,2003, Respondent purchased, received, and accepted in interstate commerce, from 15 sellers, 248 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$668,311.27.

Conclusions

Respondent's failure to make full payment promptly with respect to the 248 lots set forth in Finding of Fact No. 4 above constitutes wilful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations shall be published. This order shall take effect on the 11th day after this Decision becomes final.

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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.

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

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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: ADAMS APPLE PRODUCE, INC.
PACA Docket No. D-05-0016.
Decision Without Hearing by Reason of Default.
File June 15, 2006.**

PACA – Default.

Christopher Young Morales for Complainant.
Karla Whalen for Respondent.

Decision and order 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 referred to as the "Act", instituted by a complaint filed on July 22, 2005, 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 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$887,507.77.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail and was signed for by Respondent's representative on August 3, 2005. Subsequently, however, a copy of the complaint was returned by the U.S. Postal Service with a forwarding address. Although the complaint had already been signed for by certified mail, Complainant re-served the complaint to that forwarding address by certified mail, and the complaint was signed for by Respondent's representative on April 11, 2006. Therefore, the Hearing Clerk 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 August 3, 2005. 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 the complaint 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 Tennessee. Its business address is 3625 County Road, Flatrock, Alabama 35966. Its mailing address is P.O. Box 219,

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Higdon, Alabama 35979-0219. The corporation's Registered Agent is Paul Thornton. Mr. Thornton's address is 719 Kentucky Avenue, Signal Mountain, Tennessee 37377. Mr. Thornton's alternate address is 1107 Montvale Circle, Signal Mountain, Tennessee 37377.

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 1997-2047 was issued to Respondent on August 25, 1997. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on August 25, 2004.

3. During the period May 2003 through September 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 37 sellers, 164 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$887,507.77.

Conclusions

Respondent's failure to make full payment promptly with respect to the 164 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: MARINE PARK FARMERS MARKET INC.
PACA Docket No. D-06-0004.
Decision and Order.
Filed June 19, 2006.**

PACA -- Default.

Andrew Stanton for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton

**Decision and Order
by Reason of Default**

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by a complaint filed on December 20, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The complaint alleged, among other things, that during August 2002 through November 2004, the Respondent, Marine Park Farmers Market, Inc. (herein frequently “Marine Park” or “Respondent”), failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of \$269,455.05 for 43 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and/or foreign commerce or in contemplation of interstate or 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 find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order Respondent’s PACA license revoked. A copy of the complaint was mailed, by certified mail, together with the Hearing Clerk’s Notice Letter dated December 20, 2005, to Marine Park’s business mailing address at 2961 Avenue U, Brooklyn, New York 11229. The complaint was delivered and signed for on

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December 23, 2005. No answer to the complaint has been received. The time for filing an answer expired on January 12, 2006. *See* section 1.136(a) (7 C.F.R. § 1.136(a)) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (hereinafter, “Rules of Practice”).

The Complainant’s Motion for Decision Without Hearing by Reason of Default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

Accordingly, the material allegations in the complaint, which are admitted by Marine Park’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.*

Findings of Fact

1. Marine Park Farmers Market, Inc. is a corporation organized and existing under the laws of the State of New York. Marine Park's business address is 2961 Avenue U, Brooklyn, New York 11229.

2. At all times material herein, Marine Park was licensed under the provisions of the PACA. License number 19981578 was issued to Marine Park on July 9, 1998. This license has regularly been renewed and is effective through its anniversary date in July 2006.

3. Marine Park's license was automatically suspended on October 1, 2003, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), due to Marine Park's failure to pay an August 26, 2003, reparation award issued in favor of Nathel & Nathel, Inc., Bronx, New York, in the amount of \$50,955.00, plus interest. An additional reparation award was issued against Marine Park in favor of Nathel & Nathel, effective February 25, 2004, in the amount of \$47,157.00, plus interest. These reparation awards have not been satisfied and, consequently, the suspension of Marine Park's PACA license remains in effect.

4. As more fully set forth in paragraph III of the complaint, Marine Park, during August 2002 through November 2004, failed to make full payment promptly to four sellers of the agreed purchase prices, or balances thereof, in the total amount of \$269,455.05, for 43 lots of perishable agricultural commodities which it purchased, received, and accepted in the course of interstate and/or foreign commerce or in contemplation of interstate or foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Marine Park Farmers Market, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to four sellers of the agreed purchase prices in the total amount of \$269,455.05, for 43 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce during August 2002 through November 2004.

Order

1. Marine Park Farmers Market, Inc. committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and its PACA license, number 19981578 issued July 9, 1998, is revoked.

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

Finality

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 with the Hearing Clerk 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.

* * *

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

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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: GALLO PRODUCE AND FOOD PRODUCTS, INC.
PACA Docket No. D-05-0022.
Default Decision.
Filed June 21, 2006.**

PACA -- Default.

Chris Young-Morales for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

**Decision Without Hearing by
Reason of Default**

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 September 22, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period September 2002 through May 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 112 sellers, 924 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$2,292,989.81. The complaint further alleges that during the period December 2002 through April 2003, Respondent failed to make full payment promptly to 2 brokers in the total amount of \$7,587.50 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was mailed by the Hearing Clerk to Respondent's Registered Agent by certified mail and was signed for by Respondent's representative on September 30, 2005. Therefore, the Hearing Clerk 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 September 30, 2005. 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

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Respondent failed to answer the complaint 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 Missouri. Its business address is 1010 N. Century, Kansas City, Missouri 64120. Its mailing address is P.O. Box 33870, Kansas City, Missouri 64120-3870. The name and address of Respondent's registered agent is Michael Messina, 111 W. 75th Street, Kansas City, MO 64114.
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 19730258 was issued to Respondent on September 6, 1973. This license terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee on September 6, 2003.
3. During the period September 2002 through May 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 112 sellers, 924 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$2,292,989.81.
4. During the period December 2002 through April 2003, Respondent failed to make full payment promptly to 2 brokers in the total amount of \$7,587.50 for perishable agricultural commodities purchased, received, and accepted, in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 3 and 4, 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

GALLO PRODUCE AND FOOD PRODUCTS, INC 765
65 Agric.. Dec. 763

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.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Fresh Fare, Inc. PACA Docket No. D-04-0020. 2/6/06.

Lion Heart Group, Inc. PACA Docket No. D-05-0024. 2/8/06.

Dal-Don Produce Co., Inc. PACA Docket No. D-04-0026. 2/10/06.

John A. Foster d/b/a Foster Farm Fresh Produce. PACA Docket No. D-06-0006. 3/1/06.

P.J. Produce, Inc. and Frank J. Falletta. PACA Docket No. D-05-0023. 3/15/06.

Pieter Schoonveld d/b/a Dayton Trading Company. PACA Docket No. 06-0009. 4/10/06.

Alderiso Bros. Inc. PACA Docket No. D-06-0013. 5/11/06.

R & R Fresh Fruits and Vegetables, Inc. PACA Docket No. D-04-0009. 5/15/06.