

# AGRICULTURE DECISIONS

**Volume 66**

January - June 2007  
Part Three (PACA)  
Pages 746 - 970



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

## AGRICULTURE DECISIONS

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

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

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

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are also available online at <http://www.usda.gov/da/oaljdecisions/> along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned and will appear in pdf on the same OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

A compilation of past volumes on Compact Disk (CD) and individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available for sale. Go to [www.pay.gov](http://www.pay.gov) and search for "AgricDec". Please complete the order form therein.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of [Editor.OALJ@usda.gov](mailto:Editor.OALJ@usda.gov).

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**COURT DECISION**

COOSEMANS SPECIALTIES, INC., ET AL. v. USDA.  
No. 06-1199. . . . . 746

**DEPARTMENTAL DECISIONS**

JUDITH’S FINE FOODS INTERNATIONAL, INC.  
PACA Docket No. D-06-0012.  
Decision and Order.. . . . 758

B.T. PRODUCE CO., INC.  
PACA Docket No. D-02-0023.  
LOUIS R. BONINO.  
PACA Docket No. APP-03-0009.  
NAT TAUBENFELD.  
PACA Docket No. APP-03-0011.  
Decision and Order. . . . . 774

JOSEPH T. CERNIGLIA.  
PACA-APP Docket No. 04-0012.  
Decision and Order.. . . . 844

**REPARATIONS**

**COURT DECISION**

JOE RANDAZZO’S FRUIT & VEGETABLE, INC. v. W-W  
PRODUCE, INC.  
No. 04-7504. . . . . 862

**REPARATIONS**

**DEPARTMENTAL DECISIONS**

WILLIAM S. KINZER, d/b/a KOUNTRY LANE HARVEST v .  
NATHEL & NATHEL, INC., AND/OR ORLANDO TOMATO, INC.  
PACA Docket No. R-07-009  
Reparation Decision..... 876

DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. v.  
MULLER TRADING COMPANY, INC.  
PACA Docket No. R-07-019.  
Reparation Decision.. ..... 882

ALBERT GOOD d/b/a CASTLE ROCK VINEYARDS v. EURO-  
PACIFIC FRUIT EXPORT, INC.  
PACA Docket No. R-06-0005.  
Reparation Decision. .... 891

SOUTHERN SPECIALTIES, INC. v. AMERIFRESH, INC.  
PACA Docket No. R-07-039.  
Reparation Decision. .... 917

**MISCELLANEOUS ORDERS**

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.  
Stay Order ..... 927

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. Stay Order. ....	929
DONALD R. BEUCKE. PACA-APP Docket No. 04-0009. Stay Order. ....	930
KOAM PRODUCE, INC. PACA Docket No. D-01-0032. Stay Order. ....	931
DONALD R. BEUCKE. PACA-APP Docket No. 04-0014. In re: KEITH K. KEYESKI. PACA-APP Docket No. 04-0020. Stay Order as to Donald R. Beucke. ....	933
DONALD R. BEUCKE. PACA-APP Docket No. 04-0014. In re: KEITH K. KEYESKI. PACA-APP Docket No. 04-0020. Stay Order as to Keith K. Keyeski. ....	934
JUDITH'S FINE FOODS INTERNATIONAL, INC. PACA Docket No. D-06-0012. Order Denying Petition to Reconsider. ....	935
TUNG WAN COMPANY, INC. PACA Docket No. D-06-0019. Order Denying Late Appeal. ....	940

HUNTS POINT TOMATO CO., INC. PACA Docket No. D-03-0014. Order Lifting Stay Order. . . . .	946
---	-----

**DEFAULT DECISIONS**

TUNG WAN COMPANY, INC. PACA Docket No. D06-0019. Default Decision.. . . . .	949
---	-----

ORIENT FARMS, LLC. PACA Docket No. D-05-0013. Default Decision. . . . .	952
---	-----

FRESH AMERICA CORP. PACA Docket No. D-06-0002. Default Decision.. . . . .	955
---	-----

BEST FRESH, LLC. PACA Docket No. D-06-0020. Default Decision. . . . .	962
---	-----

MCDONALD FARMS, INC. PACA Docket No. D-06-0015. Default Decision. . . . .	964
---	-----

CARIBE TROPICAL FOODS, INC.: ALBERTINO PINA and MARIA I. PINA, d/b/a CARIBE TROPICAL FOODS, INC. PACA Docket No. D-07-0028. Default Decision. . . . .	966
--	-----

DAE WON NY, INC., d/b/a YONKERS PRODUCE.  
PACA Docket No. D-06-0018.  
Default Decision. . . . . 969  
**Consent Decisions.** . . . . . 972

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**COURT DECISION**

**COOSEMANS SPECIALTIES, INC., ET AL. v. USDA.**

**No. 06-1199.**

**Filed April 6, 2007.**

**Rehearing En Banc.**

**Filed June 20, 2007.**

**(Cite as: 482 F.3d 560).**

**PACA – Commercial bribery – Implied duty-not to allow bribes – Warning/Notice, no requirement to give – Willfulness.**

The Court upheld the Judicial Officer’s decision that the PACA includes an “inherent duty not to bribe.” Invoking the *Chevron* doctrine, the Court determined the PACA to be ambiguous regarding inherent duties of the PACA licensee and proceeded to the second *Chevron* step in measuring the Secretary’s interpretation of the PACA statute. The Court found that the Secretary was not arbitrary, capricious, or contrary to law when he/she announced the “inherent duty not to bribe” interpretation. The Court found the PACA statute to be extremely broad and used the word “any” in modifying the words “undertaking,” “transaction,” “duty,” and “specification or duty, express or implied” to contemplate a wide range of behavior. The Court rejected Cooseman’s argument that the regulated behavior under PACA only applied to the parties of a buy/sell contract and does not reach the third party USDA inspector. Cooseman argued that under PACA “a license may not be revoked unless the licensee has been given written notice and an ‘opportunity to demonstrate or achieve compliance.’” However, under 5 U.S.C. § 558(c) “willfulness,” [a prohibited act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements] alleviates the Agency’s duty to forewarn participants in a bribery scheme.

Before: SENTELLE, RANDOLPH and BROWN, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge.

Wholesale produce merchant Coosemans Specialties, Inc., petitions for review of a decision by the Secretary of the Department of Agriculture to revoke the company’s license for violations of the Perishable Agricultural Commodities Act. The Secretary concluded that the company violated the

Act's prohibition on unfair conduct when one of its employees bribed a Department of Agriculture inspector. In addition to revoking the company's license, the Secretary also barred two principals of the company from employment in the industry. The company and the individuals seek review of the Secretary's decision, contending that bribery does not violate the Act, and that the employment restrictions were unlawful. Because we conclude that the agency's actions were proper, we deny the petitions for review.

### I.

The Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-499s ("PACA" or the "Act"), was enacted in 1930 to regulate interstate and foreign commerce in fresh fruits and vegetables. The Act authorizes the agency to create a system for inspecting produce. Id. § 499n(a). It requires merchants to obtain licenses from the Secretary of the Department of Agriculture ("USDA" or "Secretary"), and subjects licensees to a number of requirements. Id. §§ 499b, 499c(a), 499e, 499i. Licensees who violate the Act may find their licenses suspended or revoked, and individuals affiliated with violators may be excluded from industry employment. Id. § 499h.

Petitioner Coosemans Specialties, Inc. ("CSI" or the "Company"), is a New York produce wholesaler whose PACA license was originally issued in 1986. The Company operates out of Hunts Point Terminal, a wholesale produce market in the Bronx, New York. At all times relevant to this matter, CSI had three principals, all of whom were part owners: Daniel F. Coosemans, president and founder; Eddy C. Creces, secretary, treasurer, and general manager; and Joe Faraci, vice president.

The perishable produce that arrives at Hunts Point often travels some distance between the supplier and a buyer, such as CSI. As a result, produce may arrive in a condition worse than expected. If the buyer then asks for a price reduction, the producer is at a disadvantage, because it has no way of knowing whether to trust the buyer's representations about the condition of the produce. The USDA's inspection process is intended to level the playing field by providing the faraway producer with an independent evaluation of the produce's condition so he can be assured that the price he receives is fair. A buyer, upon receipt of nonconforming goods, may request an inspection. An agency inspector reviews the produce and issues an official certificate assessing its condition that can help the producer and

buyer renegotiate the price. After their transaction is complete, however, the inspection certificate is of little use in subsequent transactions. If the initial buyer is a wholesaler like CSI, it sells the produce to another buyer who is typically able to personally inspect the produce at Hunts Point.

This inspection system has been subject to abuse. For two decades, corrupt USDA inspectors and buyers at Hunts Point participated in a scheme of illegal payments. An inspector who received a bribe might furnish a falsified certificate indicating that the produce's condition was worse than it actually was. The buyer would use that certificate to negotiate a lower price with the supplier. Once he paid the supplier, the buyer could resell the produce for a price that reflected the produce's actual condition. In this way, a buyer who bribed inspectors for this purpose could increase his profit margin to the detriment of the supplier. Additionally, some inspectors who had accepted bribes permitted those companies to jump to the front of the line for inspections, thereby delaying the inspections of their competitors. Produce being perishable, buyers who had to wait for inspections were likely to receive lower prices when the goods were eventually resold.

In 1999, one of the Hunts Point inspectors, William Cashin, was caught taking bribes. After his arrest, he agreed to cooperate with investigators. He conducted inspections from April until August 1999 while wearing audio and/or video recording devices to document the bribes he received. During this period, he reported that he received fourteen bribes from Joe Faraci-CSI's vice president-both to hasten inspections and to falsify the resulting certificates in CSI's favor. Faraci was charged with eight counts of bribery of a public official, subsequently pled guilty to one count, and was imprisoned and fined. In light of these events, the Secretary filed a complaint against CSI on August 16, 2002, alleging that the Company, through Faraci's actions, had violated the implied duty clause of PACA's unfair practices provision. The Secretary also filed complaints against Eddy Creces and Daniel Coosemans individually, alleging that they were responsibly connected to CSI at the time the violations occurred.

The Company and both individuals denied the allegations and sought agency review. The cases were consolidated and heard in late 2003 before an Administrative Law Judge, who concluded that the Company's license should be revoked and that Creces and Coosemans, as "responsibly connected" persons, should be subject to the employment restrictions. The

parties appealed to the Judicial Officer (“JO”), to whom the Secretary has delegated final authority in adjudicative proceedings. See 7 C.F.R. § 2.35. The JO affirmed the ALJ’s initial decision in a decision and order issued April 20, 2006, finding in particular that in exchange for Faraci’s bribes, Cashin would “falsify” USDA inspection certificates by, inter alia, “increasing the percentage of defects” and “changing the temperatures of the load.” *In re Coosemans Specialties, Inc.*, Dkt. No. D-02-0024, 2006 WL 1135512 (USDA). On June 13, 2006, CSI and the individual petitioners filed petitions before this Court seeking review of the Secretary’s decision. CSI disputes the Secretary’s interpretation of PACA’s “implied duty” clause as encompassing a duty not to pay bribes. The individual petitioners challenge the Secretary’s determination that they were subject to the employment restrictions as persons “responsibly connected” to CSI. The decision and order of the JO was stayed pending our ruling.

## II.

### A.

When reviewing an interpretation of a statute by an agency charged with the administration of that statute, we apply the two-step Chevron framework. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If the meaning of the statute is unambiguous, we must give effect to the clear congressional intent. *Id.* at 842-43, 104 S.Ct. 2778. If, however, the statutory language is ambiguous, we will uphold the agency’s interpretation as long as it is not “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844, 104 S.Ct. 2778. The USDA is entrusted to administer PACA, and therefore its interpretations are entitled to deference under *Chevron*. See *id.*

The Secretary’s basis for revoking CSI’s license is that the Company, through Faraci, violated the implied duty clause of PACA. That provision reads, in relevant part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction ... or to fail or refuse truly and correctly to account and make full payment

promptly in respect of any transaction ...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....

7 U.S.C. § 499b(4) (emphasis added).

CSI argues that the implied duty clause cannot fairly be read to include a duty not to bribe USDA inspectors. To do so runs contrary to a number of principles of statutory interpretation. We disagree. Initially, we note that Congress's language in this subsection is extremely broad. The word "any" appears no fewer than three times in the specific clause at issue, modifying the words "undertaking," "transaction" and "duty." *Id.* The breadth and ambiguity of the key phrase as well—"any specification or duty, express or implied"—contemplates a wide range of behavior. *See G&T Terminal Packaging Co. v. Dep't of Agric.*, 468 F.3d 86, 96 (2d Cir.2006) ("G&T"); cf. *Duties of Licensees*, 7 C.F.R. § 46.26 (noting that, because it is "impracticable to specify in detail all of the duties," conduct specified in the regulations is not exhaustive). Implied duties, by their nature, would not be spelled out in a contract or otherwise; they are given meaning by agency gap-filling. *See JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 614 n. 8 (D.C.Cir.2001) ("*JSG Trading II*") ("Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision."), quoted in *G & T*, 468 F.3d at 96 (noting that, since the "statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear," it is the "province of the Secretary ... to fill in these gaps"). This is especially true if the term may be better fleshed out through application of the law to specific cases and their facts, rather than by drafting an exhaustive list of all hypothetical conduct that would constitute a violation. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (noting that an agency should be accorded *Chevron* deference "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication" (internal quotation omitted)); cf. *G & T*, 468 F.3d at 97 (noting that "the expansiveness" of the implied duty clause "suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a

PACA violation”). In light of these considerations, we conclude that the implied duty clause is ambiguous.

We turn next to step two of *Chevron*, in which we consider whether the agency’s construction is unreasonable. *See Chevron*, 467 U.S. at 842-45, 104 S.Ct. 2778; 5 U.S.C. § 706(2)(A). The section in which the implied duty clause appears is labeled “unfair conduct,” and begins with the language “It shall be unlawful in or in connection with any transaction in interstate or foreign commerce ....” 7 U.S.C. § 499b. The section goes on to address specific types of dishonest or irresponsible conduct, such as failing to fulfill contract terms or misrepresenting material facts to another party. *Id.* § 499b(1)-(3), (5)-(7). The paragraph containing the implied duty clause also prohibits misrepresentations, late payments and failures to comply with other provisions of the Act designed to ensure financial responsibility of licensees. *Id.* § 499b(4). Petitioners argue that, since the paragraph and section deal with conduct between two parties to a particular transaction, the implied duty clause does not reach conduct relating to a third party, such as an inspector. Therefore, they argue, CSI’s conduct toward an inspector-not another merchant-cannot form the basis for a violation of the implied duty clause or any other part of the unfair practices provision.

We and other circuits have upheld the Secretary’s construction of the implied duty clause as including a prohibition on commercial bribery. In those cases, one party to a transaction violates a duty to the other party when it secretly bribes the latter’s agents. Commonly, a seller bribes employees of a buyer in order to ensure that the buyer remains a customer of the seller. *See, e.g., JSG Trading II*, 235 F.3d at 610-11 (affirming the Secretary’s description of “a duty of produce sellers not to corrupt agents and employees of their buyers”); *JSG Trading Corp. v. Dep’t of Agric.*, 176 F.3d 536, 543 (D.C.Cir.1999) (“*JSG Trading I*”) (affirming a construction of the implied duty clause to include commercial bribery); *Sid Goodman & Co. v. Dep’t of Agric.*, 945 F.2d 398 (4th Cir.1991) (per curiam) (unpublished table decision), available in 1991 WL 193489, at \*3 (accepting as reasonable the Secretary’s construction of the clause as imposing an “implied duty to deal fairly with other members in the industry,” and that such duty is violated by commercial bribery); *cf. G & T*, 468 F.3d at 97 (noting that, in light of the statutory purposes, “we can hardly conceive of a duty more clearly implicated than the obligation of

recipients not to make side-payments to these inspectors”).

Although these cases arise under statutory law rather than the common law of contracts, the principle of contract law that requires parties to engage in honest dealing appears to have influenced how the statute was interpreted. For example, in *JSG Trading I*, we emphasized the JO’s finding in *Goodman* that the payments were made without the knowledge of the employers, echoing a key factor in the mistake of fact doctrine. 176 F.3d at 542. In *Goodman* itself, the Fourth Circuit stated that the duty extended to one’s competitors, even though they were not involved in the transactions at issue. 1991 WL 193489, at \*4. The bribes were a violation of the Act because each licensee has “an implied duty to deal fairly with its competitors and by paying kickbacks, *Goodman*’s competitors were held at an unfair advantage.” *Id.*; see also *JSG Trading I*, 176 F.3d at 545 (discussing, in the context of the implied duty clause, whether the “marketplace is disturbed”); *In re Tipco, Inc.*, 953 F.2d 639 (4th Cir.1992) (per curiam) (unpublished table decision), available in 1992 WL 14586, at \*2 (describing the duty breached by commercial bribery as, in the JO’s words, a “duty of fair dealing”).

The principle of honest dealing is also apparent in cases arising under the common law of contracts. For example, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 127 (2d Cir.2003), the court reviewed the Secretary’s reparation award to a party who was overcharged as a result of falsified inspection certificates that the other party had obtained by bribery. The court affirmed the award on the basis of the doctrine of mistake, holding that the seller’s reliance on the integrity of USDA inspections constituted a mistake of fact that adversely affected it. It noted that the mistake resulted from the informational advantage the buyer enjoyed over the seller, and that the buyer was at fault for not informing the seller of that information. *Id.* at 128; cf. *Produce Place v. Dep’t of Agric.*, 91 F.3d 173, 177 (D.C.Cir.1996) (holding that the false or misleading statement clause in § 499b(4) was violated when the buyer knowingly misrepresented the condition of the produce to the seller). These cases are consistent with the commercial bribery cases in concluding that one party breaches its duty of honest dealing when it seeks to benefit from concealing its illegal conduct that affected the contract price.

We similarly conclude that the Secretary’s decision to construe the “implied duty” clause as imposing a duty to engage in honest dealing-which

includes a duty not to bribe USDA inspectors-is reasonable. It is consistent with the purposes of the Act as understood by many courts over the years: to protect producers and other merchants from dishonest and irresponsible conduct. *See, e.g., JSG Trading I*, 176 F.3d at 538; *G & T*, 468 F.3d at 97; *Chidsey v. Geurin*, 443 F.2d 584, 587 (6th Cir.1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir.1961). The Company's attempt to obtain speedier and more favorable inspections gave it an advantage over its sellers, who were improperly led to believe the inspections reflected accurate, independent analyses. We see no reason why merchants' duties under § 499b(4) should be limited to cases in which the unlawful conduct is visited directly upon the other party, rather than upon a third party who has some ability to affect the transaction. The statutory language does not limit the applicability of § 499b(4) to conduct in a transaction; rather, it extends to conduct "in connection with" a transaction. We hold that the agency's interpretation of the "implied duty" clause is reasonable.

B.

As a result of its conclusion that CSI violated PACA, the Secretary revoked the Company's license. Petitioners advance a number of arguments why this sanction was unlawful. Generally speaking, this Court will not overturn an agency's choice of sanction unless it is "unwarranted in law" or "without justification in fact." *See Norinsberg Corp. v. Dep't of Agric.*, 47 F.3d 1224, 1227-28 (D.C.Cir.1995) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)). As this Court recently noted, "[w]e will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates." *JSG Trading II*, 235 F.3d at 617.

When the Secretary determines that a licensee "has violated any of the provisions of section 499b," "the Secretary may ... by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." 7 U.S.C. § 499h(a). If, as here, the violative conduct can be sanctioned in a number of different ways under the statute, the USDA may choose the appropriate sanction 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.” *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991).

In reviewing these factors, the USDA noted that bribery undermines PACA’s remedial purpose of, inter alia, ensuring responsible and honest dealing by merchants. CSI argues that the agency failed to consider the mitigating circumstance of widespread extortion by USDA agents that existed for many years. The agency did acknowledge, however, that the corruption at Hunts Point was a serious problem that the agency had been battling unsuccessfully for some time. Nonetheless, it concluded that bribery was such an egregious violation of the Act that severe penalties were warranted in order to deter such conduct. CSI’s conduct not only gave it a competitive advantage, but it also increased the pressure on other merchants to engage in bribery to remain competitive. Even though the agency did not expressly describe the effect of the mitigating circumstances on its decision, its discussion of the circumstances that did impact its decision was sufficient to explain why the corruption among its inspectors did not warrant a lesser sanction. *Cf. Frank Tambone, Inc. v. Dep’t of Agric.*, 50 F.3d 52, 56 (D.C.Cir.1995) (upholding a sanction based on a decision and order that did not expressly mention the mitigating factors because the JO “adequately explained why [those factors] were insufficient to exonerate the company or to render the imposition of any sanction inappropriate”). The Secretary’s decision thus rested on a reasonable construction of the statute and was consistent with its sanction policy. We have no basis on which to disturb its choice of sanction.

### C.

CSI argues that, even if revocation were appropriate, the Secretary was required to give notice before imposing the sanction. The Administrative Procedure Act, 5 U.S.C. § 558(c) (“APA”), provides that, “[e]xcept in cases of willfulness,” a license may not be revoked unless the licensee has been given written notice and an “opportunity to demonstrate or achieve compliance.” *Id.* In this context, “an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.” *Finer Foods Sales Co. v. Block*, 708

F.2d 774, 778 (D.C.Cir.1983). The Secretary concluded that the willfulness exception applied because Faraci's conduct constituted a willful violation of PACA. We agree. Even though Faraci pled guilty to one count, the record indicates that he repeatedly made these payments over several months. The indictment to which he pled guilty states that he "willfully" and "knowingly" committed the act "with intent to influence official acts." Faraci admitted that when he made the payments he knew it was unlawful to do so. We have already held that the unlawful acts constituted a violation of PACA, and prior cases put CSI on notice of that fact. *Cf. JSG Trading II*, 235 F.3d at 617 (concluding that the Secretary's revocation of a PACA license in commercial bribery cases provided "ample notice that commercial bribes may result in revocation"). We thus hold that the Secretary's conclusion that the willfulness exception applied was supported by substantial evidence that Faraci acted with at least careless disregard of the implied duty clause. APA notice, therefore, was not necessary.

D.

The individual petitioners challenge the Secretary's determination that they were "responsibly connected" to CSI at the time of the violations. This determination means that Coosemans and Creces cannot, for a period of time, affiliate in any way "with the business operations of a licensee, with or without compensation, including ownership or self-employment" without first obtaining permission from the Secretary. 7 U.S.C. §§ 499a(10), 499h(b). "Responsibly connected" persons include those who are "affiliated or connected with a commission merchant, dealer, or broker as ... officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation." *Id.* § 499a(9). Here, both Coosemans and Creces were 33.3% owners at the beginning of the period relevant to this matter, and became 45.5% owners in July 1999. Each is also an officer, Coosemans as president and Creces as secretary and treasurer.

Although Coosemans and Creces meet the definition of "responsibly connected" persons, a 1995 amendment to the statute permits an individual who is found to be responsibly connected to demonstrate that he is "not responsible for the specific violation." H.R. REP. NO. 104-207, at 11 (1995), as *reprinted in* 1995 U.S.C.C.A.N. 453, 458. That amendment qualified the definition of "responsibly connected" by stating 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 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).

Even before Congress added this provision to the statute, this Court recognized an alter ego exception to the “responsibly connected” determination that is identical to PACA’s current provision. *See Norinsberg v. Dep’t of Agric.*, 162 F.3d 1194, 1199 (D.C.Cir.1998). We held that the “alter ego” exception applied to “cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality.” *Id.* at 1197 (internal quotation omitted). A petitioner who was not a true owner of such a corporation would be spared the consequences of the responsibly connected determination. The amendment enacted as section 499a(b)(9) codifies this exception. This provision is plainly not applicable here because there is no claim that CSI is an alter ego rather than a formal corporation. Petitioners are required to “demonstrate[ ] by a preponderance of the evidence” that they fit within the nominal or alter ego exceptions. 7 U.S.C. § 499a(b)(9). As the Secretary reasonably concluded, petitioners have failed to meet this burden. We therefore affirm the Secretary’s determination that Coosemans and Creces were responsibly connected to CSI and subject to the employment restrictions.

Despite petitioners’ arguments to the contrary, we can find no other reason why subjecting petitioners to the employment restrictions is contrary to congressional intent. The use of absolute language in § 499h(b) describing the scope of the employment restrictions, the broad definition of employment to include “any affiliation,” and the inclusion of a specific exception for persons who make a certain showing-all militate against judicially created exceptions. *Id.* § 499a(b)(10) (emphasis added); *cf. Siegel v. Lyng*, 851 F.2d 412, 415-16 (D.C.Cir.1988) (relying on the first two factors, before the provision was amended in 1995, in declining to create an exception for non-PACA job descriptions).

**III. Conclusion**

We conclude that the agency's interpretation of the "implied duty" clause as prohibiting bribery of a USDA inspector is reasonable, and that the "responsibly connected" determination is not arbitrary, capricious or contrary to law. We thus deny the petitions for review.

So ordered.

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**DEPARTMENTAL DECISIONS**

**In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.**

**PACA Docket No. D-06-0012.**

**Decision and Order.**

**Filed January 31, 2007.**

**PACA – Perishable agricultural commodities – Admissions in bankruptcy filing – Official notice – Default – Due process – Failure to pay – Willful, flagrant, and repeated violations – Publication of facts and circumstances.**

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. The Judicial Officer stated documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held the ALJ's taking official notice of documents Respondent filed in a bankruptcy proceeding is in accord with the Administrative Procedure Act (5 U.S.C. § 556(e)) and the Rules of Practice (7 C.F.R. § 1.141(h)(6)). The Judicial Officer found that Respondent had admitted the material allegations of the Complaint; therefore, there were no material issues of fact on which a meaningful hearing could be held and the ALJ properly issued a decision under the default provisions of the Rules of Practice (7 C.F.R. § 1.139). The Judicial Officer held the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139) did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer rejected Respondent's contention that a hearing should be conducted to allow it to present evidence that Respondent was not paid by one of its customers and to present evidence concerning the motive for, and circumstances surrounding, Respondent's voluntary petition in bankruptcy.

Jonathan Gordy, for Complainant.

John M. Lohner, Santurce, PR, 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 May 2, 2006. 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: (1) during the period January 2005 through August 2005, Judith's Fine Foods International, Inc. [hereinafter Respondent], failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce;<sup>1</sup> (2) on October 10, 2005, Respondent filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Puerto Rico;<sup>2</sup> (3) Respondent admitted in a document filed in the United States Bankruptcy Court, District of Puerto Rico, that the eight produce sellers referred to in paragraph III of the Complaint hold unsecured claims for \$338,942.07;<sup>3</sup> and (4) Respondent's failure to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>4</sup> On July 10, 2006, Respondent filed an answer in which Respondent denied that it willfully violated the PACA, as alleged in the Complaint.<sup>5</sup>

On August 17, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Admissions [hereinafter

---

<sup>1</sup> Compl. ¶ III.

<sup>2</sup> Compl. ¶ IV.

<sup>3</sup> Compl. ¶ IV.

<sup>4</sup> Compl. ¶ V.

<sup>5</sup> Response to Compl.

Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. On October 24, 2006, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On October 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision]: (1) finding, during the period January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,942.07 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (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 4-5).

On December 12, 2006, Respondent appealed to the Judicial Officer.<sup>6</sup> On January 11, 2007, Complainant filed a response to Respondent's Appeal Petition.<sup>7</sup> On January 16, 2007, 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.

#### **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

#### **TITLE 7—AGRICULTURE**

. . . .

#### **CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

---

<sup>6</sup>Appeal of Decision Against Defendant [hereinafter Appeal Petition].

<sup>7</sup>Response to Appeal of Respondent.

....

**§ 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 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.

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****Discussion**

Complainant alleges, during the period January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.<sup>8</sup> Complainant identified these eight produce sellers as: (1) A & J Produce Corp., Bronx, New York; (2) Wada Farms Marketing Group, Idaho Falls, Idaho; (3) Herbs Unlimited, Inc., Miami, Florida; (4) K & R Farms Produce, Inc., Orlando, Florida; (5) Tristen's Brokerage Co., Inc., Los Angeles, California; (6) Mann Packing Co., Inc.; (7) Freedom Fresh, LLC; and (8) C.H. Robinson Co.<sup>9</sup> On October 10, 2005, Respondent filed a voluntary petition under chapter 7 of the Bankruptcy Code in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005). Respondent admitted in Schedule F - Creditors Holding Unsecured Nonpriority Claims filed in this bankruptcy proceeding that it owed \$338,942.07 to the eight produce sellers that are identified in the Complaint.<sup>10</sup> Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings are officially noticed in PACA disciplinary proceedings.<sup>11</sup>

---

<sup>8</sup>Compl. ¶ III.

<sup>9</sup>Compl. ¶ III.

<sup>10</sup>A copy of Schedule F - Creditors Holding Unsecured Nonpriority Claims is attached to Complainant's Motion for Default Decision and marked Exhibit A.

<sup>11</sup>*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), printed in 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal*

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 the alleged PACA violations. Complainant is not required to summon witnesses to a hearing for the purpose of proving that Respondent was licensed under the PACA during the relevant period simply because Respondent has declined to answer these allegations. Pursuant to the Rules of Practice, if a respondent fails to deny or otherwise respond to specific allegations of the complaint, those allegations are deemed admitted.<sup>12</sup>

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.<sup>13</sup> Respondent has admitted in a bankruptcy proceeding that it has failed to pay \$338,942.07 to the same produce sellers as are named in the Complaint. Respondent has failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent has not asserted that it will achieve full compliance with the PACA by making full payment within 120 days of the date of service of the Complaint. Therefore, this proceeding is a "no-pay" proceeding.

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, where Respondent's PACA license has terminated, the appropriate sanction in lieu of revocation is publication of the facts and circumstances of the violations. A civil penalty is not appropriate in this case because "limiting

---

*dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), remanded, 47 Agric. Dec. 1486 (1988), final decision, 48 Agric. Dec. 595 (1989).

<sup>12</sup>7 C.F.R. § 1.136(c).

<sup>13</sup>*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

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 United States a civil penalty while produce sellers remain unpaid.<sup>14</sup> As there can be no debate over the appropriate sanction, a decision may be issued in this proceeding without hearing or further procedure based on the admitted facts.<sup>15</sup>

Moreover, I conclude Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated as a matter of law. Willfulness is not a prerequisite to the publication of facts and circumstances of violations of section 2 of the PACA (7 U.S.C. § 499b). Nonetheless, the record supports a finding that Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful.

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.<sup>16</sup> Respondent failed to make full

---

<sup>14</sup>*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

<sup>15</sup> 7 C.F.R. §§ 1.139, .141(b). See *Veg-Mix, Inc. v. United States Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (stating a hearing is only required where an issue of material fact is joined by the pleadings).

<sup>16</sup> 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. Department 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.), *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. 482, 504, (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.

payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,924.07 for 115 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate and foreign commerce. These failures to pay took place over the period January 2005 through August 2005, a period of 8 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved.

---

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 30, 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.), *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, Respondent's violations were willful.

Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 8-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.<sup>17</sup>

Likewise, Respondent's violations are repeated and flagrant. Respondent's violations are repeated because *repeated* means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 8-month period during which Respondent committed the violations.<sup>18</sup>

---

<sup>17</sup>*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. . 880, 897 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

<sup>18</sup> See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (stating violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant), *cert. denied*, 528 U.S. 1021 (1999); *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 falls 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 and flagrant 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 and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*) (describing 20 violations of the payment provisions of the PACA as flagrant), *cert*

### **Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Respondent's business address was Urb Ind El Commandante, San Marcos Avenue, Carolina, Puerto Rico 00087. Respondent's mailing address was P.O. Box 13301, Santurce, Puerto Rico 00908.

2. At all times material to this proceeding, Respondent was licensed under the PACA. PACA license number 19961052 was issued to Respondent on March 5, 1996. On March 5, 2006, Respondent's PACA license was terminated for failure to pay the annual renewal fee.

3. During the period of January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,942.07 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

### **Conclusion of Law**

Respondent's failures to make full payment promptly with respect to the 115 transactions referenced in Finding of Fact number 3 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent raises four issues in its Appeal Petition. First, Respondent contends Schedule F - Creditors Holding Unsecured Nonpriority Claims,

---

*denied*, 450 U.S. 997 (1981); *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 and flagrant); *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, the violations must be considered repeated violations within the context of the PACA and finding the 295 violations to be flagrant violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

filed by Respondent in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005), cannot be used as a basis for the issuance of a default decision pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Appeal Pet. at first and second unnumbered pages).

The Administrative Procedure Act authorizes official notice in adjudicative proceedings<sup>19</sup> and the Rules of Practice provides that official notice may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character.<sup>20</sup> Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.<sup>21</sup> Therefore, under section 1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.<sup>22</sup> Schedule F - Creditors Holding Unsecured Nonpriority Claims, filed by Respondent in *In re Judith's Fine Foods*

---

<sup>19</sup> 5 U.S.C. § 556(e).

<sup>20</sup> 7 C.F.R. § 1.141(h)(6).

<sup>21</sup> *Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (per curiam); *Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

<sup>22</sup> See note 11.

*International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005), has a direct relation to the matters at issue in the instant proceeding. Therefore, I conclude the ALJ properly took official notice of Schedule F - Creditors Holding Unsecured Nonpriority Claims.

Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) sets forth the procedure to be followed when a respondent fails to file an answer or when a respondent admits the material allegations of fact contained in the complaint. As Respondent has admitted the material allegations of fact in the Complaint, I find the ALJ's issuance of the Initial Decision in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) was not error.

Second, Respondent contends a hearing should be conducted to allow Respondent the opportunity to present evidence that it was the victim of the failure of one of its customers to pay Respondent (Appeal Pet. at first and second unnumbered pages).

I disagree with Respondent's contention that a hearing should be conducted to allow Respondent to present evidence that it was the victim of the failure of one of its customers to pay. The PACA requires full payment promptly and an excuse for the failure to make full payment promptly is not a defense to a respondent's failure to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I have long held that a customer's failure to pay does not negate a respondent's failures to pay produce sellers in violation of the PACA.<sup>23</sup> Accordingly, proof that Respondent was not paid by one of its customers is not a defense to Respondent's violations of the PACA and would not alter the disposition of this proceeding.

---

<sup>23</sup> *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158 (1983) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though other firms failed to pay respondent); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 686 (1980) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though other firms failed to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982).

Third, Respondent contends a hearing should be conducted to allow Respondent the opportunity to present evidence that it filed the bankruptcy petition in order to protect its unpaid produce sellers, that a bankruptcy stay prevents Respondent from proceeding against its creditors and paying its produce sellers, and that Respondent's counsel resigned from the bankruptcy proceeding without taking any action to pay Respondent's produce sellers (Appeal Pet. at first through third unnumbered pages).

Respondent's motive for filing a voluntary petition in bankruptcy and the resignation of Respondent's counsel in the bankruptcy proceeding have no relevance to the instant proceeding. Moreover, the bankruptcy stay, which may prevent Respondent from proceeding against its creditors and paying its debts is not a defense to Respondent's failures to make full payment promptly to its produce sellers in violation of the PACA. In a recent PACA disciplinary proceeding, I rejected the respondent's argument that an injunction prohibiting payment of PACA trust assets to produce sellers should excuse the respondent's PACA payment violations, as follows:

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 injunction does not act as a relief from Respondent's "no-pay" status. 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 to protect Respondent against "no-pay" sanctions would be counter to the clear purposes of the PACA.

*In re Hunts Point Tomato Co., Inc.*, 64 Agric. Dec. 1914, 1926, (2005), *aff'd*, No. 06-1072-AG, 2006 WL 3307897 (2d Cir. Nov. 13, 2006).

Similarly, Respondent here asserts it is prevented by the bankruptcy proceeding from making payment to its produce sellers. However, the bankruptcy does not alter the prompt payment requirements of the PACA, and Respondent's proof that it is now prevented by a stay from paying its produce sellers is not an excuse for its failures to pay the produce sellers in accordance with the PACA.

Fourth, Respondent contends it is entitled to a hearing under the due

process clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. at third unnumbered page).

Respondent has admitted the material allegations of the Complaint. 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 under the default provisions in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in 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.<sup>24</sup>

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 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. § 2341-2350. Respondent must seek judicial

---

<sup>24</sup> 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).

review within 60 days after entry of the Order in this Decision and Order.<sup>25</sup>  
The date of entry of the Order in this Decision and Order is January 31,  
2007.

---

**In re: B.T. PRODUCE CO., INC.**

**PACA Docket No. D-02-0023.**

**In re: LOUIS R. BONINO.**

**PACA Docket No. APP-03-0009.**

**In re: NAT TAUBENFELD.**

**PACA Docket No. APP-03-0011.**

**Decision and Order.**

**Filed May 4, 2007.**

**PACA – Perishable agricultural commodities – Bribery – Willful, flagrant, and repeated violations – Responsibly connected – License revocation – Civil penalty – Scope of employment – Liability for employee’s or agent’s violations – Irrebuttable presumption – Actively involved in activities resulting in violation – Alter ego – Nominal – Administrative Procedure Act opportunity to comply – Falsified inspection certificate – Interference with chosen occupation.**

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson’s (the Chief ALJ) decision that B.T. Produce Co., Inc. (B.T.), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of William Taubenfeld’s (B.T.’s secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer also affirmed the Chief ALJ’s decision that Louis R. Bonino, the vice president, a director, and holder of 30 percent of the outstanding stock of B.T., and Nat Taubenfeld, the president and a director of B.T., were responsibly connected with B.T. when B.T. violated the PACA. Based on these conclusions, the Judicial Officer revoked B.T.’s PACA license and Louis R. Bonino and Nat Taubenfeld became subject to licensing restrictions and employment restrictions under the PACA (7 U.S.C. §§ 499d(b), 499h(b)). The Judicial Officer held that B.T. was liable for William Taubenfeld’s violations of the PACA under 7 U.S.C. § 499p. The Judicial Officer rejected B.T.’s contention that the Agricultural Marketing Service violated the Administrative Procedure Act because it failed to provide B.T. with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action against B.T., stating, since B.T.’s violations of the PACA were willful, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected

---

<sup>25</sup> See 28 U.S.C. § 2344.

B.T.'s unsupported contention that the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. liable for William Taubenfeld's bribery, stating the PACA provides that the act of any person employed by a commission merchant, dealer, or broker, within the scope of employment, shall, in every case, be deemed the act of the commission merchant, dealer, or broker. Liability under the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees. The Judicial Officer further rejected B.T.'s contention that the Agricultural Marketing Service's construction of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. is liable for William Taubenfeld's bribery, stating B.T. could avoid liability under the PACA for William Taubenfeld's bribery either by showing William Taubenfeld was not acting for or employed by B.T. or by showing that William Taubenfeld's bribes were not made within the scope of his employment. The Judicial Officer stated the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he 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 (2) the petitioner was not an owner of the violating PACA licensee, which was the alter ego of its owners. The Judicial Officer held Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they were only nominal officers and directors of B.T. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. would violate their right under the Administrative Procedure Act (5 U.S.C. § 558(c)) to notice and opportunity to demonstrate or achieve compliance. The Judicial Officer stated 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 demonstrate or achieve compliance with all lawful requirements and, as neither Louis R. Bonino nor Nat Taubenfeld were PACA licensees, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. violated their rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer stated, 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 and, since the restriction on the employment of responsibly connected individuals is rationally related to the purpose of the PACA, 7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's assertion that they had been irrebuttably presumed to be responsibly connected with B.T., stating, under the PACA, an individual who is connected with a commission merchant, dealer, or broker as an officer, a director, or a holder of more than 10 percent of the

## 776 PERISHABLE AGRICULTURAL COMMODITIES ACT

outstanding stock of a corporation is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, the PACA (7 U.S.C. § 499a(b)(9)) provides that an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation may rebut the presumption that he is responsibly connected. The Judicial Officer agreed with the Agricultural Marketing Service's and the Chief's contention that the civil penalty assessed by the Chief ALJ against B.T. was not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T.'s PACA license into account when determining the sanction to be imposed upon B.T.

Christopher Young-Morales and Ann Parnes for the Agricultural Marketing Service and the Chief.

Jeffrey M. Chebot, Philadelphia, Pennsylvania, for B.T. Produce Co., Inc., and Nat Taubenfeld.

Mark C. H. Mandell, Annandale, New Jersey, for B.T. Produce Co., Inc., and Louis R. Bonino.

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 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: (1) B.T. Produce Co., Inc. [hereinafter B.T. Produce], during the period March 1999 through August 1999, through its officer, William Taubenfeld, made illegal payments to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) B.T. Produce, on numerous occasions prior to March 1999, made illegal payments to a United States Department

of Agriculture inspector; and (3) B.T. Produce, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>1</sup> On September 30, 2002, B.T. Produce filed an answer denying the material allegations of the Complaint and raising five affirmative defenses.<sup>2</sup>

On March 31, 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 Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce during the period March 1999 through August 1999, and prior to that time, when B.T. Produce violated the PACA. On April 18, 2003, Louis R. Bonino and Nat Taubenfeld each filed a Petition for Review of Chief's Determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's March 31, 2003, determinations that they were responsibly connected with B.T. Produce.

On June 20, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re B.T. Produce Co., Inc.*, PACA Docket No. D-02-0023, with the two responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011.<sup>3</sup>

On December 8-11, 2003, February 17-20, 2004, and August 3-4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Christopher Young-Morales and Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C. H. Mandell, Annandale, New Jersey, represented B.T. Produce and Louis R. Bonino. Jeffrey M. Chebot, Whiteman, Bankes & Chebot, Philadelphia, Pennsylvania, represented B.T. Produce and Nat Taubenfeld.

---

<sup>1</sup> Compl. ¶¶ III-VI.

<sup>2</sup> Answer ¶¶ 4-21.

<sup>3</sup> *In re Louis R. Bonino* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0009, filed June 20, 2003; *In re Nat Taubenfeld* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0011, filed June 20, 2003.

On December 6, 2005, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when William Taubenfeld paid bribes to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) concluded Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; and (3) assessed B.T. Produce a \$360,000 civil penalty in lieu of a 180-day suspension of B.T. Produce's PACA license.<sup>4</sup> On February 15, 2006, the Chief ALJ modified the sanction imposed on B.T. Produce by assessing B.T. Produce a \$360,000 civil penalty in lieu of a 90-day suspension of B.T. Produce's PACA license.<sup>5</sup>

On April 10, 2006, B.T. Produce, Louis R. Bonino, Nat Taubenfeld, the Agricultural Marketing Service, and the Chief appealed to the Judicial Officer. On May 2, 2006, the Agricultural Marketing Service and the Chief filed a response to B.T. Produce's, Louis R. Bonino's, and Nat Taubenfeld's appeal petitions. On May 5, 2006, Nat Taubenfeld filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 8, 2006, Louis R. Bonino filed a response to the Agricultural Marketing Service's and the Chief's appeal petition, and B.T. Produce filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 16, 2006, the Hearing Clerk transmitted the record, except for an exhibit identified as CX 21,<sup>6</sup> to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's conclusions that B.T. Produce committed violations of the PACA and that Louis R. Bonino and Nat Taubenfeld were responsibly connected with

---

<sup>4</sup> Initial Decision at 1-2, 17-19, 32.

<sup>5</sup> Modification of Decision.

<sup>6</sup> CX 21 is a tape recording of an April 23, 1999, conversation between William Taubenfeld and William Cashin which the Chief ALJ received into evidence over the objection of counsel for B.T. Produce, Louis R. Bonino, and Nat Taubenfeld (Tr. 958-1030).

B.T. Produce when B.T. Produce violated the PACA. However, I reject the sanction imposed by the Chief ALJ and conclude the appropriate sanction is the revocation of B.T. Produce's PACA license. Consequently, Louis R. Bonino and Nat Taubenfeld 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)).

Agricultural Marketing Service exhibits are designated by "CX." B.T. Produce's exhibits are designated by "RX." Transcript references are designated by "Tr."<sup>7</sup>

The exhibits upon which the Chief relied for his responsibly connected determination related to Louis R. Bonino are designated by "RC-Bonino." The exhibits upon which the Chief relied for his responsibly connected determination related to Nat Taubenfeld are designated by "RC-Taubenfeld."

#### 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:

---

<sup>7</sup> Transcript page references in this Decision and Order differ from transcript page references in the Chief ALJ's Initial Decision. References to page numbers in this Decision and Order are determined by use of the printed official transcript file in the Hearing Clerk's office.

....  
(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**

### **Decision Summary**

I conclude B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of

William Taubenfeld's (B.T. Produce's secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities which B.T. Produce purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke B.T. Produce's PACA license. I also conclude Louis R. Bonino and Nat Taubenfeld were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino and Nat Taubenfeld 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)).

### **Factual Background**

Hunts Point Terminal Market, located in New York City, is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of B.T. Produce. The produce houses at Hunts Point Terminal Market handle large volumes of produce delivered from points throughout the world. Because produce may have been shipped from many thousands of miles away from New York City, inspections by United States Department of Agriculture inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point Terminal Market.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may request inspection at the behest of the shipper or another party. Approximately 22,000 produce inspections are conducted annually by United States Department of Agriculture inspectors at Hunts Point Terminal Market. These inspections are crucial to the successful working of the Hunts Point Terminal Market and other produce markets, as the United States Department of Agriculture is a neutral party that examines the produce and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the produce. The United States Department of Agriculture inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the produce and can result in the renegotiation of terms

regarding the sale of the produce.

As a general rule, produce must be sold as quickly as possible. This need for expedited sale is particularly true with produce that is near ripe or ripe or that has defects, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where a United States Department of Agriculture inspection is requested, immediate sale of the produce is often beneficial to the wholesaler and the shipper in order to obtain the best price for the produce. Essentially, every hour ripe or defective produce remains unsold costs someone money. However, inspection of the produce is in everyone's best interest, so that an accurate accounting of the state of the produce is available to settle possible disputes.

A 1999 investigation, known as Operation Forbidden Fruit, conducted primarily by the Federal Bureau of Investigation with the significant involvement of United States Department of Agriculture's Office of the Inspector General, identified a number of United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were receiving bribes in connection with the inspection of produce and a number of Hunts Point Terminal Market produce houses that were paying these bribes.

The Agricultural Marketing Service's principal witness, William J. Cashin, is a former United States Department of Agriculture inspector, who was caught accepting bribes and was arrested by the Federal Bureau of Investigation.<sup>8</sup> To avoid a prison term, William Cashin agreed to cooperate with the investigation and to wear or carry devices allowing him to record, either through audio or audio-visual means, many of the transactions that involved the alleged offering and taking of bribes.<sup>9</sup> During the course of William Cashin's participation in Operation Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, William Cashin continued his normal business activities as a United States Department of Agriculture produce inspector. At the conclusion of each business day, William Cashin would meet with Federal Bureau of Investigation and Office of the Inspector

---

<sup>8</sup>Tr. 60.

<sup>9</sup>CX 5; Tr. 60-62.

General agents to discuss the day's events, principally the transactions for which he received bribes and the amounts of the bribes. William Cashin gave the money he received as bribes during each of these meetings to Federal Bureau of Investigation and Office of the Inspector General agents.<sup>10</sup> These meetings are recorded on the FBI 302 forms, many of which were received in evidence at the hearing.<sup>11</sup>

William Cashin testified, for each of the 42 inspections that he conducted at B.T. Produce between the time of his arrest and his resignation, he was paid \$50 in bribes by William Taubenfeld, who at that time was the secretary and a director of B.T. Produce.<sup>12</sup> William Cashin stated, in connection with 60 percent to 75 percent of his inspections, he gave "help" to B.T. Produce in the form of overstating the percentage of defects, overstating the number of containers inspected, or misstating the temperatures of the load.<sup>13</sup>

William Taubenfeld, who is the son of Nat Taubenfeld, was indicted on October 21, 1999, for 13 counts of bribery of a public official.<sup>14</sup> On May 16, 2000, William Taubenfeld pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to William Cashin on July 14, 1999.<sup>15</sup> In his plea, William Taubenfeld stated he paid the bribes to a United States Department of Agriculture inspector "with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting."<sup>16</sup> William Taubenfeld was sentenced to 15 months in prison, 3 years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.<sup>17</sup> William

---

<sup>10</sup>Tr. 61-62.

<sup>11</sup>CX 6-CX 19.

<sup>12</sup>CX 1 at 9, 11-12, 15-16, 18-22, CX 20; Tr. 46-47.

<sup>13</sup>Tr. 48-53, 58-59.

<sup>14</sup>CX 3; Tr. 256-57.

<sup>15</sup>CX 4.

<sup>16</sup>RX QQ at 12.

<sup>17</sup>CX 4; Tr. 257-58.

Taubenfeld's connections with B.T. Produce were severed shortly after his arrest.<sup>18</sup> William Taubenfeld did not appear at the hearing.

B.T. Produce handles second rate, third rate, and distressed produce.<sup>19</sup> Much of the produce B.T. Produce handles has been rejected by other produce houses or stores. B.T. Produce has a reputation for being able to sell lower grades of produce or produce with significant defects for good value, so that others send B.T. Produce lower quality merchandise because B.T. Produce is able to make them more money than they could make otherwise. A number of witnesses testified they were aware that produce inspected by William Cashin at B.T. Produce contained many problems, since that was why they sent the produce to B.T. Produce in the first place, and they were not surprised when they saw the United States Department of Agriculture inspection certificates. Further, these witnesses were generally pleased with the results achieved by B.T. Produce in the sale of the produce.

Nat Taubenfeld,<sup>20</sup> the president and a director of B.T. Produce,<sup>21</sup> has been in the fruit and vegetable business since he arrived in the United States in 1949.<sup>22</sup> In 1990, Nat Taubenfeld founded the current B.T. Produce business (he had used the same name in a previous business a few decades earlier) with Louis R. Bonino as a part owner.<sup>23</sup> Nat Taubenfeld worked the fruit and vegetable side of the business, while Louis R. Bonino primarily served as office manager, supervising employees and managing money.<sup>24</sup> Nat Taubenfeld brought William Taubenfeld into the business from the time of its establishment and gradually brought his son David Taubenfeld in as well.<sup>25</sup> Nat Taubenfeld gave both William Taubenfeld and David

---

<sup>18</sup>Tr. 709.

<sup>19</sup>Tr. 605, 699, 1786-90.

<sup>20</sup>Nat Taubenfeld's given name is Naftali, but he is referred to in his business and in this Decision and Order as Nat.

<sup>21</sup>CX 1; RC-Taubenfeld 1.

<sup>22</sup>Tr. 688-90.

<sup>23</sup>Tr. 688, 696-99.

<sup>24</sup>Tr. 698.

<sup>25</sup>Tr. 701-02.

Taubenfeld shares in the business, although no compensation was involved for these transactions and no share certificates were issued.<sup>26</sup>

Nat Taubenfeld stated he was unaware that his son William Taubenfeld was bribing William Cashin. He further stated he had never given money to any United States Department of Agriculture inspector to "attempt to influence the result of that produce inspection[.]"<sup>27</sup> However, Nat Taubenfeld stated that, on a number of occasions, he gave William Cashin money, not to influence inspections, but as an act of charity in response to solicitations from William Cashin for loans to help William Cashin in his relationship with his girlfriend.<sup>28</sup> Nat Taubenfeld was not sure of the time period for these loans. William Cashin testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Produce.<sup>29</sup>

No evidence was introduced indicating that Louis R. Bonino knew anything about the bribes William Taubenfeld paid to William Cashin. Mr. Bonino was not involved in the buying and selling of fruit and vegetables and managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer and who owned a trucking business before joining Nat Taubenfeld in forming B.T. Produce, signed checks and contracts, established surveillance measures, and managed office staff at B.T. Produce.<sup>30</sup> Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce from the time it was created in 1990.<sup>31</sup> As part of his duties, Louis R. Bonino handled the 30 to 40 reparation cases that arose as a result of Operation Forbidden Fruit, which resulted in B.T. Produce paying reparations of \$400,000 to \$500,000.<sup>32</sup> Mr. Bonino expressed surprise as to

---

<sup>26</sup>Tr. 703-04.

<sup>27</sup>Tr. 707.

<sup>28</sup>Tr. 711-12.

<sup>29</sup>Tr. 42-44.

<sup>30</sup>Tr. 595-602.

<sup>31</sup>CX 1; RC-Bonino 1.

<sup>32</sup>Tr. 610-12.

why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T. Produce and stated he was not aware of the illegal payments.<sup>33</sup>

Much of the hearing consisted of testimony concerning the 42 United States Department of Agriculture inspection certificates and the "help" William Cashin provided B.T. Produce with respect to the produce that was the subject of these United States Department of Agriculture inspection certificates. Since William Cashin steadfastly maintained that he had no specific memory of how he helped B.T. Produce in any particular inspections and since the Agricultural Marketing Service called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by William Cashin's actions, there is no evidence that any particular United States Department of Agriculture inspection certificate was inaccurate. On the other hand, B.T. Produce personnel testified that each of the United States Department of Agriculture inspection certificates was accurate. Moreover, their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information on the United States Department of Agriculture inspection certificates was consistent with what they expected, given what these shippers knew of the condition of the produce.

While the Agricultural Marketing Service called no witnesses, other than William Cashin, who could have corroborated that any particular United States Department of Agriculture inspection certificate was falsified, B.T. Produce's witnesses testified as to their recollection of each transaction. Not only did Nat Taubenfeld and David Taubenfeld testify regarding produce they handled that was the subject of the 42 United States Department of Agriculture inspection certificates, but office manager Robin Long; salesman Michael Bonino, who is the son of Louis R. Bonino; Steven Goodman, who was affiliated with the shipper JSG Trading Corp.; Peter Silverstein, the president of Northeast Trading, Inc.; and Harold Levy, a fruit broker at Northeast Trading, Inc.; all testified as to their roles in many of these transactions.

I find several of the transactions worth discussing in more detail. For

---

<sup>33</sup>Tr. 613-14.

example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the Complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which had been received by B.T. Produce 2 days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe."<sup>34</sup> This notation indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it."<sup>35</sup> The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until B.T. Produce sold or otherwise disposed of the produce.<sup>36</sup> United States Department of Agriculture inspection certificate number K-678085-2, indicating serious damage to 18 percent of the load<sup>37</sup> was not inconsistent with Nat Taubenfeld's observations that the plums were very ripe. While David Oppenheimer and Company suggested that the price be \$9 per box of plums, David Oppenheimer and Company agreed to an adjustment from \$9 per box to \$8 per box after factoring in the prices B.T. Produce was able to get for the plums (averaging \$8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. Produce suffered a net loss on the transaction.<sup>38</sup>

Another transaction is the June 14, 1999, United States Department of Agriculture inspection of cherries received by B.T. Produce from Northeast Trading, Inc.<sup>39</sup> Nat Taubenfeld indicated on the bill of lading that the cherries were "soft,"<sup>40</sup> as opposed to the firm cherries that customers desire.<sup>41</sup> Nat Taubenfeld testified he received an average of \$5.26 per box

---

<sup>34</sup>RX A at 1; Tr. 1095.

<sup>35</sup>RX A at 1; Tr. 1095.

<sup>36</sup>Tr. 1089.

<sup>37</sup>RX A at 6.

<sup>38</sup>RX A at 3; Tr. 1097-1100.

<sup>39</sup>RX Q.

<sup>40</sup>RX Q at 3.

<sup>41</sup>Tr. 1148.

under the market price for these cherries and he received a \$6 reduction from Northeast Trading, Inc., as a result. Nat Taubenfeld did not dispute United States Department of Agriculture inspection certificate number K-766717-3, which indicates the cherries had 21 percent defects.<sup>42</sup> Peter Silverstein, the president of Northeast Trading, Inc., testified that he had no indication there was anything wrong with United States Department of Agriculture inspection certificate number 766717-3 and the shipper did not appeal the inspection. He thought it was likely that the older cherries in this shipment were competing against younger and fresher cherries.<sup>43</sup>

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. Produce had a very flexible relationship and that sometimes, when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. Produce would be allowed to recoup a larger profit in a later transaction, to make up for a lesser profit or a loss for a different load.<sup>44</sup> Nat Taubenfeld pointed out that “the relationship between the shipper and us plays a tremendous role in our business[.]”<sup>45</sup> “[I]t’s one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that’s what I can give you and that’s what we do.”<sup>46</sup> David Taubenfeld had a more dramatic explanation—“It’s a lot of begging. There’s a lot of begging to our customers and pleading and fighting over prices and things like that.”<sup>47</sup> David Taubenfeld added that they often “worked for nothing” on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time.<sup>48</sup>

Even though the Agricultural Marketing Service was unable to demonstrate that any particular United States Department of Agriculture

---

<sup>42</sup>Tr. 1150-54.

<sup>43</sup>Tr. 1648-49.

<sup>44</sup>Tr. 1089-92.

<sup>45</sup>Tr. 1092.

<sup>46</sup>Tr. 1100.

<sup>47</sup>Tr. 1795.

<sup>48</sup>Tr. 1936.

inspection certificate was falsified to benefit B.T. Produce, the only probative evidence offered as to the purpose for William Taubenfeld's bribes was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by B.T. Produce of its shippers as satisfied with the results of United States Department of Agriculture inspections is belied by the significant number of reparation actions against B.T. Produce and approximately \$500,000 in reparation payments by B.T. Produce generated by Operation Forbidden Fruit.<sup>49</sup> Certainly, even if produce which was expected by the shipper to be seconds or worse was falsely downgraded by the United States Department of Agriculture inspector, the shipper would have lower price expectations and the shipper would most likely view B.T. Produce as having done an apparently exceptional job of selling damaged goods, which view could inure, to B.T. Produce's benefit in terms of future business.<sup>50</sup>

David Nielsen, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as to his role in the investigation of B.T. Produce. His methodology basically consisted of reviewing documents provided to the PACA Branch by the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General.<sup>51</sup> He examined the B.T. Produce PACA license files and the complaint history of B.T. Produce, as well as the documents that were supplied to him.<sup>52</sup> David Nielsen went to B.T. Produce's premises on March 26, 2001, as part of his investigation, particularly seeking out the purchase and sales records related to the United States Department of Agriculture inspection certificates that he had been given by the Federal Bureau of Investigation and the Office of the Inspector General. He spent about 2 weeks on site in March and April 2001, and returned for another 2 weeks several months later.<sup>53</sup> While Mr.

---

<sup>49</sup>Tr. 610-12.

<sup>50</sup>Tr. 1302-06.

<sup>51</sup>Tr. 247.

<sup>52</sup>Tr. 252.

<sup>53</sup>Tr. 279.

Nielsen testified that he produced a report of investigation concluding that B.T. Produce violated the PACA by paying bribes to a United States Department of Agriculture inspector to falsify 42 United States Department of Agriculture inspection certificates, he based that conclusion on the documents he had received from the Federal Bureau of Investigation and the Office of the Inspector General. Mr. Nielsen admitted under cross-examination that B.T. Produce had no records indicating any evidence of falsification of United States Department of Agriculture inspection certificates and no records supporting a finding that B.T. Produce paid bribes.<sup>54</sup> Likewise, although David Nielsen stated in his report that the 42 United States Department of Agriculture inspection certificates were used to obtain price adjustments, his report was not accurate.<sup>55</sup> David Nielsen also admitted that in other areas the conclusions in his investigation report were not accurate<sup>56</sup> and that his statement in his investigation report about falsification was an assumption based on “my understanding of the information that I had been given.”<sup>57</sup>

John A. Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as the Agricultural Marketing Service’s sanctions witness. Mr. Koller testified that the payment of bribes by B.T. Produce “to a produce inspector, constitutes willful, repeated and flagrant violations of the PACA.”<sup>58</sup> Mr. Koller further testified that bribing an inspector “corrupts

---

<sup>54</sup>Tr. 284-87.

<sup>55</sup>Tr. 290-91.

<sup>56</sup>Specifically, Mr. Nielsen testified B.T. Produce made no adjustment on the produce B.T. Produce received from Trinity Fruit Sales Co., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX I; Tr. 308); B.T. Produce made no adjustment on the produce B.T. Produce received from Garden Fresh Distribution Services, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX G; Tr. 310); and B.T. Produce made no adjustment on the produce B.T. Produce received from Mission Produce, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX T; Tr. 310).

<sup>57</sup>Tr. 321.

<sup>58</sup>Tr. 490.

the inspection process<sup>59</sup> and violates the fair trade practices provision of the PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. Produce since William Taubenfeld was an officer and employee of B.T. Produce and since his actions were within the scope of his employment.<sup>60</sup> Mr. Koller pointed out that, when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions.<sup>61</sup>

Mr. Koller recommended that an appropriate sanction would be revocation of B.T. Produce's PACA license.<sup>62</sup> He stated that civil penalties were not appropriate here, because "bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and . . . the inspection process and its credibility."<sup>63</sup> Mr. Koller also stated revocation was warranted because of the length of time the bribery had continued and because "USDA has consistently recommended license revocation in the case of bribery. . . ."<sup>64</sup> Even in instances in which a bribe was paid and the particular United States Department of Agriculture inspection certificate was accurate, the bribe payer benefits, according to Mr. Koller, because the bribe payer could benefit at a later time<sup>65</sup> and because bribery creates an "unlevel playing field."<sup>66</sup> Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Agricultural Marketing Service was not able to identify a single one of the 42 United States Department of

---

<sup>59</sup>Tr. 491.

<sup>60</sup>Tr. 491.

<sup>61</sup>RX QQ; Tr. 496-97.

<sup>62</sup>Tr. 499.

<sup>63</sup>Tr. 502.

<sup>64</sup>Tr. 503.

<sup>65</sup>Tr. 516.

<sup>66</sup>Tr. 591.

Agriculture inspections certificates that had been falsified.<sup>67</sup>

### **Findings of Fact**

1. B.T. Produce is a New York corporation whose business and mailing address is 163-166 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to the instant proceeding, B.T. Produce was a PACA licensee.<sup>68</sup>

2. William J. Cashin was employed as a produce inspector by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, at the Hunts Point Terminal Market, New York, from July 1979 through August 1999.<sup>69</sup>

3. William Cashin participated in a scheme whereby he received bribes for the conduct of United States Department of Agriculture produce inspections. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and the United States Department of Agriculture's 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 of bribery at Hunts Point Terminal Market.<sup>70</sup>

4. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General, William Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio or audio-visual recording devices. At the end of each day, William Cashin gave the Federal Bureau of Investigation agents his tapes, gave the Federal Bureau of Investigation any bribes he received, and recounted his activities. The Federal Bureau of Investigation agents would

---

<sup>67</sup>Tr. 533.

<sup>68</sup>CX 1.

<sup>69</sup>Tr. 36.

<sup>70</sup>CX 5; Tr. 60-62.

prepare a FBI 302 report summarizing what William Cashin told them about that day's activities.<sup>71</sup>

5. Beginning in 1994, and more specifically, during the period March 24, 1999, through August 12, 1999, William Taubenfeld paid bribes to William Cashin. In particular, during the period March 24, 1999, through August 12, 1999, B.T. Produce, through William Taubenfeld, made the following payments to William Cashin, a United States Department of Agriculture produce inspector, in connection with 42 inspections of perishable agricultural commodities that B.T. Produce purchased, received, and accepted from 26 produce sellers in interstate or foreign commerce:

a. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of apples shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-678083-7.

b. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-678084-5.

c. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by David Oppenheimer and Company, reflected on United States Department of Agriculture inspection certificate number K-678085-2.

d. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 23, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-679809-4.

e. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of lettuce shipped to B.T. Produce by Sun America Produce, reflected on United States Department of Agriculture

---

<sup>71</sup>CX 6-CX 19; Tr. 61-62.

inspection certificate number K-765852-9.

f. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Deschino Produce & Imports, Inc., reflected on United States Department of Agriculture inspection certificate number K-765853-7.

g. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765854-5.

h. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of mangos shipped to B.T. Produce by Diazteca Company, Inc., reflected on United States Department of Agriculture inspection certificate number K-765859-4.

i. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of cherries shipped to B.T. Produce by Trinity Fruit Sales Co., reflected on United States Department of Agriculture inspection certificate number K-765860-2.

j. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of hashiya and persimmons shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765861-0.

k. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of pears shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-765863-6.

l. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection of berries shipped to B.T. Produce by Fresh Harvest Int'l, reflected on United States Department of Agriculture inspection certificate number K-766504-5.

m. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection of apples shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-766507-8.

n. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 10, 1999, inspection of papaya and mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766702-5.

o. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-766714-0.

p. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of onions shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766715-7.

q. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Primavera Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766716-5.

r. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-766717-3.

s. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Sunniland Fruit, Inc., reflected on United States Department of Agriculture inspection certificate number K-766718-1.

t. B.T. Produce paid William Cashin, a United States

802 PERISHABLE AGRICULTURAL COMMODITIES ACT

Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766719-9.

u. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-768355-0.

v. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768356-8.

w. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768357-6.

x. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768358-4.

y. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of plums and nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768729-6.

z. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768730-4.

aa. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Mission

Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768731-2.

bb. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768956-5.

cc. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768957-3.

dd. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of limes shipped to B.T. Produce by Produce Plus, reflected on United States Department of Agriculture inspection certificate number K-768958-1.

ee. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries and apples shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768959-9.

ff. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of mangos shipped to B.T. Produce by New Zealand Gourmet, reflected on United States Department of Agriculture inspection certificate number K-768960-7.

gg. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768961-5.

hh. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Coast Tropical, reflected on United States Department of Agriculture

inspection certificate number K-769369-3.

ii. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Tavilla Sales Co., reflected on United States Department of Agriculture inspection certificate number K-769397-1.

jj. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of pears shipped to B.T. Produce by Fruit Patch, Inc., reflected on United States Department of Agriculture inspection certificate number K-769398-9.

kk. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-769883-0.

ll. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of oranges shipped to B.T. Produce by Paul Steinberg Associates, reflected on United States Department of Agriculture inspection certificate number K-769884-8.

mm. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Dade South Fruits & Vegetables, Inc., reflected on United States Department of Agriculture inspection certificate number K-769899-6.

nn. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of plums shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-769900-2.

oo. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Turino, reflected on United States Department of Agriculture inspection certificate number K-770151-9.

pp. B.T. Produce paid William Cashin, a United States

Department of Agriculture produce inspector, \$50 in connection with the August 9, 1999, inspection of tomatoes shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-770160-0.<sup>72</sup>

6. During the period in which he paid bribes to William Cashin, William Taubenfeld was employed by, and was the secretary and a director of, B.T. Produce.<sup>73</sup>

7. William Taubenfeld paid bribes to William Cashin with the expectation that William Cashin would downgrade the quality of the produce he was inspecting, on an as-needed basis, to benefit B.T. Produce.<sup>74</sup>

8. There is no evidence that any of the 42 United States Department of Agriculture inspection certificates cited in the Complaint were falsified.

9. B.T. Produce's position was improved by William Cashin's falsification of United States Department of Agriculture inspection certificates, on an as-needed basis, in exchange for bribes.<sup>75</sup>

10. On October 21, 1999, an indictment, in which the grand jury charged William Taubenfeld with 13 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b), was filed in the United States District Court for the Southern District of New York. The indictment charges that William Taubenfeld:

[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, WILLIAM TAUBENFELD, 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 B. T Produce Co., Inc., Hunts Point Terminal Market,

---

<sup>72</sup>CX 6-CX 19; RX A-RX OO; Tr. 41-56, 58-59.

<sup>73</sup>CX 1; CX 20 at 71-75.

<sup>74</sup>RX QQ.

<sup>75</sup>Tr. 48-53, 58-59.

806 PERISHABLE AGRICULTURAL COMMODITIES ACT

Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	3/24/99	\$150
TWO	4/23/99	\$50
THREE	5/24/99	\$150
FOUR	5/25/99	\$200
FIVE	6/4/99	\$100
SIX	6/14/99	\$400
SEVEN	7/8/99	\$200
EIGHT	7/14/99	\$150
NINE	7/21/99	\$300
TEN	7/30/99	\$150
ELEVEN	8/3/99	\$100
TWELVE	8/6/99	\$150
THIRTEEN	8/12/99	\$100

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)<sup>76</sup>

The bribes charged in the indictment cover the payments William Taubenfeld made to William Cashin in connection with the 42 inspections of perishable agricultural commodities identified in Finding of Fact 5.<sup>77</sup>

11. On May 16, 2000, William Taubenfeld pled guilty to Count 8 of the indictment referred to in Finding of Fact 10. Specifically, William Taubenfeld pled guilty to bribery of a public official (18 U.S.C. § 201(b)). William Taubenfeld was sentenced to 15 months in prison, 3-years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.<sup>78</sup>

12. During the period in which William Taubenfeld paid bribes to William Cashin, Nat Taubenfeld was the president and a director of B.T. Produce. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T. Produce, particularly in the area of buying and selling of

---

<sup>76</sup> CX 3.

<sup>77</sup> CX 6-CX 19.

<sup>78</sup> CX 4.

produce.<sup>79</sup>

13. During the period in which William Taubenfeld paid bribes to William Cashin, Louis R. Bonino was the vice president, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce. Louis R. Bonino was involved in the day-to-day operations of B.T. Produce, principally managing the office aspect of operations.<sup>80</sup>

14. There is no evidence that Nat Taubenfeld or Louis R. Bonino knew William Taubenfeld was bribing William Cashin.

### Conclusions of Law

1. Payment of bribes to a United States Department of Agriculture produce inspector in connection with the inspection of produce constitutes a failure to perform an implied duty in connection with transactions involving perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), William Taubenfeld's payment of bribes to a United States Department of Agriculture produce inspector constitutes violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by B.T. Produce.

3. B.T. Produce committed 42 willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by paying bribes to a United States Department of Agriculture produce inspector.

4. The appropriate sanction for B.T. Produce's 42 violations of the PACA is revocation of B.T. Produce's PACA license.

5. Louis R. Bonino was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino 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)).

6. Nat Taubenfeld was *responsibly connected*, as defined by

---

<sup>79</sup>CX 1; RC-Taubenfeld 1; Tr. 700-01.

<sup>80</sup>CX 1.

section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Nat Taubenfeld 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)).

### **Discussion**

#### *I. Introduction*

I find William Taubenfeld, an officer and a director of B.T. Produce, paid bribes to William Cashin in each of the 42 instances alleged in the Complaint. I further find bribery of a United States Department of Agriculture produce inspector violates the PACA and B.T. Produce's violations were willful, flagrant, and repeated. I find B.T. Produce is liable for these violations. I further find, while there is no evidence that any of the 42 United States Department of Agriculture inspection certificates that are the subject of this proceeding were falsified, the evidence shows William Taubenfeld paid the bribes with the expectation that B.T. Produce would receive help from William Cashin in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis, and William Cashin actually provided B.T. Produce help in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis. I conclude the purposes of the PACA can best be achieved by the revocation of B.T. Produce's PACA license. Therefore, Louis R. Bonino and Nat Taubenfeld 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)).

#### *II. B.T. Produce Violated the PACA*

##### *A. William Taubenfeld Bribe a USDA Inspector*

The evidence clearly establishes that William Taubenfeld made \$50 payments to William Cashin in the 42 instances alleged in the Complaint. While William Taubenfeld pled guilty to only a single count of bribery based on three inspections for which he paid bribes on July 14,

1999, William Cashin's undisputed testimony, as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that William Taubenfeld's bribing William Cashin was part of a long-standing practice. It is likewise undisputed that William Taubenfeld was the secretary and a director of B.T. Produce at the time the violations alleged in the Complaint were committed.

*B. B.T. Produce Is Liable for William Taubenfeld's PACA Violations*

Section 16 of the PACA (7 U.S.C. § 499p) states, in every case, 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 employment or office, shall be deemed the act of the commission merchant, dealer, or broker. There is no disputing that William Taubenfeld paid bribes to William Cashin in connection with 42 inspections of perishable agricultural commodities and that the purpose for the bribes was to benefit B.T. Produce.

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.<sup>81</sup>

As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, PACA violations committed by him are deemed to be violations by B.T. Produce.

Even if other officers, directors, and shareholders in B.T. Produce, as well as B.T. Produce's employees, were unaware of William Taubenfeld's PACA violations, 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, PACA violations by an employee are violations by the PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations and would not have condoned them.<sup>82</sup> If

---

<sup>81</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 500 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

<sup>82</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 501 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

a PACA licensee can be held responsible for the acts of an employee, who was not an officer, a director, or an owner, even where the company's officers, directors, and owners had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is an officer and a director, whether or not the other officers and directors had actual knowledge of the violative conduct. The clear and specific language of the PACA would be defeated by any other interpretation.

C. *Bribery of a USDA Inspector Violates the PACA*

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. I have consistently interpreted this provision to hold that a payment of a bribe to a United States Department of Agriculture produce inspector in connection with a produce inspection is a violation of the PACA.<sup>83</sup> Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Second Circuit have affirmed this interpretation.<sup>84</sup> A produce buyer's payment of bribes to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection

---

<sup>83</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

<sup>84</sup>*Coosemans Specialties, Inc. v. Department of Agric.*, No. 06-1199, 2007 WL 1029049 at \*5 (D.C. Cir. Apr. 6, 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 96-97 (2d Cir. 2006).

system and undermine the produce industry's trust in the entire inspection system.

***D. B.T. Produce'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.<sup>85</sup> William Taubenfeld, and therefore B.T. Produce, knew the payments to William Cashin in connection with the 42 inspections involved in this proceeding were illegal, but essentially decided that he needed to make these payments for the benefit of B.T. Produce's business. Clearly, B.T. Produce made a business decision to violate the PACA. B.T. Produce's payments to William Cashin were clearly intentional.

Likewise, B.T. Produce'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.<sup>86</sup> The payment of a bribe to a United States Department of Agriculture 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 it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of the United States Department of Agriculture produce inspector. Here,

---

<sup>85</sup>See, e.g., *Allred's Produce v. U.S. 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. U.S. 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).

<sup>86</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 504 (2006), appeal docketed, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 829 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

where the purpose of the bribes undisputedly would be to benefit B.T. Produce to the detriment of its shippers, sellers, or growers, B.T. Produce's long-standing practice of bribing William Cashin easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, B.T. Produce's violations of the PACA are repeated because repeated means more than one.<sup>87</sup> The Agricultural Marketing Service demonstrated that William Taubenfeld bribed William Cashin 42 times during the period March 1999 through August 1999, and that this practice had begun long before Operation Forbidden Fruit.

Thus, I conclude B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### ***III. The Appropriate Sanction for B.T. Produce's Violations Is License Revocation***

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 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.<sup>88</sup>

---

<sup>87</sup> See, e.g., *Allred's Produce v. U.S. 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. U.S. 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).

<sup>88</sup> 7 U.S.C. § 499h(a), (e).

The Agricultural Marketing Service requests revocation of B.T. Produce's PACA license as an appropriate sanction for B.T. Produce's PACA violations. B.T. Produce, on the other hand, urges that, if I find it has violated the PACA, I assess B.T. Produce a civil penalty of \$2,000 for each of the instances of bribery, for a total civil penalty of \$84,000.

While the Agricultural Marketing Service failed to show any particular instance in which William Cashin falsified a United States Department of Agriculture inspection certificate as a result of the bribes he was paid by William Taubenfeld, the evidence establishes that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T. Produce and to the detriment of shippers, sellers, or growers. William Taubenfeld admitted in his plea that the purpose of the bribes was to get William Cashin to downgrade produce on occasion.

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 sanction. My views accord with those of John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, who 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 Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the Agricultural Marketing Service's recommendation for PACA license revocation as follows:

[BY MS. PARNES:]

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

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I have participated in the sanction recommendation, preparation of the sanction recommendation.

Q. What is that sanction recommendation?

A. A revocation of Respondent's PACA license.

Q. And what is the basis of this sanction recommendation?

A. There's several factors that are in consideration for this recommendation. One factor is that several bribery payments have been made in this case, and the evidence overwhelmingly shows that -- the evidence overwhelming shows that Respondent, through William Taubenfeld made bribery payments to a produce inspector.

And the FBI has documented that 42 inspections, over a five-month period of time, have been affected by these bribery payments. As an aggravating factor, Mr. Cashin has already testified that he had been receiving bribery payments from Respondent as far back as 1994.

Another factor is that the trade relies on the inspection to be accurate and impartial, so they can use that inspection for resolving any disputes, and approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it's important that these inspections that are performed are accurate.

If there's any suspicion that these inspections have been tainted by bribery payments made to a produce inspector to affect the outcome of that inspection is something of concern, or is a concern.

If when an inspection has been fraudulently obtained, this effects [sic] the overall inspection process. It undermines the inspection process, and it also effects [sic] the credibility of the inspection certificate as well, in terms of it being an impartial and accurate reflection of the quality and condition of the product.

And if there's any questions on the part of the shipper, as to the credibility of that inspection, this would effect [sic] the ability of resolving hundreds of disputes that could be resolved each day, as well as tons [sic] of thousands of dollars with illegal adjustments being -- occurring in the transactions.

Another consideration or factor is the competitiveness. When you have someone who is paying bribes to a produce inspector, in order to get false information on the inspection, and price adjustments to the transaction, this provides an unfair advantage, and other wholesalers in the market, in order to compete, may feel that they have to make the bribery payments as well.

For example, if you have a wholesaler in the Hunts Point Market who is bribing a produce inspector to obtain false information and obtain price adjustments to the transaction, then other wholesalers on the market may well feel that in order to compete they will pay bribes to the inspectors as well.

Another consideration or another factor is that the Department strongly believes that a strong sanction will not only deter Respondent, but will deter other members of the industry from considering making or contemplating making a bribery payment to a produce inspector, and that is a serious violation, a serious

violation in making these bribery payments.

Q. And does the fact that Mr. Cashin's [sic] a USDA employee and he was the one who was receiving the bribes, does that have any impact on the Complainant's sanction recommendation?

A. No.

Q. Why is that?

A. Complainant feels that bribery payments to a produce -- whether the bribery payments are made to another member of the industry or to a produce inspector, it is a serious violation. And the fact that bribery payments are being made to a produce inspector does not excuse a PACA licensee from making those bribery payments.

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

A. No.

Q. Why not?

A. In this case where you have bribery payments being made to a produce inspector to obtain false information on the inspection, that undermines the credibility of the inspection certificate itself, and these bribery payments, as well, undermine the inspection process and its credibility. And that is a serious violation, and that the appropriate -- and it would be appropriate for a civil penalty and the sanction imposed in this matter.

Another consideration is that the bribery payments did occur over a long period of time, and again, the competitiveness concern here, is that when you have bribery payments being made to a produce inspector, you know, it is an advantage to those who are making those bribery payments, and for those firms that are

law abiding and not making those bribery payments, it's competitively hard for them to compete.

And another consideration here, is that bribery payments to a produce inspector are a serious violation of the PACA, and the appropriate sanction to deter this from occurring would be to have a license revocation on a licensee who has committed bribery payments.

And finally, it has been -- USDA has consistently recommended license revocation in the case of bribery and where these serious types of violations has occurred.

Tr. 499-503.

I find William Taubenfeld's payments of bribes to a United States Department of Agriculture produce inspector, within the scope of his employment, are deemed to be the actions of B.T. Produce 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 a United States Department of Agriculture produce inspector 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.<sup>89</sup> While sanctions in similar cases are not required to be uniform,<sup>90</sup> I find no reason to depart

---

<sup>89</sup>*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

<sup>90</sup>*Harry Klein Produce Corp. v. U.S. 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).

from my normal practice of imposing the maximum sanction in this proceeding.

***IV. Louis R. Bonino and Nat Taubenfeld 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.<sup>91</sup> The record establishes Nat Taubenfeld was the president and a director of B.T. Produce during the period when B.T. Produce violated the PACA.<sup>92</sup> The record also establishes Louis R. Bonino was the vice president, a director, and a holder of 30 percent of the outstanding stock of B.T. Produce during the period when B.T. Produce violated the PACA.<sup>93</sup> The burden is on Louis R. Bonino and Nat Taubenfeld to demonstrate by a preponderance of the evidence that they were not responsibly connected with B.T. Produce despite their positions at, and ownership of, B.T. Produce.

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 was actively involved in the activities resulting in a

---

<sup>91</sup>7 U.S.C. § 499a(b)(9).

<sup>92</sup>CX 1, CX 20 at 71-75.

<sup>93</sup>CX 1, CX 20 at 71-75.

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 Louis R. Bonino and Nat Taubenfeld each carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce's violations of the PACA. However, I find Nat Taubenfeld failed to carry his burden of proof that he was only nominally an officer and a director of B.T. Produce. I also find Louis R. Bonino failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce.

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.<sup>94</sup>

---

<sup>94</sup>*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756

The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period. Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.<sup>95</sup> He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.<sup>96</sup> His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.<sup>97</sup> Nat Taubenfeld brought both of his sons into the business.<sup>98</sup>

Nat Taubenfeld failed to meet his burden that he was only nominally the president and director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.<sup>99</sup>

Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.<sup>100</sup> Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.<sup>101</sup> Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training

---

n.84 (D.C. Cir. 1975).

<sup>95</sup>CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

<sup>96</sup>RC-Taubenfeld 6; Tr. 705-07, 721.

<sup>97</sup>Tr. 1281, 1298.

<sup>98</sup>Tr. 701-03.

<sup>99</sup>Tr. 669, 684, 1281, 1298.

<sup>100</sup>CX 1; RC-Bonino 1.

<sup>101</sup>Tr. 595, 605-06, 652-53.

employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.<sup>102</sup> Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.<sup>103</sup>

Louis R. Bonino failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, he had substantial responsibilities in many aspects of the business, and he had authority over employees. Moreover, Louis R. Bonino failed to meet his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of B.T. Produce.

### **Requests for Oral Argument**

B.T. Produce, Nat Taubenfeld, and Louis R. Bonino request oral argument before the Judicial Officer. B.T. Produce's, Nat Taubenfeld's, and Louis R. Bonino's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,<sup>104</sup> are refused because the parties have thoroughly briefed the issues and oral argument would appear to serve no useful purpose.

### **Appeal Petitions**

#### **B.T. Produce's Appeal Petition**

B.T. Produce raises six issues in its appeal petition.<sup>105</sup> First, B.T. Produce contends the Chief ALJ's finding of fact number 8 is not supported

---

<sup>102</sup>Tr. 633.

<sup>103</sup>Tr. 611-12.

<sup>104</sup>7 C.F.R. § 1.145(d).

<sup>105</sup>B.T. Produce filed "Respondent's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R § 1.145(a) from the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter B.T. Produce's Appeal Petition].

by sufficient evidence.<sup>106</sup>

The Chief ALJ found “[t]he evidence supports a finding that there were transactions where B.T.’s position was improved by the falsification of inspections as a result of bribes paid to Cashin.”<sup>107</sup> I agree with the Chief ALJ’s finding and reject B.T. Produce’s contention that the Chief ALJ’s finding is not supported by substantial evidence. William Cashin testified that, pursuant to his understanding with William Taubenfeld, he (Mr. Cashin) would “help” B.T. Produce on United States Department of Agriculture inspection certificates covering particular loads of produce in exchange for \$50 payments. William Cashin testified he was paid for each inspection he conducted for B.T. Produce, and he would provide “help” 60 percent to 75 percent of the time.<sup>108</sup> William Cashin’s testimony that he falsified United States Department of Agriculture inspection certificates issued in connection with the inspection of produce for B.T. Produce is corroborated by William Taubenfeld’s guilty plea in which William Taubenfeld admitted he paid bribes to William Cashin to induce him to falsify United States Department of Agriculture inspection certificates.<sup>109</sup>

Nat Taubenfeld provided further testimony supporting William Cashin’s testimony that he gave “help” to B.T. Produce. Nat Taubenfeld testified that, when B.T. Produce received produce, B.T. Produce would start selling the produce immediately, before William Cashin performed an inspection.<sup>110</sup> However, for every United States Department of Agriculture inspection certificate introduced as evidence, the amount of produce noted on the inspection certificate is the same as the full amount of produce received by B.T. Produce, as indicated by the bill of sale.<sup>111</sup> Nat Taubenfeld testified that he told William Cashin to write the original count on the United States Department of Agriculture inspection certificates even if some

---

<sup>106</sup>B.T. Produce’s Appeal Pet. at 2-5.

<sup>107</sup>Initial Decision at 18 (Finding of Fact 8).

<sup>108</sup>Tr. 44-60.

<sup>109</sup>CX 3, CX 4; RX QQ; Tr. 585.

<sup>110</sup>Tr. 1279, 1283.

<sup>111</sup>CX 7-CX 19; RX A-RX Z, RX AA-RX OO; Tr. 1283.

of the produce had already been sold and was therefore not inspected.<sup>112</sup>

Many of the United States Department of Agriculture inspection certificates for which William Taubenfeld paid bribes indicate the produce inspected contained serious defects. The payments B.T. Produce made to shippers for this produce reflect the defects indicated on the United States Department of Agriculture inspection certificates. However, in many cases, B.T. Produce sold the produce near market price,<sup>113</sup> at market price,<sup>114</sup> or above market price.<sup>115</sup> I find B.T. Produce's frequent ability to sell produce near, at, or above market prices suggests that the produce had fewer defects than stated on the United States Department of Agriculture inspection certificates and the United States Department of Agriculture inspection certificates were falsified.

Second, B.T. Produce contends the Agricultural Marketing Service failed to prove B.T. Produce violated the PACA because the Agricultural Marketing Service did not introduce any evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers.<sup>116</sup>

As discussed in this Decision and Order, *supra*, I disagree with B.T. Produce's contention that there is no evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers. However, even if I were to find no evidence of falsification of United States Department of Agriculture inspection certificates and no evidence of harm to B.T. Produce's shippers, I would still find William Taubenfeld's payments to a United States Department of Agriculture inspector violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The PACA does not expressly provide that a payment to a United States

---

<sup>112</sup>Tr. 1284.

<sup>113</sup>RX A-RX B, RX D, RX F-RX J, RX N, RX SS.

<sup>114</sup>RX R, RX W-RX Y, RX LL, RX SS.

<sup>115</sup>RX E, RX II, RX SS; Tr. 1279-81.

<sup>116</sup>B.T. Produce's Appeal Pet. at 6-21.

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.<sup>117</sup>

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 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 or bribes to United States Department of Agriculture produce inspectors.<sup>118</sup>

---

<sup>117</sup>7 U.S.C. § 499b(4).

<sup>118</sup>*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta &*

Third, B.T. Produce contends William Taubenfeld's payments to William Cashin were not within the scope of William Taubenfeld's employment with B.T. Produce; therefore, B.T. Produce did not violate the PACA.<sup>119</sup>

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;<sup>120</sup> (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.<sup>121</sup>

The record establishes that William Taubenfeld was within the scope of his employment with B.T. Produce when he paid bribes to William Cashin. William Taubenfeld paid bribes to William Cashin at B.T. Produce's place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by B.T. Produce. William Taubenfeld was authorized to apply for United States Department of Agriculture inspections of perishable agricultural commodities and the bribes William Taubenfeld paid to William Cashin were intended to benefit B.T. Produce.<sup>122</sup> Therefore, I find William Taubenfeld was acting within the scope of his employment when he paid William Cashin.

Fourth, B.T. Produce contends the Agricultural Marketing Service failed to provide B.T. Produce with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action

---

*Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

<sup>119</sup>B.T. Produce's Appeal Pet. at 19-21.

<sup>120</sup>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.

<sup>121</sup>*See generally* Restatement (Second) of Agency § 228 (1958).

<sup>122</sup>Tr. 44-52.

against B.T. Produce on August 16, 2002, in violation of the Administrative Procedure Act.<sup>123</sup>

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.<sup>124</sup> The record establishes that William Taubenfeld intentionally made unlawful payments to William

---

<sup>123</sup> B.T. Produce's Appeal Pet. at 21-27.

<sup>124</sup> See note 85.

Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is inapposite.

B.T. Produce argues that, while William Taubenfeld willfully violated the PACA, William Taubenfeld's willfulness cannot be imputed to B.T. Produce; therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is applicable to B.T. Produce.<sup>125</sup>

I disagree with B.T. Produce's contention that William Taubenfeld's willful violations of the PACA cannot be imputed to B.T. Produce. The relationship between a commission merchant, dealer, or broker and its employees, acting within the scope of their employment, is governed by section 16 of the PACA (7 U.S.C. § 499p) which unambiguously provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

B.T. Produce's employee, secretary, and director, William Taubenfeld, was acting within the scope of employment when he knowingly and willfully bribed William Cashin. Thus, as a matter of law, the knowing and willful violations by William Taubenfeld are deemed to be knowing and willful violations by B.T. Produce, even if B.T. Produce's other officers and directors had no actual knowledge of the bribery and would not have condoned the bribery had they known of it.<sup>126</sup> The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action

---

<sup>125</sup> B.T. Produce's Appeal Pet. at 23.

<sup>126</sup> *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 790 (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).

between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (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. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

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

inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

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

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

Therefore, I conclude 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 and William Taubenfeld's willful violations of the PACA are B.T. Produce's willful violations of the PACA. Consequently, 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 B.T. Produce.

Fifth, B.T. Produce contends the Chief ALJ's construction of section 16 of the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. Produce liable for William Taubenfeld's payments to William Cashin, where B.T. Produce, even with the exercise of the utmost supervision, could not

discover or control William Taubenfeld's activities.<sup>127</sup>

B.T. Produce does not cite any authority in support of its position that a corporation's liability for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional. Section 16 of the PACA (7 U.S.C. § 499p) unambiguously provides that the act, omission, or failure 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, omission, or failure of the commission merchant, dealer, or broker. Liability under section 16 of the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees,<sup>128</sup> and I am unable to locate any case holding the imposition of liability under section 16 of the PACA (7 U.S.C. § 499p) is unconstitutional. Therefore, I reject B.T. Produce's unsupported contention that holding a corporation liable for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional.

Sixth, B.T. Produce contends the Agricultural Marketing Service's construction of section 16 of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. Produce is liable for William Taubenfeld's payments to William Cashin.<sup>129</sup>

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as B.T. Produce asserts. B.T. Produce could avoid liability under the PACA for William Taubenfeld's bribery either by

---

<sup>127</sup> B.T. Produce's Appeal Pet. at 27-29, 35-40.

<sup>128</sup> *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 606 (2006) (holding KOAM Produce, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at KOAM Produce, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector), *appeal docketed*, No. 06-4838 (2d Cir. Oct. 19, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1886-87 (2005) (holding M. Trombetta & Sons, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at M. Trombetta & Sons, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector).

<sup>129</sup> B.T. Produce's Appeal Pet. at 29-35.

showing William Taubenfeld was not acting for, or employed by, B.T. Produce at the time he bribed William Cashin or by showing that William Taubenfeld's bribes were not made within the scope of his employment or office. Therefore, I reject B.T. Produce's contention that B.T. Produce was irrebuttably presumed to be liable for William Taubenfeld's bribery.

### **Louis R. Bonino's and Nat Taubenfeld's Appeal Petitions**

Louis R. Bonino and Nat Taubenfeld raise six issues in their appeal petitions.<sup>130</sup> First, Louis R. Bonino and Nat Taubenfeld contend they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.<sup>131</sup>

The Chief ALJ found Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.<sup>132</sup> As discussed in this Decision and Order, I agree with the Chief ALJ's finding and Louis R. Bonino's and Nat Taubenfeld's contentions that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.

Second, Louis R. Bonino contends the record is bereft of any evidence that B.T. Produce was operating as the alter ego of Louis R. Bonino.<sup>133</sup>

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

---

<sup>130</sup> Louis R. Bonino filed "Petitioner Louis R. Bonino's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, As Modified, February 6, 2006" [hereinafter Bonino's Appeal Petition]. Nat Taubenfeld filed "Petitioner Nat Taubenfeld's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, As Modified, February 6, 2006" [hereinafter Taubenfeld's Appeal Petition].

<sup>131</sup> Bonino's Appeal Pet. at 2-3; Taubenfeld's Appeal Pet. at 2-5.

<sup>132</sup> Initial Decision at 30-32.

<sup>133</sup> Bonino's Appeal Pet. at 4.

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 Louis R. Bonino was an owner of B.T. Produce; therefore, the defense that Louis R. Bonino was not an owner of B.T. Produce, which was the alter ego of its owners, is not available to Louis R. Bonino.<sup>134</sup>

Third, Louis R. Bonino and Nat Taubenfeld contend they were nominal officers of B.T. Produce.<sup>135</sup>

In order for a petitioner to show that he or she was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of a corporation or association, 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 a violation 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.<sup>136</sup> The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period.

During the period when B.T. Produce violated the PACA, Louis R. Bonino owned 30 percent of the outstanding stock of B.T. Produce. Louis R. Bonino's ownership of a substantial percentage of stock alone is

---

<sup>134</sup> *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1351 (2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1308 (2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 438-39 (2006), *aff'd per curiam*, 195 F. App'x 850 (11th Cir. 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

<sup>135</sup> Bonino's Appeal Pet. at 4-5; Taubenfeld's Appeal Pet. at 5-6.

<sup>136</sup> See note 94.

very strong evidence that he was not a nominal shareholder.<sup>137</sup> Louis R. Bonino has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of B.T. Produce.

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.<sup>138</sup> Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.<sup>139</sup> Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.<sup>140</sup>

---

<sup>137</sup> *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Donald R. Beucke*, 65 Agric. Dec. 1372, 1387-88 (2006) (stating Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was substantially connected is a strong indication that a 33⅓ percent owner does not serve in a nominal capacity), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

<sup>138</sup> *In re Donald R. Beucke*, 65 Agric. Dec. 1372, 1394 (2006), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1359 (2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1321 (2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

<sup>139</sup> CX 1; RC-Bonino 1.

<sup>140</sup> Tr. 595, 605-06, 652-53.

Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.<sup>141</sup> Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.<sup>142</sup>

Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.<sup>143</sup> He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.<sup>144</sup> His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.<sup>145</sup> Nat Taubenfeld brought both of his sons into the business.<sup>146</sup>

Nat Taubenfeld failed to meet his burden that he was only nominally the president and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.<sup>147</sup>

Louis R. Bonino and Nat Taubenfeld each failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that Louis R. Bonino and Nat Taubenfeld were intimately involved in the day-to-day workings of B.T. Produce, they each had substantial

---

<sup>141</sup> Tr. 633.

<sup>142</sup> Tr. 611-12.

<sup>143</sup> CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

<sup>144</sup> RC-Taubenfeld 6; Tr. 705-07, 721.

<sup>145</sup> Tr. 1281, 1298.

<sup>146</sup> Tr. 701-03.

<sup>147</sup> Tr. 669, 684, 1281, 1298.

responsibilities in many aspects of the business, and they had authority over employees. In short, I find Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce.

Fourth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their right under the Administrative Procedure Act to notice and opportunity to demonstrate or achieve compliance with the PACA.<sup>148</sup>

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 demonstrate or achieve compliance with all lawful requirements, except in cases of willfulness.<sup>149</sup> Neither Louis R. Bonino nor Nat Taubenfeld is a PACA licensee. The responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, concern merely the determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Louis R. Bonino or Nat Taubenfeld. Therefore, with respect to the responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) inapposite.

Fifth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.<sup>150</sup>

Individuals found to be responsibly connected with a commission

---

<sup>148</sup> Bonino's Appeal Pet. at 6-10; Taubenfeld's Appeal Pet. at 19-22.

<sup>149</sup> 5 U.S.C. § 558(c).

<sup>150</sup> Bonino's Appeal Pet. at 6-10, 14-18; Taubenfeld's Appeal Pet. at 6-9, 14-19.

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.<sup>151</sup>

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.<sup>152</sup> 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.<sup>153</sup>

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 Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations.

Contrary to Louis R. Bonino's and Nat Taubenfeld's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.<sup>154</sup> A number of

---

<sup>151</sup> *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. 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).

<sup>152</sup> H.R. Rep. No. 1041 (1930).

<sup>153</sup> *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

<sup>154</sup> *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).

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.<sup>155</sup>

Sixth, Louis R. Bonino and Nat Taubenfeld assert the irrebuttable presumption that they were responsibly connected with B.T. Produce is unconstitutional.<sup>156</sup>

I disagree with Louis R. Bonino's and Nat Taubenfeld's assertion that they are irrebuttably presumed to have been responsibly connected with B.T. Produce when B.T. Produce 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

---

<sup>155</sup> *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 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).

<sup>156</sup> Bonino Appeal Pet. at 10-14; Taubenfeld Appeal Pet. at 6-14.

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*, Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they met the second prong of the two-prong test.

### **The Agricultural Marketing Service's and the Chief's Appeal Petition**

The Agricultural Marketing Service and the Chief raise three issues in "Complainant's and Respondent's Appeal of the Decision and Order" [hereinafter the Agricultural Marketing Service's and the Chief's Appeal Petition]. First, the Agricultural Marketing Service and the Chief contend the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T. Produce's PACA license into account when determining the sanction to be imposed upon B.T. Produce. The Agricultural Marketing Service and the Chief urge that I revoke B.T. Produce's PACA license.<sup>157</sup>

I agree with the Agricultural Marketing Service and the Chief that the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), or United States Department of Agriculture precedent.

I have considered and discussed the nature of B.T. Produce's PACA violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. I find the nature of B.T. Produce's violations, as they relate to the purposes of the PACA, justify revocation of B.T. Produce's PACA license. In addition, the Agricultural Marketing Service, the agency charged with the responsibility for achieving the congressional purpose of the PACA, recommends the imposition of license revocation as the appropriate sanction for B.T. Produce's PACA violations. John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United

---

<sup>157</sup> The Agricultural Marketing Service's and the Chief's Appeal Pet. at 11-23.

States Department of Agriculture, testified that bribery of a United States Department of Agriculture produce inspector is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. After examining the relevant circumstances and the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA, I conclude revocation of B.T. Produce's PACA license is in accord with the United States Department of Agriculture's sanction policy and the sanction imposed by the Chief ALJ is not in accord with the United States Department of Agriculture's sanction policy.

Moreover, the Chief ALJ's assessment of a \$360,000 civil penalty, in lieu of a 90-day suspension of B.T. Produce's PACA license, is not in accord with United States Department of Agriculture precedent. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector 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.<sup>158</sup>

Further still, the Chief ALJ's reliance on collateral effects of the revocation of B.T. Produce's PACA license, when determining the sanction to be imposed upon B.T. Produce, is error. The Chief ALJ states, when determining the sanction to impose on B.T. Produce, he considered collateral effects of license revocation on B.T. Produce's employees, as follows:

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent's employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an

---

<sup>158</sup> See note 89.

impact on company ownership than its non-culpable employees. Initial Decision at 27-28.

However, collateral effects of a respondent's PACA license revocation are neither relevant to a determination whether a respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) nor relevant to the sanction to be imposed for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Secretary of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's employees.<sup>159</sup> The adverse impact of license revocation on B.T. Produce's employees is unfortunate, but it is not relevant to this proceeding.

Second, the Agricultural Marketing Service and the Chief state, assuming for the sake of argument that a civil penalty is the appropriate sanction in this proceeding, the Chief ALJ did not correctly apply the formula mandated by the PACA to arrive at the \$360,000 civil penalty the Chief ALJ assessed against B.T. Produce. The Agricultural Marketing Service and the Chief contend, if a civil penalty were appropriate, B.T. Produce should be assessed a civil penalty of at least \$3,650,000.<sup>160</sup>

I conclude revocation of B.T. Produce's PACA license is warranted in

---

<sup>159</sup> *In re JSG Trading Corp.* (Order Denying Pet. for Recons.), 57 Agric. Dec. 710, 728 (1998) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 (1997) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees and the effect of revocation of the respondent's PACA license on employment of 30 persons and on small and medium-sized businesses which rely on respondent is irrelevant), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding the harm suffered by the respondent's 25 employees from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

<sup>160</sup> The Agricultural Marketing Service's and the Chief's Appeal Pet. at 23-24.

law and justified by the facts. Therefore, I find no purpose would be served by addressing the methodology used by the Chief ALJ to determine the amount of the civil penalty which he assessed against B.T. Produce or the amount of the civil penalty which the Chief ALJ should have assessed against B.T. Produce had a civil penalty been an appropriate sanction.

Third, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Louis R. Bonino and Nat Taubenfeld were not actively involved in the activities resulting in B.T. Produce's violations of the PACA, is error.<sup>161</sup>

I agree with the Chief ALJ that Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite portions of the record which establish that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce. While I find that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce, I reject the Agricultural Marketing Service's and the Chief's suggestion that an individual's active involvement in day-to-day management is, by itself, sufficient to establish that the individual was also actively involved in the activities resulting in a violation of the PACA. I find Louis R. Bonino and Nat Taubenfeld, although actively involved in the day-to-day management of B.T. Produce, proved by a preponderance of the evidence that they were not actively involved in activities resulting in B.T. Produce's violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Louis R. Bonino was actively involved in the activities resulting in B.T. Produce's violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of B.T. Produce. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual who 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

---

<sup>161</sup> The Agricultural Marketing Service's and the Chief's Appeal Pet. at 24-28.

and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended to allow 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 the 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.”<sup>162</sup> 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.”<sup>163</sup> Louis R. Bonino carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce’s violations of the PACA.

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

---

<sup>162</sup> H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

<sup>163</sup> H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

### ORDER

1. B.T. Produce has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). B.T. Produce's PACA license is revoked, effective 60 days after service of this Order on B.T. Produce.

2. I affirm the Chief's March 31, 2003, determination that Louis R. Bonino was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Louis R. Bonino 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 Louis R. Bonino.

3. I affirm the Chief's March 31, 2003, determination that Nat Taubenfeld was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Nat Taubenfeld 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 Nat Taubenfeld.

### RIGHT TO JUDICIAL REVIEW

B.T. Produce, Louis R. Bonino, and Nat Taubenfeld 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. § 2341-2350. B.T. Produce, Louis R. Bonino, and Nat Taubenfeld must seek judicial review within 60 days after entry of the Order in this Decision and Order.<sup>189</sup> The date of entry of the Order in this Decision and Order is May 4, 2007.

---

**In re: JOSEPH T. CERNIGLIA.**

---

<sup>189</sup> See 28 U.S.C. § 2344.

**PACA-APP Docket No. 04-0012.**

**Decision and Order.**

**Filed June 6, 2007.**

**PACA-APP – Responsibly connected – *De facto* officer – Notice of corporate changes – Active involvement – Nominal Officer.**

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding Joseph T. Cerniglia [hereinafter Petitioner] was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated the PACA. In a default decision, Fresh Solutions, Inc., was found to have violated the PACA during the period August 16, 2002, through April 29, 2003. The Judicial Officer found that during the violation period, Mr. Cerniglia was a *de facto* officer of Fresh Solutions, Inc. In addition, the Judicial Officer found that it was reasonable for the PACA Branch to treat Mr. Cerniglia as an officer, a director, and a holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., as the company's PACA license indicated, because neither the company nor Mr. Cerniglia provided the PACA Branch with notice of the corporate changes. The PACA provides a two-prong test which an individual must meet in order to demonstrate that he or she was not responsibly connected. Mr. Cerniglia failed to address either prong of the test. The Judicial Officer, after examining the evidence, found Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA and he was not a nominal officer.

Charles E. Spicknall, for Respondent.

Joseph T. Cerniglia, Pro se.

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

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

**PROCEDURAL HISTORY**

On December 3, 2003, the PACA Branch filed a complaint against Fresh Solutions, Inc., alleging it was a corporation licensed under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a-499s) [hereinafter the PACA], that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The PACA Branch further alleged that Fresh Solutions' pending application for a new PACA license should be denied.

The proceedings were initially assigned to Administrative Law Judge [hereinafter ALJ] Leslie B. Holt, but were subsequently reassigned to ALJ Jill S. Clifton. Judge Clifton, in a teleconference with the parties, cancelled the scheduled hearing because Fresh Solutions had not filed an answer. The PACA Branch moved for a decision by reason of default. Judge Clifton

ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with this disciplinary proceeding against Fresh Solutions. The PACA defines the term “responsibly connected” and imposes employment and licensing restrictions on individuals who are found responsibly connected with a corporation that violated the PACA (7 U.S.C. § 499a(b)(9);<sup>1</sup> 7 U.S.C. § 499d(b)(A)-(B);<sup>2</sup> 7 U.S.C. § 499h(b)<sup>3</sup>).

In a letter dated January 20, 2004, the PACA Branch notified Joseph T. Cerniglia that it made an initial determination that he was responsibly connected with Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when the disciplinary complaint alleged that

---

<sup>1</sup> 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.

<sup>2</sup> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; (B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

<sup>3</sup> 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. . . . The Secretary may approve such employment . . . 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. . . . The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (RX 3). Mr. Cerniglia responded, in a letter dated February 19, 2004, that he resigned as an officer and a director of Fresh Solutions on January 1, 2002. He also stated that 100 percent of the stock of Fresh Solutions was transferred to Morris Lewis on the same date (RX 4).

On April 12, 2004, Judge Clifton issued a decision finding, because of its failure to pay produce vendors as alleged in the disciplinary complaint, Fresh Solutions committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004). Because the company no longer held a PACA license, Judge Clifton ordered the publication of the facts and circumstances of the violations. In addition, Judge Clifton refused Fresh Solutions' application for a new PACA license finding Fresh Solutions "was not in full compliance with the PACA at the time of [its] licensing application" and "unfit to be licensed." (RX 26.) Fresh Solutions did not appeal the decision which then became final.

On July 7, 2004, James R. Frazier, Chief of the PACA Branch, issued the final determination that Mr. Cerniglia was responsibly connected with Fresh Solutions during the period of time the company violated the PACA. On August 5, 2004, Mr. Cerniglia filed a petition for review of the agency's determination.

On January 11, 2006, ALJ Victor W. Palmer conducted a hearing in Atlanta, Georgia, regarding Mr. Cerniglia's petition for review of the PACA Branch Chief's determination that he was responsibly connected with Fresh Solutions at the time the company violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In the course of the hearing, the PACA Branch entered 39 exhibits which are designated "RX \_\_\_." These exhibits include the original record used by the PACA Branch Chief to make his determination. Mr. Cerniglia entered 18 exhibits, 5 of which are designated "EX \_\_\_," and 13 of which were in the original record reviewed by the PACA Branch Chief and are designated as "PX \_\_\_." Two witnesses testified, Mr. Cerniglia on his own behalf and Josephine

Jenkins for the PACA Branch. Transcript pages are designated "Tr. \_\_\_."

On May 4, 2006, ALJ Palmer issued his Decision and Order finding "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" (7 U.S.C. § 499b(4)). The ALJ held:

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. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19.

On June 2, 2006, Mr. Cerniglia filed a timely appeal of the ALJ's Decision and Order. I have reviewed the record. After giving careful consideration to the evidence before me, I affirm the decision of the ALJ and find Joseph T. Cerniglia was responsibly connected with Fresh Solutions when it committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in the amount of \$351,968.50.

#### **FINDINGS OF FACT**

Joseph T. Cerniglia lives in Alpharetta, Georgia (Tr. 18). In 1972, he graduated from the University of West Georgia with a degree in history and environmental science. Mr. Cerniglia then went to work at his father's produce business, Cerniglia Produce Co., Inc. (Tr. 54.) When that company incorporated in 1976, he became one of the officers and owner of 10 percent of the company stock (Tr. 58). In 1989, Cerniglia Produce's PACA license was revoked for violating the PACA by failing to pay for

produce. *In re Cerniglia Produce Co.*, 48 Agric Dec. 1133 (1989). Mr. Cerniglia then went to work for Collins Brothers, the company that purchased Cerniglia Produce. (Tr. 55, 59.) He worked for Collins Brothers until the PACA Branch issued the determination that he was responsibly connected with Cerniglia Produce Co., Inc., when it violated the PACA, and he became subject to the PACA's employment restrictions that barred a PACA licensee from employing him (Tr. 59).

In 1993, Mr. Cerniglia started the business that would eventually become Fresh Solutions in the basement of his home. He incorporated the business in 1994 and first obtained a PACA license in or about 1995 (Tr. 18).<sup>4</sup> During 1995, Mr. Cerniglia met Jonathan Scott Green. Mr. Green became a "partner" in the business and became the chief executive officer. In addition, Mr. Green's father, John Green, also became a partner in the company. (Tr. 89.) The senior Mr. Green helped with sales (Tr. 95). In 1996, the company was renamed Fresh Solutions, Inc. (EX 5 at 3).

Mr. Cerniglia started Fresh Solutions, Inc., as a company that would help chain restaurants buy produce in a better manner (Tr. 60). He acted as a consultant working with national chain restaurants and would "advise them on how to purchase fresh produce, suggest purchasing strategies and a list of criteria for the selection of produce vendors[.]" (Tr. 82.) For his services, Mr. Cerniglia would receive 3 percent of the purchase price of the produce his customers bought (Tr. 83-84).

After the Greens joined Fresh Solutions, Jonathan Scott Green managed the financial aspects of the company while John Green helped with sales to restaurants and Mr. Cerniglia managed the operations and produce matters (Tr. 95-97). The Greens brought in new customers who wanted different services. Fresh Solutions revised its business plan so that it would take title to the selected produce although it was shipped directly from the distributor to the restaurant. Fresh Solutions would then invoice the restaurant and pay the distributor for the produce. Fresh Solutions utilized 70 or 80 produce distributors throughout the country. (Tr. 87-88.) As part of the new plan, Fresh Solutions attempted to develop hand-held devices to allow chain restaurants to order produce on-line while checking inventories. This effort

---

<sup>4</sup> Although Mr. Cerniglia testified that he incorporated Fresh Solutions in 1994, information provided on the company's application for a PACA license indicates the company incorporated in Georgia on May 30, 1996 (RX 2).

was not successful. (Tr. 114-16.)

In July of 1996, there were five shareholders of Fresh Solutions, each owning 20 percent of the company. The shareholders were Joseph Cerniglia, Joseph Cerniglia, Sr., Jonathan Scott Green, John Green, and Windsor Jordan (PX 8).<sup>5</sup> At that time, Jonathan Scott Green was the chief executive officer and president of Fresh Solutions, and Mr. Cerniglia was the chief operating officer and secretary (RX 42 at 40). Two years later, additional shares of Fresh Solutions were issued and ownership was redistributed so that Mr. Cerniglia owned 45 percent, Jonathan Scott Green owned 33 percent, John Green owned 20 percent, and Windsor Jordan owned 2 percent (EX 1). In 2000-2001, corporate ownership changed again with two new shareholders, Morris Lewis and Mason McGowin, each obtaining 20 percent of the company's shares. Mr. Cerniglia's ownership decreased to 29 percent and Jonathon Scott Green's ownership interest became 31 percent (RX 1 at 4).

By the end of 2001, Mason McGowin and Morris Lewis had invested \$1,735,000 in Fresh Solutions and Mr. Lewis guaranteed a \$1 million loan for Fresh Solutions (RX 24 at 5). In 2001, Fresh Solutions, Inc., reported a net loss of \$2,267,291 (RX 24). As a condition for continuing to fund the corporation, Mr. Lewis proposed a scheme by which he would receive the tax benefit of the net loss suffered by Fresh Solutions (RX 42 at 295). The scheme required the other shareholders, including Mr. Cerniglia, to transfer their ownership interests in the corporation to Mr. Lewis. In addition, Mr. Cerniglia and the other officers decided to resign their corporate officer positions and to cease being directors. The scheme allowed Mr. Lewis to convert Fresh Solutions into an S Corporation and transfer Fresh Solutions' net income or loss to his personal income tax liability (RX 42 at 295-300). Mr. Cerniglia was told that, after the time required by law to allow the tax benefit for Mr. Lewis, the stock "would be redistributed back to where it was." (RX 42 at 295-96; Tr. 155-56.)

To facilitate Mr. Lewis' tax scheme, the directors of Fresh Solutions, Inc., held a meeting on December 28, 2001, at which Joseph T. Cerniglia and Jonathan Scott Green resigned as officers and directors of the

---

<sup>5</sup> Mr. Jordan introduced the Greens to Mr. Cerniglia but did not participate in the operation of the company (Tr. 91-93).

corporation effective midnight January 1, 2002 (RX 8). Further, Mr. Cerniglia transferred his stock certificates to Morris Lewis on January 1, 2002 (RX 7 at 1-4). Finally, the stock ledger of Fresh Solutions indicates that as of January 1, 2002, all of the outstanding shares of stock of Fresh Solutions were held by Morris Lewis (PX 8).

Prior to the December 28, 2001, meeting, Mr. Cerniglia was an officer and director of Fresh Solutions (Tr. 10, 20, 99; EX 1). Mr. Cerniglia's titles varied over time. In the July 2, 1998, Minutes of Annual Meeting of the Shareholders and Directors of Fresh Solutions, Inc., he is identified as "Treasurer and CFO and Secretary." (EX 1 at 2.) Even though Mr. Cerniglia recorded and signed those minutes, he claims he was never the chief financial officer of Fresh Solutions (Tr. 99). In addition, on Fresh Solutions' PACA license application, which Mr. Cerniglia signed on August 1, 2001, he is identified as "COO." (RX 1 at 4.) Furthermore, Mr. Cerniglia owned 29 percent of the shares of Fresh Solutions (Tr. 229).

After the December 28, 2001, meeting, Mr. Cerniglia frequently held himself out as an officer of Fresh Solutions. On October 8, 2003, Mr. Cerniglia signed Fresh Solutions' new application for a PACA license. He identified himself as secretary, treasurer, chief operating officer, director, and the company's largest shareholder, with 29 percent of the company stock (RX 2). Fresh Solutions' corporate registration (current as of September 12, 2003) with the State of Georgia lists Mr. Cerniglia as the company's chief financial officer (RX 11). On March 21, 2003, Mr. Cerniglia signed a Master Agreement for Information Technology Services and the accompanying Statement of Work on behalf of Fresh Solutions with Automated Solutions Consulting Group, Inc. [hereinafter ASC].<sup>6</sup> He signed as the Fresh Solutions' chief operating officer. (RX 32, RX 33.) Furthermore, the produce industry viewed Mr. Cerniglia as an officer of Fresh Solutions. In a June 2, 2003, article in the produce industry newspaper, *The Packer*, Mr. Cerniglia, who is identified as Fresh Solutions' chief operating officer, discussed the company's financial difficulties and

---

<sup>6</sup> In February 2004, following Mr. Cerniglia's resignation from Fresh Solutions, his wife, together with the wife of the president of ASC, started a new produce firm under the name Fresh Works. Mr. Cerniglia worked for that firm for a short period of time. (Tr. 119-20.)

plans to pay its debt (RX 23). Red Book Credit Services, a produce industry information service, listed Mr. Cerniglia as chief operating officer of Fresh Solutions in its March 2002 publication (RX 22).

Throughout 2002, Mr. Cerniglia's responsibilities with Fresh Solutions remained identical to what they were prior to his relinquishing his officer and director positions and transferring his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30). In 2002, Mr. Cerniglia's salary increased by \$13,000 to over \$117,000 (Tr. 255; PX 9). He continued to receive a car allowance of \$550 per month and still used a company expense account (Tr. 256-58). In August 2002, he received a 30-day loan for \$40,000 from the company to assist in purchasing a new house (Tr. 258-59).

Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account which was opened in 1994 (RX 27). Mr. Cerniglia had a stamp of his signature made to facilitate check issuance. The accounting department used the stamp to sign checks (Tr. 20-21). Most of the checks issued by Fresh Solutions during the period August 16, 2002, through April 29, 2003, when Fresh Solutions was found to have violated the PACA by failing to make payment for produce, were signed using the signature stamp (Tr. 21). However, on occasion, Mr. Cerniglia exercised his signature authority by personally signing checks, including signing checks issued during the violation period (RX 19 at 24, 75, 105).

Shortly before Fresh Solutions' violation period began on August 16, 2002, three checks were issued payable to "Fresh Solutions, Inc." These checks totaled almost \$120,000<sup>7</sup> and were signed with Mr. Cerniglia's signature stamp (RX 19 at 22, 299, 310). The checks were deposited into the one Fresh Solutions bank account on which Mr. Cerniglia was sole signatory (Tr. 75-81). In January 2003, prior to entering into the Master Agreement for Information Technology Services, Mr. Cerniglia personally signed two checks payable to ASC which totaled \$7,000 (RX 19 at 105, 157).

Despite expectations by Mr. Cerniglia that his shares in Fresh Solutions

---

<sup>7</sup> Check number 10080 was issued on July 11, 2002, in the amount of \$10,000; check number 10091 was issued on July 18, 2002, in the amount of \$55,000; and check number 10140 was issued on August 15, 2002, in the amount of \$54,714.53.

would be reissued to him after Mr. Lewis implemented his tax scheme, that never happened (RX 42 at 295-96; Tr. 155). On May 16, 2003, Morris Lewis, as holder of all the outstanding shares of Fresh Solutions and chairman of the company, presided over a special meeting of the shareholders. At the meeting, he removed all directors from their positions; he appointed himself as sole director of the corporation; and he placed restrictions on "the corporation, its Officers, Directors, Employees and/or agents," prohibiting them from entering into contracts or hiring or employing anyone so as to create obligations or indebtedness (RX 36). After the May 16, 2003, meeting, Mr. Cerniglia's salary was significantly decreased (Tr. 49-52; PX 10a, PX 10b). Even though his salary was decreased, Mr. Cerniglia continued to represent Fresh Solutions, Inc., before the PACA Branch, and on October 2, 2003, 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 vendors (EX 3 at 2). On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions (RX 42 at 8-9, 33; Tr. 245). On March 2, 2004, Mr. Cerniglia, along with Jonathan Scott Green and E. Mason McGowin, notified the PACA Branch that there had been a change in ownership of Fresh Solutions and that the change had taken effect on January 1, 2002 (RX 43).

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 (RX 17).

### **DISCUSSION**

In 1934, Congress amended the PACA to provide that the Secretary could, with notice, revoke the license of any PACA licensee that employed an individual "who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice." Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586. However, Congress did not define the term "responsibly connected" until 1962, when it amended the PACA to define "responsibly connected" to mean "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." (7 U.S.C. § 499a(b)(9) (1994).)

In the 1995 amendments to the PACA, Congress gave to the person who met the statutory definition of “responsibly connected” the opportunity to challenge the initial finding and, if successful, avoid the employment sanctions.

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).

In 1998, the United States Court of Appeals for the District of Columbia Circuit, in *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), first examined the revised definition. The Court articulated the test for determining if an individual is responsibly connected. First, there is an initial determination whether the individual meets the statutory definition of “responsibly connected.” The Court indicated, if the individual fits the definition, the burden shifts to the individual to demonstrate, by a preponderance of the evidence, that the individual was not actively involved in the activities resulting in the violation of the PACA and that the individual was a nominal officer, nominal director, or nominal shareholder of the violating company. As an alternative to proving that the individual was nominal, the individual could prove he was not an owner of the violating company and that the violating company was the alter ego of the company’s owners. *Norinsberg*, 162 F.3d at 1197.

Mr. Cerniglia’s primary argument, that he should not be deemed responsibly connected and, thus, subject to PACA’s employment restrictions, is that he “was not a stockholder of Fresh Solutions, nor was he an officer or director of Fresh Solutions.” (Appeal Pet. at 2.) He further claims that he “transferred his stock in Fresh Solutions and resigned his positions as an officer and director many months prior to Fresh Solutions’ PACA violations.” *Id.* Assuming, *arguendo*, that Mr. Cerniglia resigned

from all his officer and director positions at Fresh Solutions and divested himself of all his ownership interest in the company, he failed to notify the PACA Branch that he was no longer an officer, director, or shareholder of Fresh Solutions. The PACA regulations mandate that notice of such corporate changes be sent promptly to the PACA Branch.

**§46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.**

The licensee shall:

(a) Promptly report to the Director in writing;

....

(2) Any change in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each such person[.]

7 C.F.R § 46.13(a)(2).

While the regulation imposes the burden of notifying the PACA Branch about changes on the licensee, an individual hoping to avoid a responsibly connected determination must ensure the notice of his or her changes reaches the agency, even if that requires the individual to personally notify the PACA Branch. It is reasonable for the PACA Branch to treat each individual who is identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee as responsibly connected until the PACA Branch receives notice otherwise.

As a general rule, I find that any individual identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of the PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.

The PACA Branch did not receive notice that Mr. Cerniglia resigned as an officer and director of Fresh Solutions and that he divested his ownership interest in the company until March 2, 2004 (RX 43). Therefore, the PACA Branch correctly concluded that, for purposes of the PACA, Joseph T. Cerniglia was an officer, director, and holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Furthermore, as ALJ Palmer held, Mr. Cerniglia continued to serve as an officer of Fresh Solutions until the March 2, 2004, resignation.

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. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19. Examples of evidence demonstrating Mr. Cerniglia's continuing role as an officer of Fresh Solutions include the following:

- Testimony from Mr. Cerniglia that his responsibilities remained the same after he allegedly relinquished his officer and director positions and transferred his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30).
- Fresh Solutions' October 2003 application for a PACA license identifying Mr. Cerniglia as secretary, treasurer, chief operating officer, director, and the company's largest shareholder (RX 2). Mr. Cerniglia signed the application certifying the "answers given to the foregoing questions are true." (RX 2 at 3.)

- Fresh Solutions' corporate registration with the State of Georgia that lists Mr. Cerniglia as a corporate officer as of September 2003 (RX 11).
- A contract for computer services, signed by Mr. Cerniglia as the corporation's chief operating officer on March 21, 2003. This contract was with a firm run by an individual whose wife would later start a business with Mr. Cerniglia's wife. (RX 32, RX 33.)
- Bank account signature cards showing Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account (RX 27).
- Fresh Solutions' continued reliance on Mr. Cerniglia's signature authority to conduct business (RX 19).
- A letter dated October 2, 2003, signed by Mr. Cerniglia to the PACA Branch advising that Fresh Solutions, Inc., was diligently working to pay and resolve the debts it owed to produce vendors (EX 3 at 2).
- Trade publications, including articles for which Mr. Cerniglia was interviewed, identifying him as chief operating officer (RX 22, RX 23).

As support for his argument that he no longer held any positions with or ownership interest in Fresh Solutions, Mr. Cerniglia entered into evidence copies of stock certificates endorsed for transfer to Mr. Lewis (PX 1-PX 6); Fresh Solutions' stock register (PX 8); minutes of the December 28, 2001, board of directors meeting (PX 7); copies of Mr. Cerniglia's W-2 Wage and Tax Statement for the years 2002 and 2003 (PX 9, PX 10a, PX 10b); and selected pages of Fresh Solutions' and Morris Lewis' tax returns (RX 10 at 1, 8, 33). Mr. Cerniglia's reliance on these documents as proof that he was no longer an officer, director, or shareholder of Fresh Solutions is misplaced. Courts have long held that, even though an individual may not formally hold an officer position, his actions can make him a *de facto*

officer and responsible for the actions of the company. *Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978); *O'Neill v. C.I.R.*, 271 F.2d 44, 49 (9th Cir. 1959). Mr. Cerniglia held himself out as an officer of Fresh Solutions, but more importantly he acted as an officer of Fresh Solutions. Therefore, I find Joseph T. Cerniglia was a *de facto* officer of Fresh Solutions during the time the corporation violated the PACA.

Mr. Cerniglia's effort to distinguish *In re Anthony L. Thomas*, 59 Agric. Dec. 367 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001), is misplaced. The teaching from the *Thomas* decision is that the PACA Branch may look beyond the formalities to an individual's actions and activities with a licensee to determine the individual's true role in a violating company. Without this ability to examine the details of a PACA licensee's corporate governance, unscrupulous individuals would have a safe haven to avoid enforcement of the PACA.

Mr. Cerniglia, in his appeal, did not address the balance of the *Norinsberg* test used to determine if an individual is responsibly connected. Therefore, he waives any argument that he was not actively involved, that he was a nominal officer, director, or shareholder, or that there was an alter ego that actually ran the company.

In the remand decision, *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999), I discussed the two-prong test an individual must meet to demonstrate that he was not responsibly connected with a violating company.

First, a petitioner must demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity

subject to a license which was the alter ego of its owners.

*Id.* at 608-09.

The question before me is whether Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA. I find he was. In *Norinsberg*, I established the standard to determine active involvement. "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." *Id.* at 610-11.

Mr. Cerniglia participated in activities that directly caused Fresh Solutions to miss payments to produce vendors. In August 2002, the month Fresh Solutions first missed payments for produce, Mr. Cerniglia borrowed \$40,000 from the company in order to purchase a new house (Tr. 258-59).<sup>8</sup> In January 2003, during the time Fresh Solutions failed to make produce payments, Mr. Cerniglia personally signed two checks payable to ASC, a computer company run by an individual whose wife started a business with Mr. Cerniglia's wife (RX 19 at 105, 157). On March 21, 2003, Mr. Cerniglia entered into a contract on behalf of Fresh Solutions with ASC. Between July 11, 2002, and August 15, 2002, the day before Fresh Solutions' first violation of the PACA, three checks totaling almost \$120,000 were issued by Fresh Solutions and deposited in the account over which Mr. Cerniglia had exclusive control (RX 19 at 22, 299, 310). Mr. Cerniglia neither explained why the money was deposited in this account nor addressed when or why he, as sole signatory on this account, removed the funds from this account (Tr. 80-81). Each of these activities by Mr. Cerniglia deprived Fresh Solutions of money needed to pay its produce vendors. Each activity occurred just before or during the time period of August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Therefore, I find Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of

---

<sup>8</sup> Mr. Cerniglia repaid the loan in approximately 30 days (Tr. 259).

the PACA.

A finding that an officer, director, or holder of more than 10 percent of a company's stock was actively involved in the activities resulting in a violation of the PACA is sufficient to hold that the individual is responsibly connected with the violating company. However, I also find Mr. Cerniglia was not a nominal officer of Fresh Solutions. The test to determine if an individual is a nominal officer is whether the individual had "an actual, significant nexus with the violating company during the violation period." *Thomas*, 59 Agric. Dec. at 380-81. The factors examined for this test are similar to those examined to determine if an individual is a *de facto* officer. I look at the role an individual had in the violating company to determine if he participated with the company as an officer.

Perhaps, most telling here is that Mr. Cerniglia's responsibilities did not change from the time period during which he acknowledges he was an officer of the company through the time period he claims to have no longer been an officer of Fresh Solutions. Mr. Cerniglia continued to have signature authority on the company's checking accounts and signed checks after he allegedly resigned as an officer and through the violation period; he entered into contracts for Fresh Solutions after he claims to have resigned; he completed and signed a PACA license application as an officer, although he now claims that he was not an officer; he continued to hold himself out as an officer and spokesperson for Fresh Solutions, during the time the company violated the PACA and after he allegedly resigned; and his compensation increased after he claims to have resigned as an officer. All these activities demonstrate that he had an actual, significant nexus with Fresh Solutions during the violation period. Therefore, I find Mr. Cerniglia was not merely a nominal officer of Fresh Solutions during the time the company violated the PACA.

#### CONCLUSIONS OF LAW

Joseph T. Cerniglia was an officer, director, and more than 10 percent shareholder of Fresh Solutions from the time the company was first incorporated until January 1, 2002. From January 1, 2002, until March 2, 2004, when he notified the PACA Branch of the changes to Fresh Solutions' ownership and corporate governance, he was a *de facto* officer of

the company. In addition, because Mr. Cerniglia failed to notify the PACA Branch of the changes, the PACA Branch was reasonable in treating Mr. Cerniglia as an officer, director, and more than 10 percent shareholder of Fresh Solutions, as Fresh Solutions' PACA license indicated, until he notified the PACA Branch that he was no longer part of the company.

From August 16, 2002, through April 29, 2003, Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors. *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004).

Mr. Cerniglia failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Fresh Solutions, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period from August 16, 2002, through April 29, 2003. Furthermore, Mr. Cerniglia failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Fresh Solutions during the same time frame.

Joseph T. Cerniglia was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) with Fresh Solutions, Inc., during the period August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

For the foregoing reasons, the following Order is issued.

### **ORDER**

I affirm the PACA Branch's July 7, 2004, determination that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Mr. Cerniglia 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 Mr. Cerniglia.

### **RIGHT TO JUDICIAL REVIEW**

Mr. Cerniglia 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. Mr. Cerniglia must seek judicial review within 60 days after entry of the Order in this Decision and Order.<sup>9</sup>

The date of entry of the Order in this Decision and Order is June 6, 2007.

---

<sup>9</sup> 28 U.S.C. § 2344.

862 PERISHABLE AGRICULTURAL COMMODITIES ACT

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATIONS**

**COURT DECISIONS**

**JOE RANDAZZO'S FRUIT & VEGETABLE, INC. v. W-W  
PRODUCE, INC.,  
No. 04-75045.  
Filed March 26, 2007.**

**(Cite as: 2007 WL 925795).**

**PACA – Reparations – Evidence, unsworn documentary, not persuasive – Summary judgment sua sponte – USDA's finding of facts are prima facie evidence on appeal.**

Buyer of corn (Randazzo) admits he received a shipment, but that he contracted with and paid Gibbons (a non-party vendor to this case) for the corn and should not owe the money to a second vendor (WW-Produce). The Judicial Officer (JO)'s decision discounted the unsworn documentary evidence favoring the Buyer. Randazzo appealed finding of JO that it failed to pay when due for receipt of the corn. In the appeal of the JO's decision, Randazzo tendered deposition evidence which was acquired in discovery after the JO's decision and which was of a greater weight than the unsworn documents previously offered.

The court decided the case on the record. Although favorable evidence was now more forthcoming from Randazzo, the finding of facts by the JO in the case below was prima facie evidence and conclusive unless effectively rebutted by the Petitioner (Buyer)

**United States District Court  
E.D. Michigan,  
Southern Division**

**OPINION AND ORDER REGARDING APPELLEE'S MOTION  
FOR SUMMARY JUDGMENT AFFIRMING REPARATION ORDER**

GERALD E. ROSEN, United States District Judge.

**I. INTRODUCTION**

JOE RANDAZZO'S FRUIT & VEGETABLE, INC.      863  
v. W-W PRODUCE, INC.  
66 Agric. Dec. 862

In the present suit, Plaintiff/Appellant Joe Randazzo's Fruit & Vegetable, Inc. ("Randazzo") challenges a decision and order issued by a Judicial Officer of the United States Department of Agriculture ("USDA"), directing Randazzo to pay \$5,532.80 to Defendant/Appellee W-W Produce, Inc. ("W-W") for a shipment of corn that Randazzo allegedly received from W-W but did not pay for. Randazzo contends here, as it did in the proceedings before the USDA, that it purchased the load of corn in question from a third party, Gibbons, Inc., and not W-W, and that its payment is therefore owed to (and has been paid to) Gibbons.

Presently before the Court is W-W's motion for an award of summary judgment affirming the USDA's decision in its favor. Randazzo has responded to this motion, and W-W has filed a reply in further support of its motion. Having reviewed the parties' briefs, the accompanying exhibits, the underlying USDA decision, and the remaining materials in the record, the Court finds that the relevant facts and legal arguments are adequately presented in the parties' written submissions, and that oral argument would not aid the decisional process. Accordingly, the Court will decide W-W's motion "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings on this motion.<sup>1</sup>

Contrary to W-W's assertion in its motion to dismiss, the limited case law on point does not indicate that a bond under § 499g(c) must incorporate the interest that has accrued between the USDA's decision and the filing of an appeal. To the contrary, one of the cases cited by W-W holds that interest accruing after the USDA's decision is *not* part of the "reparation

---

<sup>1</sup> In addition to seeking an award of summary judgment in its favor, W-W filed a motion to dismiss at the outset of this action, arguing that the bond posted by Randazzo did not meet the statutory threshold set forth at 7 U.S.C. § 499g(c). Under this provision, an appeal from a USDA reparation order must be supported by "a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail." 7 U.S.C. § 499g(c). In this case, Randazzo posted a bond in the amount of \$11,665.60-*i.e.*, double the underlying USDA award of \$5,532.80 plus a \$300 filing fee-without accounting for the accrual of interest that the USDA also awarded in its order.

awarded” within the meaning of the statute. *See Melmarkets, Inc. v. Victor Joseph & Son, Inc.*, No. 89-CIV-6585, 1990 WL 155594, at \*3 (S.D.N.Y. Oct.11, 1990). Similarly, in a second case cited in W-W’s motion, the court merely assumed, without deciding, that “interest unto the date of appeal should be considered part of the award proper,” but then found that the somewhat smaller bond posted by the appellant “substantial[ly] compli[ed]” with the statutory requirement. *L. Gillarde Co. v. Joseph Martinelli & Co.*, 168 F.2d 276, 281 (1st Cir.), *amended on reh’g*, 169 F.2d 60 (1st Cir.1948). In light of this case law and the language of the underlying statutory provision, the Court finds that the bond posted by Randazzo here is sufficient to allow its appeal to go forward. Accordingly, W-W’s motion to dismiss is denied.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff/Appellant Joe Randazzo’s Fruit & Vegetable, Inc. (“Randazzo”) is a Michigan corporation that operates a fruit and vegetable market in Detroit, Michigan. Samuel Randazzo is the company’s president and handles all of the purchasing of produce sold at the market. Defendant/Appellee W-W Produce, Inc. (“W-W”) is a produce supplier located in Belle Glade, Florida.

On May 23, 2003, Samuel Randazzo determined that the Randazzo market needed corn, and he contacted a number of suppliers and brokers to determine pricing and availability. All are agreed that he purchased 1,008 crates of yellow sweet corn that day, and that this shipment of corn was loaded onto a truck in Brinson, Georgia and delivered to the Randazzo market on or around May 25, 2003.

The dispute in this case concerns the identity of the seller from which Randazzo purchased this load of corn. W-W asserts that it sold this shipment of corn to Randazzo, and it states without contradiction that it sent an invoice to Randazzo by facsimile on the date of this sale, May 23, 2003, reflecting a purchase price of \$5,392.80 for the corn and \$140.00 for top ice (for a total of \$5,532.80). Randazzo, in contrast, contends that it purchased the load of corn at issue from a third party, Gibbons, Inc., which acted as an intermediary between Randazzo and W-W as supplier, and it has produced a May 27, 2003 invoice from Gibbons reflecting a purchase price of \$4,989.60 for a shipment of corn and \$140.00 for top ice (for a total of

\$5,129.60). Having already paid this latter amount to Gibbons, Randazzo denies any obligation to, in its view, pay two different sellers for a single load of corn.

#### **A. The Challenged USDA Decision and Order**

Upon Randazzo's failure to remit the \$5,532.80 payment called for under its May 23, 2003 invoice, W-W commenced a reparation proceeding under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499*aet seq.*, seeking an order from the United States Department of Agriculture ("USDA") directing Randazzo to pay for the shipment of corn. In a decision and order dated December 6, 2004, the USDA granted the relief requested by W-W, ordering Randazzo to pay W-W the invoiced amount of \$5,532.80 plus interest and a \$300.00 filing fee.

In so ruling, the USDA's judicial officer relied principally on Randazzo's failure to produce any admissible evidence of the claimed role of Gibbons, Inc., as an intermediary between Randazzo as purchaser and W-W as supplier. In particular, while it was clear that W-W was the supplier of the corn shipped from Georgia to Randazzo, there was no documentary evidence of any transaction between W-W and Gibbons regarding this shipment of corn. Rather, Randazzo's sole evidence on this point was an unsworn letter from Daniel Gibbons of Gibbons, Inc., stating that his company had contracted with W-W for the load of corn at issue and then sold this corn to Randazzo. The judicial officer found that this unsworn statement lacked evidentiary value, leaving Randazzo without any admissible evidence of an agreement between Gibbons, Inc. and W-W to provide a load of corn to Randazzo.

In contrast, W-W had produced at least some documentary evidence of an agreement directly with Randazzo to supply the load of corn at issue. First and foremost, W-W produced the invoice it had faxed to Randazzo on the day the corn was ordered, May 23, 2003, along with phone records reflecting the transmission of a fax from W-W to Randazzo that day. In addition, the judicial officer noted the undisputed evidence in the record that W-W provided the information necessary to trigger the shipment of corn from its grower in Georgia to the Randazzo market in Michigan.

Accordingly, because W-W indisputably held the initial title to this shipment of corn, and because there was no admissible evidence of a transaction that would have caused this title to pass from W-W to Gibbons, Inc., the judicial officer concluded that Randazzo was obligated to pay W-W for this shipment in accordance with W-W's May 23, 2003 invoice. The judicial officer further opined that any payment that Randazzo might have mistakenly made to Gibbons for this shipment was the result of Randazzo's failure to exercise due diligence or investigate upon receiving W-W's invoice for this same shipment.

### **B. The Evidence Adduced During Discovery in This Action**

Following the USDA's unfavorable decision, Randazzo commenced the present appeal in this Court. As discussed at greater length below, the statutory provision that authorizes such an appeal entitles Randazzo to a "trial de novo" on its challenge to the USDA's ruling, with the exception that the USDA's decision and attendant findings of fact are treated as "prima-facie evidence of the facts therein stated." 7 U.S.C. § 499g(c). In anticipation of this potential "trial de novo," the parties have engaged in discovery in this case, resulting in a record more extensive than the limited documentation and competing sworn statements presented for consideration by the USDA's judicial officer.<sup>2</sup>

This latter claim seemingly is belied by the USDA decision itself, which explicitly refers to and addresses "a number of affirmative defenses" raised by Randazzo. (USDA 12/6/2004 Decision at 3.) Moreover, the applicable USDA regulations governing reparation proceedings expressly permit the filing of a counterclaim along with an answer to a complaint, *see* 7 C.F.R. § 47.8(a), and Randazzo has not provided any support for its contention that it was precluded from doing so. Similarly, to extent that Randazzo wished to present sworn deposition testimony to the USDA's judicial officer, or to have W-W's complaint addressed at an oral hearing rather than decided

---

<sup>2</sup> In its response to W-W's summary judgment motion, Randazzo seemingly suggests that the proceedings before the USDA's judicial officer were deficient for lack of any deposition transcripts, the taking of any testimony, or the cross-examination of witnesses. (*See* Randazzo's Response Br. at 13.) Randazzo further asserts, without evidentiary support, that it was "prevented from filing any affirmative defenses, counter claims or cross claims." (*Id.* at 10.)

JOE RANDAZZO'S FRUIT & VEGETABLE, INC. 867  
v. W-W PRODUCE, INC.  
66 Agric. Dec. 862

upon written submissions alone, the pertinent regulations permit such requests to be made, with the judicial officer then deciding whether such additional procedures are warranted in a particular case. *See* 7 C.F.R. § 47.16(a) (setting forth procedure for requesting leave to take depositions); 7 C.F.R. §§ 47.15(a)(1), 47.20(b)(1) (authorizing parties to request an oral hearing in cases where the claim for damages does not exceed \$30,000). There is no indication that Randazzo made any such requests during the proceedings before the USDA.

Most significantly, the record includes the deposition testimony of Daniel Gibbons of Gibbons, Inc. In this testimony, as in his letter submitted during the USDA reparation proceedings, Gibbons stated that he, through his company, had purchased the load of corn at issue from W-W and taken title to this produce, had identified Randazzo as a customer for this corn, and then had provided Randazzo with the information necessary to pick up the load from W-W's grower in Georgia and deliver it to the Randazzo market in Michigan. (*See* Randazzo's Response, Ex. 2, Gibbons Dep. at 14, 17-20.) More specifically, Gibbons testified that he spoke with a long-time acquaintance who was employed as a salesperson for W-W, Billy Mackey, and that he and Mackey reached a verbal agreement for W-W to sell and Gibbons to buy the load of corn at issue, without either of them knowing at the time who the end purchaser of the corn might be. (*See id.* at 12-14, 17-18, 26-28.)<sup>3</sup>

Although Gibbons testified that he typically would have received some sort of written confirmation of his oral agreement with W-W—consisting, for example, of a fax from W-W confirming that the corn had been loaded on a truck, (*see id.* at 20, 26, 29)—he failed to produce any such documentation at his deposition, nor do any such materials appear in the record. In addition, Gibbons stated that he never received a bill from W-W for the load of corn at issue here. Rather, Gibbons asserted that he first learned of a problem with the transaction when Randazzo informed him that W-W was seeking payment for the very same load of corn that Randazzo had purchased from Gibbons. Having already been paid by Randazzo, Gibbons agreed to issue a

---

<sup>3</sup> Mackey evidently was terminated from his position at W-W at some point after the transaction at issue here, and has since passed away.

check to W-W, but was told that W-W was insisting on collecting from Randazzo rather than Gibbons. (*See id.* at 22-23.)<sup>4</sup>

The record also includes the deposition testimony of Randazzo's president, Samuel Randazzo, and its accounts payable clerk, Rhonda Ulmer. Mr. Randazzo testified that on May 23, 2003, after determining that his market needed some corn, he called a number of shippers and brokers and found that Gibbons was offering the best price. (*See* Randazzo's Response, Ex. 1, Randazzo Dep. at 8.) He then wrote out a purchase slip, reflecting a price between \$4.85 and \$4.95 per crate, and forwarded this document to another Randazzo employee, Mark Galli, who was responsible for arranging delivery of the corn. (*See id.* at 8-12; *see also* Randazzo's Response, Ex. 4, Purchase Slip.) When this load of corn arrived at Randazzo's dock, the accompanying bill of lading was matched with Mr. Randazzo's initial purchase slip and a fax confirmation subsequently received from Gibbons, and a check was issued to Gibbons in the amount of \$5,129.60, reflecting a price of \$4.95 per crate plus \$140 for top ice. (*See* Randazzo Dep. at 37-43; *see also* Randazzo's Response, Ex. 3, Ulmer Dep., Ex. 1, Bill of Lading; Randazzo's Response, Ex. 5, Gibbons Invoice.)<sup>5</sup>

Mr. Randazzo did not deny that his market might have received a faxed invoice from W-W on May 23, 2003, reflecting an apparent purchase of a load of corn from W-W at a price of \$5.35 per crate. In his view, however, any such invoice would have been ignored as mistakenly received, since it could not have been matched with any purchase slip from him reflecting such a transaction with W-W. (*See* Randazzo Dep. at 22-23, 37, 43-44.) Mr. Randazzo further testified that he did not know at the time that W-W was the supplier of the corn he had purchased from Gibbons, and that he learned of this only when a W-W representative subsequently called him and claimed that Randazzo owed W-W for a load of corn. (*See id.* at 16-17,

---

<sup>4</sup> According to the sworn statement submitted by W-W in the USDA reparation proceeding, Randazzo ultimately did forward to W-W a check issued by Gibbons, but W-W determined upon investigation that Gibbons had insufficient funds in its bank account to cover this check. Accordingly, W-W returned the check to Randazzo and again demanded payment directly from the market. (*See* USDA 12/6/2004 Decision at 6.)

<sup>5</sup> Ms. Ulmer's deposition testimony is essentially the same as Mr. Randazzo's with regard to the paper trail for this transaction and the market's usual procedures for ordering and payment. Thus, her testimony need not be recounted in any detail here.

34.)Mr. Randazzo responded that his market had purchased the corn in question from Gibbons, not W-W, but he nonetheless offered to help W-W in its effort, and he forwarded a check from Gibbons to W-W in an unsuccessful attempt to resolve this dispute. (*See id.* at 20-21.)

Dissatisfied with this outcome, W-W commenced a reparation proceeding before the USDA, and secured a decision and order directing Randazzo to pay W-W for the load of corn at issue. Through the present suit, Randazzo seeks to overturn the USDA's decision and order.

### III. ANALYSIS

#### A. The Standards Governing W-W's Motion

Through the present motion, W-W seeks summary judgment in its favor on Randazzo's challenge to the USDA's decision and order directing Randazzo to pay \$5,532.80 plus interest and costs to W-W. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c).

The familiar principles governing the resolution of summary judgment motions are affected somewhat by the statutory provision governing appeals of USDA reparation orders. As noted earlier, this Court must conduct a "trial de novo" on Randazzo's challenge to the USDA's decision, "except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated."7 U.S.C. § 499g(c). Accordingly, as the courts have explained, the USDA's findings are "conclusive unless effectively rebutted." *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1033 (D.C.Cir.1988); *see also Genecco Produce, Inc. v. Sandia Depot, Inc.*, 386 F.Supp.2d 165, 170 (W.D.N.Y.2005).

In the specific context of a summary judgment motion, then, the prevailing party in the reparation proceeding-in this case, W-W-meets its initial burden as movant by citing "an absence of evidence to rebut the prima facie case presented by the [USDA's] order." *Frito-Lay*, 863 F.2d at

1032. This, in turn, imposes a burden of production upon the non-moving party, Randazzo, to “go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Frito-Lay*, 863 F.2d at 1033 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) (internal quotation marks and additional citation omitted). Unless Randazzo identifies evidence which, if credited by the trier of fact, would rebut the prima facie case established through the USDA’s decision, W-W is entitled to summary judgment in its favor—namely, a determination as a matter of law that Randazzo’s challenge to the USDA’s decision cannot succeed. See *Frito-Lay*, 863 F.2d at 1033; *B.T. Produce Co. v. Robert A. Johnson Sales, Inc.*, 354 F.Supp.2d 284, 288-89 (S.D.N.Y.2004). With these standards in mind, the Court turns to the present motion.

**B. Randazzo Has Identified Issues of Fact as to Whether It Purchased the Load of Corn at Issue from Gibbons Rather Than W-W.**

As discussed, the parties’ dispute in this case concerns the identity of the seller of the load of corn ordered by Randazzo on May 23, 2003 and delivered to the market within a day or two thereafter. In the decision and order now on appeal, the USDA determined that Randazzo had purchased this corn from W-W, and not from Gibbons as Randazzo had contended in its submissions in the reparation proceeding. Through its present motion, W-W argues that Randazzo has failed to produce evidence to rebut the USDA’s findings on this point. The Court cannot agree.

At first blush, the present motion appears to be easily resolved. The lynchpin of the USDA’s decision, after all, was the absence of any “indication in the record of any contractual relationship between [W-W] and Gibbons for the subject trucklot of corn.” (USDA 12/6/2004 Decision at 9.) W-W denied the existence of any such agreement, of course, and Randazzo was unable to present the sworn testimony or statement of anyone with personal knowledge to the contrary. Rather, the sole documentation submitted by Randazzo in support of a claimed contractual relationship between W-W and Gibbons was a letter from Daniel Gibbons attesting to such an agreement, and the USDA’s judicial officer discounted this letter as “not sworn” and hence lacking “any evidentiary value.” (*Id.*) Consequently,

JOE RANDAZZO'S FRUIT & VEGETABLE, INC. 871  
v. W-W PRODUCE, INC.  
66 Agric. Dec. 862

because it was undisputed that W-W held the initial title to the load of corn at issue, and because there was no evidence that title passed to an intermediary-whether Gibbons or some other third party-at any time during the shipment of the corn from W-W's grower in Georgia to the Randazzo market in Michigan, the USDA's judicial officer concluded that W-W had "sustained its burden to prove that [Randazzo] purchased and accepted the subject trucklot of corn at a contract price of \$5,532.80," (*id.* at 10)-*i.e.*, the price set forth on W-W's invoice.

The evidentiary deficiency noted by the USDA's judicial officer, however, has been cured in the record presented for this Court's consideration. In particular, Randazzo has produced the sworn deposition testimony of Daniel Gibbons, in which he confirms the thrust of his earlier letter-namely, that his company, Gibbons, Inc., entered into an oral agreement with W-W to purchase the load of corn at issue, and then sold this corn to Randazzo. Accepting this testimony as true, as the Court must at the present juncture, Randazzo seemingly has rebutted the prima facie case established through the USDA's decision and order, and has offered proof which, if credited by the trier of fact, demonstrates the passage of title from W-W to Gibbons.

Nonetheless, W-W insists that the deposition testimony of Daniel Gibbons, standing alone, is insufficient to establish the requisite agreement between W-W and Gibbons and passage of title from the former to the latter. As an initial matter, W-W points to Randazzo's failure to identify any documentary support for Gibbons's claim of an oral agreement with W-W. While Gibbons testified that he typically would have received some sort of written confirmation of this agreement, he failed to produce any such documentation at his deposition, nor do any such materials appear in the record. Next, to the extent that Randazzo has produced some documentary support for its claimed purchase of a load of corn from Gibbons at around the same time as the transaction at issue here, W-W argues that these materials appear to evidence Randazzo's purchase of a *different* load of corn, and not the load supplied by W-W.

Neither of W-W's challenges, however, would permit this Court to reject *as a matter of law* the account offered at Daniel Gibbons's deposition. First, while Gibbons's testimony is undeniably weakened by his failure to

produce the documentation that, by his own admission, should have accompanied and memorialized his oral agreement with W-W, this Court is unaware of any requirement that a witness's sworn testimony must be supported by documentary evidence in order to be credited.<sup>6</sup> Rather, this lack of documentary support affects only the weight of Gibbons's testimony, and this is a matter that must be left for the trier of fact to determine.

Similarly, any questions that might arise from Randazzo's documentary evidence of a transaction with Gibbons would merely permit, but not require, a trier of fact to discount the direct testimony of Samuel Randazzo and Daniel Gibbons, based on their own personal knowledge, that Randazzo purchased the load of corn at issue here from Gibbons rather than W-W. In W-W's view, the documents produced by Randazzo tend to undermine this deposition testimony in two respects. First, W-W notes that the invoice issued by Gibbons to Randazzo refers to a shipment of corn that was loaded on May 24, 2003 and delivered on May 27, 2003. (*See* W-W's Motion, Ex. C.) Yet, W-W construes other evidence in the record as indicating that the load of corn at issue here was shipped on May 23, 2003 and delivered on May 25, 2003.<sup>7</sup> It follows, in W-W's view, that the invoice issued by Gibbons must refer to a *different* shipment of corn that was loaded and delivered shortly *after* the corn at issue here.

Next, W-W points to an apparent discrepancy in the prices quoted in the two invoices separately issued to Randazzo by W-W and Gibbons. Specifically, the Gibbons invoice lists a price of \$4.95 per crate of corn, while the W-W invoice billed Randazzo at a rate of \$5.35 per crate. W-W

---

<sup>6</sup> Along the same lines, W-W observes in its motion that Randazzo will be unable to offer the testimony of Billy Mackey—who, as noted earlier, was employed by W-W at the time of the transaction at issue here, but is now deceased—to corroborate Gibbons's claim that his oral agreement with W-W arose during a telephone call with Mackey. Again, however, a trier of fact remains free to credit the testimony of a witness despite the absence of corroborating testimony from another witness.

<sup>7</sup> It is not clear how W-W arrives at a delivery date of May 25, 2003. The collection of documents cited in support of this proposition includes (i) W-W's invoice to Randazzo, which reflects a "[d]eliver[y]" date of May 23, 2003; (ii) a bill of lading dated May 23, 2003, which lacks any reference to the dates that the truck was loaded or arrived at its destination; and (iii) an invoice from the trucking company to Randazzo, which lists May 23, 2003 as both the ship date and the delivery date. (*See* W-W's Motion, Ex. D.)

JOE RANDAZZO'S FRUIT & VEGETABLE, INC. 873  
v. W-W PRODUCE, INC.  
66 Agric. Dec. 862

reasons, and the USDA's judicial officer agreed, (*see* USDA 12/6/2004 Decision at 9), that it would make no sense for Gibbons to act as an intermediary between W-W and Randazzo, and yet charge Randazzo 40 cents per crate *less* than the price charged by the supplier, W-W, from which Gibbons purportedly obtained the load of corn at issue here. Rather, the logical conclusion, in W-W's view, is that the Gibbons and W-W invoices refer to two different shipments of corn.

Once again, however, these arguments go only to the weight that a trier of fact should give to the deposition testimony of Samuel Randazzo and Daniel Gibbons. To the extent that the accounts of Mr. Randazzo and Mr. Gibbons deviate from the corresponding documentary evidence of the transactions about which they testified, W-W has not explained why it would not be possible for a trier of fact to favor the former over the latter. Documents, after all, can be mistaken too—they can be drafted, for example, by someone who lacks personal knowledge of the statements they contain, or by someone who is simply wrong about the dates on which events occurred. Indeed, while W-W is quite prepared to discount the testimony of Daniel Gibbons, it seemingly has no doubt about the accuracy of the dates shown on *Gibbons's own invoice* as the shipment and delivery dates of a particular load of corn. Accordingly, while W-W surely is entitled to impeach Randazzo and Gibbons with any purportedly inconsistent statements found in their records, it must be left to the trier of fact to resolve any such inconsistencies.

More fundamentally, at least some of the purported "inconsistencies" identified by W-W rest upon the premise that W-W's own documentation is correct. With regard to the discrepancy in the prices shown on the W-W and Gibbons invoices, for example, the price charged by Gibbons is economically irrationally *only if* one assumes that the price stated in the W-W invoice accurately reflects the amount that W-W actually charged for a crate of corn at the time. Yet, accepting as true, for the moment, Samuel Randazzo's testimony that the purchase reflected in W-W's invoice *did not occur*, this Court surely cannot safely assume, at the present juncture, that the price quoted in this wholly spurious invoice is an accurate reflection of

W-W's pricing at the time.<sup>8</sup>

Thus, in order to discount Randazzo's evidence as involving a different sale of corn, rather than the sale of the corn at issue here with Gibbons serving as intermediary, this Court would have to credit, to some extent at least, W-W's contrary evidence depicting a direct transaction with Randazzo. W-W has not explained why its own documentation of the transaction at issue here should be entitled to the status of immutable truth, particularly where none of these documents, on its face, evidences an agreement between W-W and Randazzo under the terms claimed by W-W. While the USDA chose to credit W-W's evidence, this was primarily due to the absence of contrary evidence. As explained, this evidentiary deficiency has been cured in the record before this Court. Under these circumstances, Randazzo has overcome the presumption that the USDA's findings are correct, and has established its entitlement to the "trial de novo" called for under 7 U.S.C. § 499g(c).

#### IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant/Appellee's motion for summary judgment is DENIED. IT IS FURTHER ORDERED that Defendant/Appellee's motion to dismiss appeal also is DENIED.

---

<sup>8</sup> Indeed, such an assumption would be particularly problematic here, where the parties disagree as to the very nature of the transaction that occurred here. W-W asserts that it sold directly to the Randazzo market, while Randazzo contends that it purchased through an intermediary. Even assuming that W-W's invoice reflects the price it would have charged for a direct sale to a market, it does not necessarily follow that W-W would have charged the same price to an intermediary that planned to turn around and resell to a retail market

WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST 875  
v. NATHEL & NATHEL, INC.  
AND/OR ORLANDO TOMATO, INC.  
66 Agric. Dec. 876

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATIONS**

**DEPARTMENTAL DECISIONS**

**WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST v.  
NATHEL & NATHEL, INC. AND/OR ORLANDO TOMATO, INC.**

**PACA Docket No. R-07-009.  
Reparation Decision.  
Filed November 15, 2007**

**PACA –R –Broker – Breach of Duty.**

Where Respondent A, a broker, was in violation of the Regulations for hiring a second broker without authority from Complainant to do so, Respondent A was held liable to Complainant for the difference between the original contract price of the produce, and the reduced price paid by the buyer, Respondent B, in accordance with a revised confirmation received from the second broker. Complaint dismissed against Respondent B.

Presiding Officer Leslie Wonk  
*Decision and Order by William G. Jenson, Judicial Officer.*

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against the Respondents in the amount of \$6,245.75 in connection with one truckload of tomatoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were

served upon the parties. Copies of the formal Complaint were served upon the Respondents, which filed Answers thereto, denying liability to Complainant. Respondent Orlando Tomato, Inc. also asserted a Counterclaim against Complainant seeking to recover a \$2,000.00 freight expense allegedly incurred in connection with the subject load of tomatoes. Complainant filed a reply to the Counterclaim denying liability.

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, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent Nathel & Nathel, Inc. elected not to file any additional evidence. Respondent Orlando Tomato, Inc. filed an Answering Statement. Complainant and Respondent Orlando Tomato, Inc. also submitted Briefs.

### **Findings of Fact**

1. Complainant is an individual, William S. Kinzer, doing business as Kountry Lane Harvest, whose post office address is 150 Fern Springs Way, Salem, South Carolina, 29676. At the time of the transaction involved herein, Complainant was not licensed under the Act.

2. Respondent, Nathel & Nathel, Inc. (hereafter "Nathel"), is a corporation whose post office address is 354-361 Row C, New York City Terminal Market, Bronx, New York, 10474-7403. At the time of the transaction involved herein, Respondent Nathel was licensed under the Act.

3. Respondent, Orlando Tomato, Inc. (hereafter "Orlando"), is a corporation whose post office address is 121 Parris Ridge Drive, Boiling Springs, South Carolina, 29316. At the time of the transaction involved herein, Respondent Orlando was licensed under the Act.

4. On or about August 8, 2005, Complainant sold to Respondent Nathel, and shipped from loading point in the state of North Carolina, to Nathel, in Bronx, New York, 1,400 cartons of extra large field-packed vine ripe tomatoes.

5. A broker, Dino Mainolfi, issued an "Order Confirmation" to

WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST 877  
v. NATHEL & NATHEL, INC.  
AND/OR ORLANDO TOMATO, INC.  
66 Agric. Dec. 876

Respondent Nathel on August 8, 2005, listing the sale of the tomatoes on a delivered "P.A.S." basis. The confirmation also states "count is 45-48... color on ¾ load is pink... Orlando Tomato will bill you on product & freight. (Dino's commission 25¢ per Box. I will bill you my brokerage.)"

6. Respondent Orlando issued a "Confirmation of Sale & Purchase" to Complainant on August 8, 2005, also listing the sale on a delivered "P.A.S." basis. Beside the term "P.A.S.," Orlando wrote "but bill 6.20." Orlando also described the color of the tomatoes as "¾ load pink, 3 to 4 pallets 5 color."

7. On August 9, 2005, Complainant issued invoice number 5010 billing Respondent Nathel for 1,400 cartons of field pack large tomatoes at \$6.20 per carton, for a total invoice price of \$8,680.00.

8. On August 12, 2005, Dino Mainolfi issued a second "Order Confirmation" to Respondent Nathel, instructing Nathel to pay Complainant \$1.75 per carton, delivered, for the tomatoes. The confirmation also states "these tomato's [sic] were sent to you on a price after sale basis... note: in house inspection & pictures, tomato's [sic] overripe & decay."

9. Respondent Nathel paid Complainant \$1.75 per carton, or a total of \$2,434.25, for the 1,391 cartons of tomatoes it accepted<sup>1</sup> with check number 80140, dated September 15, 2005. Respondent Nathel also paid Dino Mainolfi \$350.00 for brokerage with check number 79996, dated September 12, 2005.

10. The informal complaint was filed on October 6, 2005, which is within nine months from the accrual of the cause of action.

### Conclusions

Complainant asserts that it sold one truckload of tomatoes to Respondent Nathel, under the broker services of Respondent Orlando, at an agreed purchase price of \$6.20 per carton, or a total of \$8,680.00. Complainant

---

<sup>1</sup> The shipment was originally comprised of 1,400 cartons of tomatoes, but a handwritten notation on Respondent Orlando's confirmation indicates that nine cartons of the tomatoes were placed back on the truck (see Report of Investigation Exhibit No. 1-7), so Respondent Nathel actually received only 1,391 cartons of tomatoes.

states it shipped the tomatoes in compliance with the contract of sale, but that upon arrival of the tomatoes an agreement was made without Complainant's knowledge or consent with Dino Mainolfi, an individual unknown to Complainant, that the price of the load could be changed. In accordance with this agreement, Respondent Nathel paid Complainant only \$2,434.25 for the tomatoes, thereby leaving an unpaid invoice balance of \$6,245.75, which amount Complainant seeks to recover from the Respondents through this proceeding.

Initially, we note that Complainant and Respondent Orlando are in agreement that Complainant hired Respondent Orlando as its broker to negotiate the sale of the tomatoes.<sup>2</sup> The record shows that Respondent Orlando thereafter hired a third party, Dino Mainolfi, to effectuate the sale of the tomatoes to Respondent Nathel.<sup>3</sup> A broker employed to negotiate the sale of produce may not employ another broker or selling agent, including auction companies, without the specific prior approval of his principal. See 7 C.F.R. § 46.28(b). Complainant vehemently denies granting Respondent Orlando such authority. Respondent Orlando is, therefore, in violation of the Regulations for having hired a second broker to sell the tomatoes without first obtaining Complainant's permission to do so.

The record shows both Respondent Orlando, and the other broker, Dino Mainolfi, confirmed the sale of the tomatoes on a "P.A.S." or price after sale basis.<sup>4</sup> The term "price after sale" is not defined in either the Uniform Commercial Code (U.C.C.) or the Act and Regulations. It is considered a subcategory of the "open price term" (U.C.C. § 2-305(1)), and is generally understood as meaning that the parties will agree upon a price after the buyer effects its resales.<sup>5</sup> If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

Respondent Orlando's president, Don Turner, asserts in an affidavit submitted as Respondent's Answering Statement, that he did not agree on a

---

<sup>2</sup> See Formal Complaint, paragraph 6, and Answer, paragraph 6.

<sup>3</sup> See Report of Investigation, Exhibit No. 8-1.

<sup>4</sup> See Report of Investigation, Exhibit Nos. 1-7 and 4-2

<sup>5</sup> U.C.C. § 2-305(1), "Open Price Term," provides that, "the parties if they so intend can conclude a contract for sale even though the price is not settled."

WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST 879  
v. NATHEL & NATHEL, INC.  
AND/OR ORLANDO TOMATO, INC.  
66 Agric. Dec. 876

price with Dino Mainolfi or Respondent Nathel, and that since there had not been an agreement on a price, he instructed Complainant to bill Respondent Nathel \$6.20 per carton for the tomatoes.<sup>6</sup> The record shows, however, that following delivery of the tomatoes, Mr. Mainolfi issued a second “Order Confirmation” to Respondent Nathel, showing the price of the tomatoes as settled at \$1.75 per carton, delivered.<sup>7</sup> The record shows further that Mr. Mainolfi also sent Respondent Nathel a copy of Complainant’s invoice whereon the invoice price of \$6.20 per carton is crossed through, and the settled price of \$1.75 per carton is written in below it, beside which are the initials “DM.”<sup>8</sup> Respondent Nathel paid Complainant in accordance with the confirmation received from Mr. Mainolfi<sup>9</sup>, and there is no indication that Respondent Nathel was negligent in doing so, as it was not given any indication that Mr. Mainolfi was acting outside the authority granted to it by its principal to negotiate a sales price for the tomatoes. Accordingly, we find that the Complaint against Respondent Nathel should be dismissed.

As we mentioned, Respondent Orlando’s Don Turner denies agreeing upon a price for the tomatoes with Mr. Mainolfi. However, whether or not Mr. Mainolfi acted outside his authority as broker by confirming a sales price of \$1.75 per carton to Respondent Nathel, Respondent Orlando is nevertheless culpable, as it is Respondent Orlando who violated the Regulations by bringing an additional broker into the transaction. Although Respondent Orlando’s Don Turner asserts that there was never an agreement regarding the price of the tomatoes, Mr. Turner admittedly instructed Complainant to bill Respondent Nathel \$6.20 per carton, or a total of \$8,680.00, for the tomatoes. As there is no independent evidence, such as a U.S.D.A. inspection, to establish that the tomatoes were not in accordance with the contract requirements, Complainant is entitled to

---

<sup>6</sup> See Answering Statements, paragraphs 4 and 6.

<sup>7</sup> See Report of Investigation, Exhibit No. 4-4.

<sup>8</sup> See Report of Investigation, Exhibit No. 4-5.

<sup>9</sup> See Report of Investigation, Exhibit No. 4-7.

recover as damages from Respondent Orlando the difference between the invoice price, \$8,680.00, and the \$2,434.25 payment received from Respondent Nathel, or \$6,245.75.

There remains for our consideration Respondent Orlando's Counterclaim, wherein it seeks to recover \$2,000.00 from Complainant for the freight expense it allegedly incurred in connection with the tomatoes. In its reply to the Counterclaim, Complainant asserts that Respondent Orlando was instructed that all sales were to be made on an f.o.b. basis, so it should not have incurred the freight expense claimed. In addition, Complainant points out that Respondent Orlando has not submitted any proof that it actually paid the freight bill.

Respondent Orlando does not dispute Complainant's contention that all sales were to be made on an f.o.b. basis. We also note that the \$6.20 per carton price that Respondent Orlando instructed Complainant to bill for the tomatoes is within the \$6.00 to \$7.00 per carton price range listed in the August 8, 2005 shipping point price report issued by U.S.D.A. Market News for similar tomatoes shipped from Asheville, North Carolina, the nearest reporting location to Complainant. The prices included in this report do not include freight. Therefore, if it was anticipated that Complainant would be paying the freight for the load, then the sales price that Respondent Orlando instructed Complainant to bill for the tomatoes should have been sufficient to cover the f.o.b. cost plus freight. However, since the sales price reported by Respondent Orlando was more in line with prevailing f.o.b. prices, we are unconvinced by Respondent Orlando's assertion that it was ever contemplated that Complainant would pay the freight associated with this shipment. Moreover, although Respondent Orlando submitted a copy of the invoice for \$2,000.00 received from the freight company<sup>10</sup>, it did not submit any evidence, such as a cancelled check, to establish that it paid this bill. Respondent Orlando cannot claim reimbursement for an expense that it has not actually incurred. Consequently, Respondent Orlando's Counterclaim should be dismissed.

Respondent Orlando's failure to pay Complainant \$6,245.75 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

---

<sup>10</sup> See Report of Investigation, Exhibit No. 9-6.

WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST 881  
v. NATHEL & NATHEL, INC.  
AND/OR ORLANDO TOMATO, INC.  
66 Agric. Dec. 876

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. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (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 Orlando shall pay Complainant as reparation \$6,245.75, with interest thereon at the rate of 4.86% per annum from September 1, 2005, until paid, plus the amount of \$300.00.

The Complaint against Respondent Nathel is dismissed.

Respondent Orlando’s Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

---

**DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. v.  
MULLER TRADING COMPANY, INC.**

**PACA Docket No. R-07-019.**

**Reparation Decision.**

**Filed May 16, 2007.**

**PACA-R –Damages – Material Breach .**

Where Complainant materially breached the contract by shipping seeded watermelons, rather than the seedless watermelons called for in the contract of sale, but Respondent's damages resulting from the breach could not be measured using the normal method, i.e., the difference between the value of the watermelons as accepted and the value they would have had if they had been as warranted, because the account of sales prepared by Respondent's customer did not accurately account for the number of watermelons shipped, we found that the case presented special circumstances such that a more appropriate measure of Respondent's damages was the difference at the time of sale between the market value of the seedless watermelons called for in the contract of sale, and the market value of the seeded watermelons actually shipped.

Presiding Officer Leslie Wonk.

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

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$4,466.60 in connection with one trucklot of watermelons shipped in the course of interstate commerce. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. 883  
v. MULLER TRADING COMPANY, INC.  
66 Agric. Dec. 883

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. Respondent also submitted a Brief.

**Findings of Fact**

1. Complainant, Diamond Fruit & Vegetable Distributors, Inc., is a corporation whose post office address is 30 Old Tucson Road #5, Nogales, Arizona, 85621. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Muller Trading Company, Inc., is a corporation whose post office address is 545 N. Milwaukee Avenue, Suite 201, Libertyville, Illinois, 60048. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about November 17, 2005, Complainant, by oral contract, agreed to sell and ship to Respondent, from loading point in Nogales, Arizona, to Respondent's customer, Del Monte Fresh, in Kankakee, Illinois, 140 cartons of 4-count seedless watermelons at \$0.22 per carton, or \$2,006.84, 196 cartons of 5-count seedless watermelons at \$0.20 per carton, or \$2,584.40, and 84 cartons of 6-count seedless watermelons at \$0.18 per carton, or \$973.44, for a total f.o.b. contract price of \$5,564.68.

4. Following arrival and unloading of the watermelons at the place of business of Del Monte Fresh, in Kankakee, Illinois, a U.S.D.A. inspection was performed on the watermelons at 12:44 p.m., on November 22, 2005, the report of which disclosed 13% average defects, including 10% quality (hollow heart), and 3% bruising. The watermelons failed to grade U.S. No. 1 "account condition." In the remarks section of the inspection certificate, the inspector wrote "faces of cut quarters have 18 to 96 seeds per

884 PERISHABLE AGRICULTURAL COMMODITIES ACT

melon, with 2 to 40 seeds brown to black, remainder white. Seed count reported at applicant's request."

5. Following the inspection, Del Monte Fresh notified Respondent that it was rejecting the watermelons "due to brown/black seeds," after which the watermelons were moved to Anthony Marano Company, Chicago, Illinois, who resold the watermelons and accounted to Respondent as follows:

Lot: 8F987 MULLER TRADING CO INC.

WATER-  
MELON  
SDLS 1S

11/29/2005	1 @	\$7.50	\$7.50
11/30/2005	18 @	\$8.50	\$153.00
11/30/2005	2 @	\$5.00	\$10.00
12/01/2005	25 @	\$8.50	\$212.50
12/02/2005	20 @	\$8.50	\$170.00
12/02/2005	1 @	\$7.50	\$7.50
12/05/2005	2 @	\$7.50	\$15.00
<u>12/13/2005</u>	<u>3 @</u>	<u>\$7.50</u>	<u>\$22.50</u>
	72	\$8.31	\$598.00

WATER-  
MELON  
SDLS 4S

11/25/2005	111 @	\$22.00	\$2,442.00
11/26/2005	4 @	\$25.00	\$100.00
11/28/2005	15 @	\$22.00	\$330.00
<u>11/29/2005</u>	<u>1 @</u>	<u>\$22.00</u>	<u>\$22.00</u>
	131	\$22.09	\$2,894.00

WATER-  
MELON  
SDLS 5S

11/09/2005	84 @	\$10.00	\$840.00
11/10/2005	12 @	\$20.00	\$240.00

DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. 885  
v. MULLER TRADING COMPANY, INC.  
66 Agric. Dec. 883

11/10/2005	32 @	\$8.00	\$256.00
11/25/2005	56 @	\$21.50	\$1,204.00
11/26/2005	24 @	\$22.00	\$528.00
11/28/2005	14 @	\$22.00	\$308.00
11/28/2005	28 @	\$20.00	\$560.00
11/29/2005	12 @	\$22.00	\$264.00
<u>11/29/2005</u>	<u>4 @</u>	<u>\$20.00</u>	<u>\$80.00</u>
	266	\$16.09	\$4,280.00

WATER-  
MELON  
SDLS 6S

11/26/2005	26 @	\$22.0	\$572.00
<u>11/28/2005</u>	<u>44 @</u>	<u>\$22.00</u>	<u>\$968.00</u>
	70	\$22.00	\$1,540.00

WATER-  
MELON  
SDLS 1S

11/29/2005	1 @	\$210.00	\$210.00
<u>11/30/2005</u>	<u>2 @</u>	<u>\$210.00</u>	<u>\$420.00</u>
	3	\$210.00	\$630.00

<u>Received</u>		Merchandise	\$8,020.00
11/23	1.00	140 Freight	\$0.00
WATERMELON SDLS 4'S			
11/23	1.00	196 Unloading	\$0.00
WATERMELON SDLS 5'S			
11/23	1.00	84 Inspection	\$0.00
WATERMELON SDLS 6'S			
11/23	1.00	1 Cartage	\$6.55
WATERMELON SDLS 1S			
11/23	1.00	1 <u>Other</u>	<u>\$0.00</u>
WATERMELON SDLS 35 CT BINS			

<u>Total Cost</u>	<u>\$8,026.75</u>
-------------------	-------------------

6. Anthony Marano Company paid Respondent \$8,020.20 for the watermelons with check number 111276, dated November 30, 2005.

7. Respondent paid Complainant \$1,098.08 for the watermelons with check number 9334, dated December 27, 2005.

8. The informal complaint was filed on March 25, 2006, which is within nine months from the accrual of the cause of action.

### **Conclusions**

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one trucklot of watermelons sold to Respondent. Complainant states Respondent accepted the watermelons in compliance with the contract of sale, but that it has since paid only \$1,098.08 of the agreed purchase price thereof, leaving a balance due Complainant of \$4,466.60. In response to Complainant's allegations, Respondent asserts that Complainant shipped seeded watermelons, rather than seedless watermelons as specified in the contract of sale, resulting in rejection of the entire lot.

We will first consider Respondent's allegation that the watermelons were rejected. Review of the record discloses that the subject watermelons were unloaded into the warehouse of Respondent's customer, Del Monte Fresh, before they were inspected on November 22, 2005.<sup>1</sup> The unloading or partial unloading of the transport is an act of acceptance. See 7 C.F.R. § 46.2 (dd)(1). We therefore find that Del Monte Fresh accepted the watermelons. Once the watermelons were accepted by Del Monte Fresh, Respondent was precluded from rejecting the watermelons to Complainant. See *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996). Consequently, we find that Respondent accepted the watermelons.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing,*

---

<sup>1</sup> See Formal Complaint, Exhibit #01.

DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. 887  
v. MULLER TRADING COMPANY, INC.  
66 Agric. Dec. 883

*Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). The burden to prove both a breach and damages rests with the buyer of accepted goods. *Perez Ranches, Inc. d/b/a P.R.I. Sales v. Pawel Distributing Co.*, 48 Agric. Dec. 725 (1989); *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971).

As we mentioned, Respondent asserts that Complainant breached the contract by shipping seeded rather than seedless watermelons. There is no dispute that the contract called for seedless watermelons. The U.S.D.A. inspection performed on the watermelons at Del Monte Fresh, in Kankakee, Illinois, disclosed that the faces of cut quarters had 18 to 96 seeds per melon, with 2 to 40 seeds brown to black, and the remainder white. The United States Standards for Grades of Watermelons define “seedless watermelons” as those having 10 or less mature seeds, not including pips/caplets, on the face of a watermelon cut into four equal sections (one lengthwise cut and one crosswise cut). See 7 C.F.R. § 51.1982. With 2 to 40 seeds per cut quarter, we find that the watermelons shipped by Complainant do not meet the definition for seedless watermelons. The failure of Complainant to ship seedless watermelons constitutes a material breach of contract for which Respondent is entitled to recover provable damages.

The general measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale. *R. F. Taplett Fruit & Cold Storage Co. v. Chinnok Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980). In the instant case, the resale of the watermelons was handled by Anthony Marano Company, in Chicago, Illinois (hereafter “Marano”).

888 PERISHABLE AGRICULTURAL COMMODITIES ACT

Marano reported total sales for the watermelons of \$8,020.20.<sup>2</sup> Respondent asserts, however, that this amount includes sales of 196 cartons of 5-count watermelons from another shipper<sup>3</sup>, CH Rivas (hereafter “Rivas”), which were on the same truck as the watermelons from Complainant.<sup>4</sup> We note that the account of sales prepared by Marano lists the following watermelons as received on November 23, 2005:

11/23	1.00	140	WATERMELON	SDLS	4’S
11/23	1.00	196	WATERMELON	SDLS	5’S
11/23	1.00	84	WATERMELON	SDLS	6’S
11/23	1.00	1	WATERMELON	SDLS	1S
11/23	1.00	1	WATERMELON	SDLS	35 CT BINS

There is no mention in this list of another 196 cartons of 5-count seedless watermelons, although the list of individual sales shows sales of 266 cartons of 5-count seedless watermelons, which is more than the 196 cartons shipped by Complainant, but less than the total of 392 cartons of 5-count watermelons reportedly shipped. We also note that for the 4 and 6-count watermelons, the sales listed are also less than the quantity received, and there is no explanation given for this discrepancy. While it is possible that some of the watermelons were resold in 35-count bins, we cannot presume that this was the case. Additionally, the account of sales shows sales of 5-count watermelons took place on November 9 and 10, 2005, presumably two weeks before the shipment at issue was received on November 23, 2005. Consequently, given the noted discrepancies in the account of sales prepared by Marano, we are unable to use the account of sales to determine the value of the watermelons as accepted.

Since we are determining damages for a material breach of contract, as opposed to a breach concerning the condition of the product, we also cannot resort to the use of the percentage of condition defects disclosed by the U.S.D.A. inspection to determine the value of the watermelons as accepted. As we mentioned, U.C.C. Section 2-714(2) provides that damages for a

---

<sup>2</sup> See Opening Statement, Exhibit #01-A.

<sup>3</sup> See Answer, Exhibit #16.

<sup>4</sup> See Answer, Exhibit #09.

DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. 889  
v. MULLER TRADING COMPANY, INC.  
66 Agric. Dec. 883

breach of contract shall be measured as the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, *unless special circumstances show proximate damages of a different amount*. We believe such special circumstances exist here. Specifically, in the instant case, Complainant breached the contract by shipping seeded rather than seedless watermelons. Accordingly, to determine Respondent's damages resulting from this breach, we should inquire as to whether there was, at the time of sale, a difference in value between seeded and seedless watermelons. This difference would, in our opinion, provide a more accurate measure of Respondent's damages resulting from Complainant's breach.

The U.S.D.A. Market News Recap of Available Fruit F.O.B. Prices for Monday, November 21, 2005, the first reporting date following the date of shipment for the watermelons in question, shows that 4-count seeded watermelons shipped from Mexico through Nogales, Arizona, were mostly selling for \$0.16 to \$0.18 per pound, and that 4-count seedless watermelons of the same origin were mostly selling for \$0.24 to \$0.26 per pound. Based on the average reported price of \$0.17 per pound for seeded 4-count watermelons, and \$0.25 per pound for 4-count seedless watermelons, we find that the seeded watermelons shipped by Complainant were worth \$0.08 per pound less than the seedless watermelons ordered. No prices were reported for 5 and 6-count watermelons on the referenced report; however, we assume that there was a similar discrepancy in the prices for these watermelons. Accordingly, we find that for the 27,452 pounds of watermelons shipped by Complainant, Respondent is entitled to recover damages equal to \$0.08 per pound, or \$2,196.16. In addition, Respondent may recover the \$309.00 U.S.D.A. inspection fee as incidental damages. With this, Respondent's total damages amount to \$2,505.16. When this amount is deducted from the contract price of the watermelons of \$5,564.68, there remains an amount due Complainant for the watermelons of \$3,059.52. Respondent paid Complainant \$1,098.08 for the watermelons. Therefore, there remains a balance due Complainant from Respondent of \$1,961.44.

Respondent's failure to pay Complainant \$1,961.44 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. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (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 \$1,961.44, with interest thereon at the rate of 4.89 % per annum from January 1, 2006, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

---

**ALBERT GOOD, d/b/a CASTLE ROCK VINEYARDS v. EURO-PACIFIC FRUIT EXPORT, INC.**

**PACA Docket No. R-06-0005.**

**Reparation Decision.**

**Filed June 7, 2007.**

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 891  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

**PACA-R – Importation requirements – Labels not affixed – Delays.**

Where a buyer has specified the method of transportation and the carrier to a foreign country, the buyer is in a better position to know the importation requirements of that country. Accordingly, in an f.o.b. contract, the buyer was responsible for delays caused by the failure to affix labels required by that country when the contract terms did not require the seller to affix those labels.

The warranty of suitable shipping condition warrants that the produce was in a condition when loaded such that under normal shipping conditions, it would arrive at contract destination without abnormal deterioration. What is abnormal deterioration, which would constitute a breach of the warranty, is determined by PACA standards and regulations, and abnormal deterioration is not determined by the laws and regulations of the foreign country which is the ultimate destination.

Presiding Officer Jonathan Gordy  
*Decision and Order by William G. Jenson, Judicial Officer.*

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”). A timely formal Complaint was filed with the Department on May 9, 2005, in which Complainant seeks a reparation award in the amount of \$36,233.16 in connection with transactions in interstate and foreign commerce involving two container loads of table grapes.

The Department served the formal Complaint and copies of the Department’s Report of Investigation on the parties. Respondent did not file an Answer to the Complaint, and therefore a Default Order was issued on June 27, 2005. We set aside the default by Order on September 20, 2005, after Respondent petitioned to reopen the proceeding. The September 20, 2005 Order allowed Complainant to submit an Amended Complaint, which Complainant filed on September 29, 2005. In response to the Amended Complaint, Respondent filed an Application for Orders on September 30, 2005, which was granted in part and denied in part by Order on December 12, 2005. On February 21, 2006, an additional Order was

entered that served the Answer.

The amount claimed in the Amended Complaint exceeds \$30,000.00, however, the parties waived oral hearing, and therefore the documentary method of procedure provided for in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's Report of Investigation ("ROI Ex. #"). The procedure also gives the parties an opportunity to file evidence in the form of sworn statements. Complainant filed an Opening Statement, Respondent filed an Answering Statement, and Complainant filed a Statement in Reply. After the period for filing statements, the parties were given an opportunity to file Briefs. Respondent filed a Brief.

#### **Findings of Fact**

1. Complainant, Albert L. Good, is an individual doing business as Castle Rock Vineyards, whose postal address is Route 2, Box 299, Delano, California 90245-4336.
2. At all times material to this decision, Albert Good was licensed under the PACA, license number 19920921 that was issued on April 1, 1992.
3. Respondent, Euro-Pacific Fruit Export, Inc., is a California Corporation whose postal address is 1550 E. Franklin Avenue, Suite B, El Segundo, California 90245-4336.
4. At all times material to this decision, Respondent was licensed under the PACA, license number 19990103 that was issued on October 16, 1998.
5. On November 3, 2004, Mathias Mentges, the President of Respondent, negotiated the purchase of three containers of "CAT 1", or USDA fancy grade, "Red Globe" variety of table grapes from Complainant.
6. The grapes were to be bagged and packed in boxes, for a total of 5,472 packages for all three containers.
7. The sale was F.O.B., with the delivery of the grapes made at Complainant's cooler in Richgrove, California with the intended destination of Sweden.
8. The containers of grapes were delivered into Respondent's possession on November 15, 2004 and shipped to Helsingborg, Sweden.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 893  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

9. Complainant invoiced Respondent for the two relevant containers, OOLU600642-5 and OOLU6107708 for a total of \$61,800.72, on November 16, 2004.<sup>1</sup>

10. The two containers of grapes arrived in Helsingborg, Sweden on December 10, 2004.

11. Mathias Mentges e-mailed Complainant's salesman Nick Bikakis on December 13, 2004, stating:

Nick,

The above referenced orders [CRV#11677, CRV #11679] arrived in Helsingborg this past Friday 12/10/04. The Swedish Ministry of Agriculture / Swedish Health Authorities inspected the contents at the port and held up the release due to the boxes not being stamped "CAT 1". Our customer called the right people and obtained the release but had to stamp the boxes prior to distribution. At the time of the inspection at the port the buyer from the chain-store that purchased the goods also saw the fruit. He rejected it due to decay. A Survey was immediately taken. First report is that the transit temperatures were good with arrival pulp temps of 32.3 and 33.1

I have instructed that the Temp Charts we [sic] sent a.s.a.p. as well as the preliminary report and that the original survey be complete a.s.a.p.

Above are the photos I received with the notification of problems. I will keep you posted daily.

Regards  
Mathias

---

<sup>1</sup> The record in this proceeding does not establish what happened to the third load that Respondent negotiated for on November 3, 2004.

1. Attached to that e-mail was a file that contained the inspection report and photographs. The report, dated Dec. 10, 2004,<sup>2</sup> indicates:

At the request of Scandinavian Fruit Partners AB, I the undersigned by the Chamber of Commerce of southern Sweden appointed surveyor for fruits and vegetables, have inspected 2 containers of California table grapes of the variety "Red Globe" as follows:

Container No.: OOLU 600642-5 and OOLU 610770-8  
arrived to [sic] Helsingborg on the 10<sup>th</sup> of december [sic] in 2004  
Quantity: 1.824 boxes 1.824 boxes /bagged merchandise/  
Brand: "1<sup>st</sup> Place" 1<sup>st</sup> Place"  
Packer and Shipper: Alg Enterprises, Delano, Ca. 93215  
Pulp-temperature at arrival: 32.3 F 33.1 F

Container OOLU 600642-5 had 3 slanting pallets, cause by three lost pallets [sic] having been placed between first and second row in the front of container. The boxes have to be repalletized by hand.

On inspect the merchandize from 16 boxes, taken from different pallets, of each container has been carefully examined.

Statement of quality:

Juicy [sic] from split grapes, too hard packed and pressed, has started a process of rot in certain numbers of bunches and caused [sic] a deteriorating [sic] of quality.

Presence of rot and white-mould.

Presence of grapes with black spots on the rind.

---

<sup>2</sup> This one-page report can be found in the Report of Investigation at 6e, with black and white copies of the attached pictures at 6o-6aa. Mathias Mentges refers to the report attached to his Declaration of Mathias Mentges at Exhibit 5 with the eight pages of attached black and white copies of the photographs. The same report, with color copies of the photographs, is found in Exhibit 1 of Respondent's verified Answer.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 895  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

The lots have to be sold in original condition. Claims of clients are to be expected. The presence of injury prejudices the presentation on sale. The final value of commerce can first be fixed after selling and awaiting reactions of clients.

In case of making a larger control by the Swedish Board of Agricultural Protection Service these lots would have been refused and a sorting should have been required before selling on the fresh fruit market.

Enclosure: 14 pictures showing the appearance of the merchandise.

2. Because of the inspection report, and the failure to mark the boxes "CAT 1" Respondent was unable to directly import the grapes into Sweden and deliver them to its retail customer.

3. On January 3, 2005, Mathias Mentges, Michael Mentges (the Secretary-Treasurer of Respondent), Nick Bikakis, Laurie Renard (a salesperson for Complainant), and Brent Hillen (another salesperson for Complainant) met and discussed the inspection reports.

4. Respondent remitted to Complainant, in two checks dated January 7, 2005, a total of \$25,567.56. Along with the checks, Respondent also presented an undated liquidation accounting that shows that the grapes sold for \$53,330.15 with a net return of \$25,567.56 after \$27,762.58 in deductions for: "Terminal/haulage OOCL" of \$356.72, "Forwarding" of \$119.40, "DUTY - Full value 11.5%" of \$9,756.12, "Handling/Storage" of \$746.27, "Survey etc (DHL not charges)" of \$373.13, "Truck to Holland" of \$1,511.19, "Ocean Freight" of \$13,675.75, and "Trucking L.B. Delano L.B." of \$1,224.00.

5. Complainant never cashed the two checks, and instead sent the checks to the Regional Office of the PACA Branch in Fort Worth, Texas which received them on April 5, 2006, and they were forwarded to the Tucson, Arizona Office of the PACA Branch on April 7, 2006. Complainant requested, in a letter accompanying the checks, in reference to this proceeding that: "We would seek the assistance of your office in requesting that Euro-Pacific Fruit Export Inc. replace the two stale dated checks with no limited

endorsements as the undisputed amount so we may pursue the disputed portion through this reparation proceeding.”<sup>3</sup>

6. An informal complaint was filed on March 11, 2005 within nine months after the cause of action for this proceeding accrued.

### **Respondent’s procedural and evidentiary objections**

Before we discuss the merits of Complainant's claims, Respondent has raised numerous objections during the course of this proceeding, some of which have been adequately addressed in earlier rulings, others of which remain unresolved. Most recently, Respondent filed an "Objections to the Opening Statement," along with its Answering Statement, and in its Brief, Respondent lodged additional objections. These objections fall into two categories: procedural and evidentiary.

First, Respondent raises more than a half a dozen procedural objections, all of which are overruled.

The following example establishes Respondent’s tone: Respondent objects to Complainant’s filing of a “Complaint” on September 29, 2005, because our Order of September 20, 2005 required Complainant to file an “Amended Complaint”. (Respondent’s Brief at 2.) Respondent writes in its most emphatic font: “*Complainant never filed an Amended Formal Complaint as he was ordered to do.*” (Respondent’s Brief at 2.) Respondent insists that the filing of the document captioned “COMPLAINT” “*must* be rejected and an Order in the usual form denying Complainant relief *must* be entered in favor of Euro-Pacific Fruit Export, Inc.” (Respondent’s Brief at 2.) The Rules of Practice do not require that documents be captioned with technical accuracy. *See B. G. Sales v. Sin-Son Produce Co., Inc.*, 43 Agric. Dec. 1991 (1984) (holding that a misdated document was valid irrespective of the mistake). We have already recognized the captioned “Complaint” filed on September 29, 2005, as the “Amended Complaint,” on the first page of our “Order Denying in Part and Granting in Part Respondent's Applications for Orders” dated December 12,

---

<sup>3</sup> The Letter (and the two checks) were sent to Respondent on April 11, 2006 by David Studer, Acting Regional Director of the Western Region of the PACA Branch. The Letter did not appear to have the check stubs attached. Copies of the Checks and the Stubs can be found attached to the Declaration of Michael Mentges Ex. 3 and Ex. 4.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 897  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

2005.<sup>4</sup>

Respondent maintains seven additional baseless objections: Complainant's Opening Statement was not properly verified (Objections to Opening Statement at 3.);<sup>5</sup> the Opening Statement does not include "pertinent documents that must be identified in the Statement" (*id.*);<sup>6</sup> Nick Bikakis has not been shown as authorized to sign the Opening Statement (*id.*);<sup>7</sup> California Bus. & Prof. Code section 17918 prevents action because Complainant has not presented any evidence that it was operating in accordance with the California fictitious business name statement laws (*id.* at 5.);<sup>8</sup> Complainant has had purported *ex parte* communications with the

---

<sup>4</sup>We also note that the Order of September 20, 2005 considered a document captioned "Application to Vacate Default Order and Reparation Award Against Euro-Pacific Fruit Export, Inc." as a "Petition to Reopen After Default", which would have been the technically accurate caption for that pleading. If technical inaccuracy of Respondent's caption had not been overlooked, Respondent would not have made it this far.

<sup>5</sup>This objection is based on an imprecise verification. Complainant's verification in its entirety reads:

Nick Bikakis, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof and that the same are true, except as to those matters therein stated on information and belief, and as to such matters he believes them to be true, and that he is duly authorized to sign the complaint on behalf of the Complainant.

Respondent has argued that "the foregoing complaint" language in the verification renders the verification inadequate. An example of verification language that parties may use is in the Rules of Practice, 7 C.F.R. § 47.20(h). The example is substantially similar in substance to Complainant's language, but not identical in form. Regardless, Nick Bikakis signed on behalf of Albert L. Good d/b/a Castle Rock Vineyards. (Opening Statement at 5.) Nick Bikakis signed the verification. (*Id.*) The notary signed, stamped and dated the document. (*Id.*) The Rules of Practice require nothing more. See 7 C.F.R. § 47.20(c).

<sup>6</sup>This objection is without any foundation in the Rules of Practice because Complainant is not required to provide documents with his statements.

<sup>7</sup>See discussion *supra* fn. 5.

<sup>8</sup>Complainant is not required to prove that it is operating in accordance with the California statute; Complainant is licensed by the PACA as Albert L. Good with the trade name Castle Rock Vineyards.

Department (see Objections to Opening Statement at 1-2.);<sup>9</sup> we should hold an oral hearing instead of a documentary procedure;<sup>10</sup> and, Nick Bikakis made deliberately false and misleading statements in violation of 7 U.S.C. § 499b when he failed to correctly identify his employer (*id.*).<sup>11</sup> These objections are meritless, and are overruled.

Respondent's second category of objections is to the evidence. Respondent objects to the evidence presented in the Opening Statement and the Statement in Reply. Respondent patterns these evidentiary objections after the Federal Rules of Evidence ("FRE"). (Objections to Opening

---

<sup>9</sup> Respondent's objections to *ex parte* communications with the Department are meritless because: (1) no *ex parte* communication has occurred between Complainant and the examiner and (2) the nature of procedure under the Rules of Practice is for sequential filings.

First, disallowed *ex parte* communication occurs when a judge discusses the merits of the proceeding with one side of a case without the opposing side present to participate. *See e.g.* 7 C.F.R. § 1.149; ABA Model Rules of Professional Conduct, Rule 3.5. The "judge" is the examiner who prepares the decision for the Judicial Officer's signature. No *ex parte* communication has occurred in this case because the examiner, an OGC attorney, never communicated with either party on the merits in writing or otherwise outside the documents filed with the Department.

Second, Respondent has fundamentally misunderstood the sequential nature of the service in the Rules of Practice. The current method of service in the Rules of Practice is that a party serves the documents on the PACA Branch, and the PACA Branch serves the opposing party. 7 C.F.R. § 47.4. For example, Respondent has objected to the letter dated April 4, 2006 (and the attached checks) that Complainant served on the PACA Branch on April 5, 2006. The PACA Branch served Respondent the letter and checks on April 11, 2006. Respondent has had an opportunity to comment on that communication. This is the sequence that the Rules establish. This example and all of Respondent's other objections to *ex parte* communications follow this pattern. Therefore, all of Respondent's objections to *ex parte* communications are overruled.

<sup>10</sup> Respondent explains its objection: "Respondent has timely requested Oral Argument and . . . the amount in controversy is greater than \$30,000." (Objections to Opening Statement at 1.) A careful examination of the record does not reveal a timely request for an in-person hearing. Respondent has not cited the document that contains the request. Because no request for an oral hearing was timely filed as required by 7 C.F.R. § 47.15, Respondent's objection is overruled.

<sup>11</sup> Nick Bikakis has identified his employer in his verification: Albert L. Good d/b/a Castle Rock Vineyards. If this is false, Respondent has not shown that it is false.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 899  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

Statement at 4-14; Respondent's Brief at 6-8.)

Respondent's evidentiary objections are overruled for one reason: The FRE do not apply to this proceeding. This is an administrative forum that is conducted pursuant to the requirements of the Administrative Procedure Act. *See In re: Fred Hodgins*, 56 Agric. Dec. 1242, 1295 (1997). In this administrative forum, the rules for exclusion are contained in our Rules of Practice. The Rules of Practice require that examiners exclude evidence at an oral hearing only when the evidence is "immaterial, irrelevant, or unduly repetitious, or which is not the sort of evidence upon which responsible persons are accustomed to rely." 7 C.F.R. § 47.15(2)(g). In the documentary procedure portions of the Rules of Practice, there is no rule that requires the exclusion of evidence at all. 7 C.F.R. § 47.20. Even under the rules for an oral hearing (7 C.F.R. § 47.15(2)(g)), Respondent has not presented any valid objections that would cause us to exclude this evidence.

For example, Respondent has objected on hearsay grounds to the following passages in the Opening Statement which read: "My Employer, Mr. Al Good had spoke with Mr. [Mathias] Mentges previously and told him we would ship two loads of Red Globe Grapes. I called up Mr. Mentges to confirm the sale as well as the P.O. numbers, and prices." (Opening Statement at 1.) Neither sentence would be excluded in an oral hearing because the testimony is not hearsay. But even if Respondent had presented a legitimate hearsay objection, reliable hearsay is admissible under the Rules of Practice, and when it is admitted, hearsay evidence is given its appropriate weight. *See G&S Farms v. Mendelson-Zeller, Co.*, 20 Agric. Dec. 272 (1961). Therefore, all of Respondent's hearsay objections are overruled.

Similarly, Respondent variously objects to the Opening Statement and the Statement in Reply based on: lack of foundation, lack of authentication, lay legal opinions, best evidence rule,<sup>12</sup> inadmissible opinion, inadmissible

---

<sup>12</sup> The best evidence rule only requires that an original of a document be produced as proof of its contents, and not "secondary evidence" in its place. *See* FRE 1002. When a party's understanding of a document is at issue, his testimony should not be excluded. *See U.S. v. Mayans*, 17 F.3d 1174, 1184-85 (9th Cir. 1994). Every document that Nick Bikakis refers to is already in evidence, and his testimony does not appear to be intended to prove the contents of those documents. A fair reading of the Opening Statement reveals that Nick

settlement discussions, lack of personal knowledge, irrelevance and hearsay.<sup>13</sup> In sum, Respondent objects to all but a few sentences of the Opening Statement and the Statement in Reply. It is not necessary to discuss in detail all of these immaterial objections, and all of these objections are overruled. The evidence is given its appropriate weight.<sup>14</sup>

### **Respondent's Pending Motions**

Respondent has also presented two motions that must be resolved: A motion to extend the time to file declarations and a motion for Judicial Notice.

First, Respondent appears to have requested an extension of time to file the declarations of two individuals residing in the United Kingdom and Sweden. (See Declaration of Merl Ledford III at 2.) Respondent's request was filed with the Answering Statement, and served on Complainant. However, Respondent never filed additional declarations, or renewed its request to submit additional affidavits in its Brief, even though Respondent continued to maintain a number of its objections. (See Respondent's Brief at 1-2.) The time for filing additional affidavits has long past, and therefore the motion for an extension of time is denied.

Second, On June 22, 2006, Respondent filed a "Declaration of Michael

---

Bikaksi discussed the contents of the document to show his state of mind concerning the document and his actions in accordance with his state of mind. Complainant's interpretation of the inspection report is relevant to Complainant's belief that the inspection report was inadequate to show the table grapes' condition when they arrived in Sweden. Therefore, Respondent's objections based on the "Best Evidence Rule" are overruled.

<sup>13</sup> Not included in this list are Respondent's numerous objections that the Opening Statement contains inappropriate "spin", or is misleading and deceptive. (e.g. Objection to Opening Statement at 5, 7-8, 10.) These "spin" objections, unlike those listed, have no basis in the FRE at all. The best place to point out factual errors in an opening statement is in the answering statement or the brief. Accordingly, Respondent's poorly grounded objections based on purported fraud or deception, even if not specifically identified here, are also overruled.

<sup>14</sup> For instance, Complainant refers in the Statement in Reply to the opinion of the PACA Branch as a reason to support a finding against Respondent. (Statement in Reply at 1.) The opinions of the PACA Branch in the Report of Investigation, in so far as they state legal conclusions, do not dictate the resolution of this proceeding, nor do those opinions shift the burden of proof onto the opposing party.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 901  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

P. Mentges for Judicial Notice of Non-Conforming Produce; to Close Evidence and For Order and Judgment for Respondent Euro-Pacific Fruit Export, Inc.” (“Motion for Judicial Notice”). In the Motion for Judicial Notice, Respondent requests the following: that judicial notice be taken that the grapes were improperly marked for import into Sweden; that judicial notice be taken that the grapes arrived in a condition that made the grapes illegal to import into Sweden; that because Complainant failed to respond to the Objections found in the Answering Statement, the objections must be sustained; and that the evidence in the proceeding be closed and an order entered in favor of Respondent because Complainant has not met his burden of proof.

The Motion for Judicial Notice is denied for three reasons: First, to the extent that the Motion for Judicial Notice seeks to establish facts outside of the Answering Statement, it was untimely filed, because it was filed more than 20 days after the Opening Statement. Second, the Motion for Judicial Notice requests that we take judicial notice of facts from a commonly available source, in accordance with FRE § 201(b)(2), that Respondent has not produced or referenced. Third, there is no requirement in the Rules of Practice that we ever find in favor of a party that has made objections simply because the opposing party has not answered them. The motion is denied.<sup>15</sup>

Now that we have addressed the procedural issues, we will turn to the merits of this case.

### **Conclusions**

Most of the contract terms for the sale are not in dispute. The parties agree that Complainant sold to Respondent two containers of “CAT 1” table grapes F.O.B. with the contract destination of Sweden. (See Declaration of Mathias Mentges at 5, Exhibits 1-3; Complainant’s Opening Statement at 1.) Both parties agree that Complainant delivered the grapes into

---

<sup>15</sup> The Motion for Judicial Notice has not been served on Complainant. However, it does not prejudice Complainant to deny the motion, and no benefit would be obtained by granting Complainant time to respond.

Respondent's possession, and that Respondent shipped the grapes to Helsingborg, Sweden. (See Complainant's Opening Statement at 2; Declaration of Mathias Mentges at 6; ROI Ex. 1a, 1c.) There is no serious dispute that the price owed on the original contract was \$61,772.52 as described in the two invoices attached to the Complaint.<sup>16</sup> (Complaint at Ex. 1 and Ex. 2.) Nor is there any dispute that Respondent did not pay Complainant the full invoice price on the grapes (\$61,800.72), and instead Respondent issued two checks that were \$36,233.16 less than the originally invoiced amount. (See Declaration of Michael Mentges at 5; Letter.) The parties agree that Complainant did not cash the checks for \$25,567.56, and therefore Complainant has not been paid in any amount for the two container loads of grapes. (See *id.*)

However, Respondent claims that when the grapes reached Sweden, it rejected the grapes because Complainant had breached the contract. Respondent also claims that it was authorized to resell the grapes and remit the proceeds based on an "open" contract. As discussed below, Respondent has failed to demonstrate that it rejected the grapes, that Complainant breached the agreement, or that Respondent negotiated a new agreement to sell the grapes on an "open" basis. Because Respondent has breached the contract by failing to pay the full contract price, we will award Complainant its full claim for \$36,233.16 in damages.

### **I. Respondent Has Not Shown that It Timely Rejected the Grapes in Clear and Unmistakable Terms.**

Respondent has claimed that it rejected the grapes when they reached Sweden. The burden of proving rejection is on Respondent. *Crawford v. Ralph & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 806 (1992); *San Tan Tillage Co. v. Kaps Foods*, 38 Agric. Dec. 867, 871 (1979). Respondent seems to have claimed that it rejected the grapes in a phone call on December 11, 2004, in an e-mail on December 13, 2004, and in a meeting on January 3, 2005. Rejections are only effective if the rejection is

---

<sup>16</sup>There are two invoices in the ROI that have slightly different terms than the invoices Complainant attached to the Complaint (and which can also be found in the ROI Exhibits 1a and 1c). These invoices have the same invoice numbers, but with slightly lower amounts due. Invoice no. 11677 is for \$30,861.96 and invoice no. 11679 is for \$30,868.76. (ROI Exhibit 6c, 6d.) The \$35.00 difference in both cases appears to be the addition of "Phyto". (Compare ROI Exhibits 6c, 6d with ROI Exhibits 1a, 1c.)

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 903  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

made in clear, unmistakable terms. *Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1292 (1996); *Farm Market Service, Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429, 431 (1983). And, the rejection is not effective unless the buyer seasonably notifies the seller. *Firman Pinkerton Co.*, 55 Agric. Dec. at 1292-93. The statements of Mathias and Michael Mentges have failed to establish that a timely rejection was tendered, or that Respondent was clearly and unmistakably rejecting the grapes.

Respondent claims that Mathias Mentges notified Complainant's office by telephone on December 11, 2004 that (1) Respondent was rejecting the non-conforming grapes, (2) the grapes had been rejected for importation into Sweden, (3) Complaint had failed to properly mark the grapes, and (4) an official inspection was being performed. (Declaration of Mathias Mentges at 8.)

Mathias Mentges's claims that he timely rejected the grapes as non-conforming in the purported telephone call are not credible because the contemporaneous e-mail does not support his testimony. The e-mail Mathias Mentges sent Mr. Bikakis on December 13, 2004, only two days after the purported telephone call, never mentions that Respondent had rejected the grapes, only that the ultimate customer had rejected them. Further, the e-mail specifically promises to "keep you posted daily." (Declaration of Mathias Mentges Ex. 4.) Respondent did not request guidance on grapes from Complainant that, if properly rejected, would not be Respondent's property. *See* U.C.C. § 2-603 ("when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty . . . to follow any reasonable instructions received from the seller with respect to the goods . . .").

Complainant did not submit testimony to rebut Mathias Mentges's rejection claims in the Statement in Reply. However, Mathias Mentges states in his Declaration: "I telephoned ALBERT L. GOOD's office with notice (i) that the [sic] EURO-PACIFIC was rejecting ALBERT L. GOOD'S [sic] non-conforming Grapes . . . ." (Declaration of Mathias Mentges at 8.) Without identifying to whom Mathias Mentges spoke, Complainant would have the task of bringing forward an unidentified member of his office staff to reject Mathias Mentges's claim. Moreover, if the rejection had actually occurred, Mathias Mentges should have been able

to identify the person with whom he discussed the rejection, which he does not do. Because Mathias Menteges's purported rejection is inconsistent with the contemporaneous e-mail, his bare assertion - that he telephoned his rejection to Complainant's "office" - lacks sufficient credibility for us to rely upon it. Respondent has failed to prove that an effective rejection was made by telephone on December 11, 2004.

The e-mail of December 13, 2004 is also inadequate to show rejection because Mathias Menteges did not state in clear, unmistakable terms that Respondent was rejecting the grapes. The only clear rejection described was that of Respondent's buyer. A notice that Respondent's ultimate buyer rejected the produce is not sufficient to operate as a rejection between the Respondent and Complainant. *See In re: Mathis v. Kenneth Rose Co.*, 46 Agric. Dec. 1562, 1566 (1987) (citing *Womack Bros. Produce v. P.L. Echols*, 20 Agric. Dec. 895 (1961)).

The witnesses' statements imply that Respondent rejected the produce during the meeting on January 3, 2005. Even if we concluded that the content of the meeting itself included a clear, unmistakable rejection, (which we do not conclude), the rejection would not have been timely, occurring two weeks after the grapes had arrived in Sweden. *See* 7 C.F.R. 46.2(cc) (defining a "reasonable time" for rejection does not exceed 24 hours after the fresh fruits or vegetables are unloaded and made available for inspection).<sup>17</sup>

An ineffective rejection has the same consequence as acceptance. *Dew-Grow, Inc., a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. 2020 (1983); *Nikademos Dist. Co. v. D & J Tomato Co.*, 50 Agric. Dec. 1884, 1888 (1991). Because of Respondent's ineffective rejection, Respondent is deemed to have accepted the grapes and therefore is liable for the full invoice price of the grapes, unless it can prove that Complainant breached the contract.

---

<sup>17</sup> Respondent's witnesses have also implied that Complainant's employees accepted the inspection report at this meeting. Respondent's witnesses noted that Mr. Hillen, one of the Complainant's employees, "shook his head in a manner" expressing "disbelief" or "disappointment" in the quality of the grapes. (Declaration of Mathias Menteges at 9; Declaration of Michael Menteges at 3-4.) This testimony is too speculative to be given any serious credit, because Respondent's witnesses were not inside Mr. Hillen's mind to indicate why he shook his head.

**II. Respondent Has Not Proved that Complainant Breached the Contract.**

Respondent claims that Complainant breached the contract in three ways: (1) by failing to label the boxes as “CAT 1”, therefore preventing the importation of the grapes, (2) by packing the grapes in the wrong boxes, and (3), by breaching the warranty of suitable shipping condition. Respondent has not shown that the contract was breached.

**1. Respondent Has Failed to Show that Labeling the Grapes “CAT 1” Was a Contract Term for which Complainant is Liable.**

Respondent’s first claim centers on EU grade standards. According to Respondent, under EU standards only “CAT 1” produce, which is comparable to USDA grade fancy, may be directly imported to retailers in EU countries. (Declaration of Mathias Mentges at 4.) For direct import, the label of “CAT 1” must be affixed before the produce arrives at the foreign dock. (*Id.*) Respondent does not claim that an entire container of produce is irrevocably returned to the United States when the produce is unlabeled, but rather that the produce must be sold to a wholesaler for repacking and grading before it is accepted into an EU country. (See *id.* at 4-5.) Mathias Mentges discussed at length that only “CAT 1” grapes could be imported into Sweden, (Declaration of Mathias Mentges at 4-5) and that if the boxes are not stamped “CAT 1” the grapes are automatically downgraded to “CAT 2”, which is the equivalent of U.S. No. 1 grade. (Declaration of Mathias Mentges at 4-6.) This would result (and did result) in Respondent having to label the grapes on the dock before it could deliver the grapes to its Swedish retail customer. (See *id.* at 6.)

The burden is on the proponent of a contract term to prove that term. *Merit Packing Company v. Pamco Airfresh, Inc.*, 47 Agric. Dec. 1345, 1346 (1988). The written testimony in this case is inadequate to show that this specific labeling was a contract term.

Mathias Mentges testified sufficiently to show that the contract did require red globe variety table grapes that met the “CAT 1” grade standards.

(Declaration of Mathias Mentges at 5.) And, Complainant has not attempted to dispute that “CAT 1” labels were not affixed to the grapes. Respondent has presented un rebutted testimony that the labeling on boxes was important to Respondent, and that the boxes were unlabeled. (See Declaration of Mathias Mentges at 4-5.)

However, as the party bearing the burden to show this contract term, Respondent did not demonstrate that the contract *required* Complainant to label the boxes. The purchase orders make no reference to the grade of the grapes at all (See Declaration of Mathias Mentges Exhibits 1-3), and neither do the invoices (ROI Ex. 1a, 1c). Mathias Mentges’s description of the contract does not present any labeling terms either:

On November 3, 2004, I made an oral agreement on behalf of EURO-PACIFIC with ALBERT L. GOOD for FOB purchase of three containers of 19 pound Bagged Cat 1 (“First Place”) red globe grapes totaling 5,472 packages . . . for delivery by MR. GOOD as “Shipper” to a known and disclosed destination in the Kingdom of Sweden, an EU country.

(Declaration of Mathias Mentges at 5.) There is no indication in the evidence that the contract required Complainant to label the grapes “CAT 1” before shipment. Respondent asserts that “the Shipper (Complainant)<sup>18</sup> must clearly label each box of table grapes . . .” (Respondent’s Brief at 3.) The evidence supports a conclusion that grapes must be properly labeled for importation into Sweden, but there is no reason to assume that Complainant was obligated to label the grapes “CAT 1” absent an express contract that required Complainant to so label the grapes.

Moreover, this was an f.o.b. contract. “[In an f.o.b. transaction,] the buyer assumes all risk of damage and delay in transit not caused by the seller.” 7 C.F.R. § 46.43(i).<sup>19</sup> Buyers in an f.o.b. transaction are responsible for the risk of loss during transportation, including non-

---

<sup>18</sup> Contrary to Respondent’s assertion, it appears that Respondent arranged for shipment of the containers to Sweden (See Declaration of Mathias Mentges, Ex. 1-3.) This would make Respondent the “shipper”.

<sup>19</sup> Similarly, under the U.C.C. § 2-509(1)(a), the risk of loss transfers when the seller delivers the goods to the carrier.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 907  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

delivery. *See In re: East Produce v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 856 (2000). Sellers in an f.o.b. contract are only required as a general rule to “put the goods in the possession of a carrier and make such a contract for their transportation as may be reasonable . . .” *See* U.C.C. § 2-504.<sup>20</sup> Respondent appears to have made the transportation arrangements, because, in its purchase orders, Respondent specified the method of transportation and the carrier. (See Declaration of Mathias Mentges, Ex. 1-3.) Complainant put the grapes in the carrier’s possession according to the proven terms of the contract. As the importer into Sweden, Respondent was in the better position to notify Complainant what Sweden required in labeling. There is no evidence that Respondent notified Complainant of this requirement. Respondent therefore bore the risk that the Swedish authorities might delay or prevent delivery to Respondent’s customer.

Respondent reached a specific agreement with Complainant as to the amount, quality, and price of the grapes. Complainant fully performed the agreement when he placed the grapes on the truck in California. Respondent’s first claim of breach fails because it has not shown with testimony or other evidence that this f.o.b. contract required Complainant to label these grapes “CAT 1”.

**2. Respondent Has Not Shown that Complainant Packaged the Grapes in Breach of the Contract.**

Respondent’s second claim of a breach centers on the packaging of the grapes. Respondent alleges that Complainant packed one container of grapes in the wrong sort of boxes, and that this was a breach of the contract. (Respondent’s Brief at 4.) The purchase orders appear to show that the contract required Complainant to package the grapes in “Styro-Pack” boxes for at least one of the two containers. (Declaration of Mathias Mentges Ex. 1, Ex. 2, Ex. 3.)

However, the invoices show that the contract required Complainant to package the grapes in hard plastic boxes. The invoices contain the one-line

---

<sup>20</sup> Complainant’s warranty of suitable shipping condition, discussed *infra* section II.3, is separate from the default rule described in the U.C.C.

description: “Red Globe Grapes 19# Bags Hard Plast 1st Place.” (ROI Ex. 1a, 1c.) From the invoice date until the delivery date, Respondent would have had several weeks to review the invoice and seek clarification or correction of the contract terms listed on the invoice. Yet even after the grapes arrived, there is no indication that Respondent objected to the boxes listed on the invoice until Respondent filed the Declaration of Mathias Mentges in this proceeding. Respondent’s failure to promptly object to the terms on the invoice is a strong indication that the terms set forth on the invoice were correctly stated. See *Lisenby v. Craft Tomato Co.*, 46 Agric. Dec. 1870 (1989); *Smith Potato, Inc. v. Wood Bros. Produce*, 45 Agric. Dec. 2091, 2095 (1986); *Pemberton Produce, Inc. v. Tom Lange Co.*, 42 Agric. Dec. 1630 (1983); *Graff v. Chandler-Topic Co.*, 41 Agric. Dec. 1787, 1789 (1982); *Sunshine Produce Co. v. Si Si Fruit Distributors*, 34 Agric. Dec. 104, 108 (1975); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218 (1960). Therefore, we conclude that the contract required Complainant to package the grapes in plastic boxes. There is no indication in the record that Complainant breached this contract term.

### **3. Respondent Failed to Show that Complainant Breached the Warranty of Suitable Shipping Condition.**

Respondent’s main claim in its pleadings is that Complainant breached the warranty of suitable shipping condition. In this instance, the contract called for the grapes to be shipped f.o.b. to Sweden. The Regulations, 7 C.F.R. § 46.43(i), define “f.o.b.” as meaning “that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.” Suitable shipping condition is defined, 7 C.F.R. § 46.43(j), “that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.”

The suitable shipping condition provisions of the Regulations ( 7 C.F.R. § 46.43(j)) which require delivery to contract destination “without

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 909  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

*abnormal deterioration*”, or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See generally *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 708 (1980); see Williston, Sales § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the PACA dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should negotiate a delivered sale rather than an f.o.b. sale. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. at 708.

Respondent has stated the law concerning the warranty of suitable shipping condition somewhat differently: “It is uncontroverted that all ‘F.O.B.’ sales are warranted for ‘suitable shipping condition for good

arrival at the [known] and disclosed point of intended destination.” (Respondent’s Brief at 3.) Taken alone, this paraphrase of the law is merely imprecise. However, Respondent then states a conclusion that is a bold misstatement of the law: “It is uncontroverted that ‘Good Arrival’ is determined under the laws of the known and disclosed destination according to inspection standards established by that jurisdiction.” (Respondent’s Brief at 3.) With this misstatement, Respondent errs in two major respects.

First, the warranty of suitable shipping condition, as the above cited cases indicate, is not a warranty that the produce will arrive in a condition acceptable to the buyer (or a foreign inspector) at the delivery point. A shipper warrants that the produce was the proper grade when loaded so that under normal shipping conditions, only normal deterioration will occur. We ask the question: “[W]ere the perishables, at shipping point, in suitable condition for shipment to a specific destination?” *Lookout Mountain Tomato & Banana Co. v. Consumer Produce, Co.*, 50 Agric. Dec. 960, 966 (1991).

Second, the law of the United States applies in this situation. “[T]he validity of contracts to sell perishable agricultural commodities in interstate commerce is to be determined by the federal act and the regulations issued under it to the extent that they are applicable . . .” A. *Sam & Sons Produce Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1059 (1991). The warranty of suitable shipping condition attaches through the regulations promulgated under the PACA whenever the term “f.o.b.” is used in a produce transaction. See *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980 (1997). Therefore, what is “abnormal deterioration” is the question and the answer will be determined based on PACA standards and regulations.

Respondent’s misstatement causes Respondent to make several irrelevant arguments concerning the warranty of suitable shipping condition. Specifically: Complainant accepted European Union inspections in the past, the health ministry of Sweden will not permit table grapes with any amount of mildew, mold or rot to be imported into Sweden, and the grapes were illegal to import into Sweden. (See Respondent’s Brief at 4). The scope of the warranty is not concerned with those events, even if all of those assertions are true. If Respondent wanted the grapes to be of a certain condition at the arrival point, it could have arranged for “delivered” terms.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 911  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

The only relevant issue is whether Complainant has breached the warranty.

As the party who accepted the grapes, it is Respondent's burden to show breach of the warranty of suitable shipping condition. See *Anthony Farms v. Bushman's*, 45 Agric. Dec. 1640, 1642-43 (1986); *Martori Bros. Distributors v. Anthony Gagliano & Co.*, 45 Agric. Dec. 1621, 1623 (1986); *Fresh Western Marketing, Inc. v. Corgan & Son, Inc.*, 45 Agric. Dec. 1313, 1318 (1986). In order to carry its burden, Respondent must show that the shipping conditions were normal. See *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 856, (1992). If the shipping conditions were normal, Respondent must also present adequate proof that abnormal deterioration occurred such that the Complainant breached the warranty of suitable shipping condition. See *Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce*, 50 Agric. Dec. 998, 1001 (1991). There is some evidence, in the form of temperature recorder tapes, that suggests that the shipping conditions were normal. However, we will presume without deciding that the shipping conditions were normal, because we conclude in any event that Respondent has not presented adequate evidence of abnormal deterioration.

The kind of evidence required to show abnormal deterioration is well established in our case law. In this instance, there is a case directly on point. In *Ontario International, Inc. v. The Nunes Company*, 52 Agric. Dec. 1658 (1993), we considered a Swedish inspection report and photographs similar to the report and photographs submitted in this case. *Id.* at 1669-70. In that case, we held that the inspection report's general statements concerning the value of the produce, without statements of percentages of defects, were inadequate to demonstrate that the warranty of suitable shipping condition was breached. *Id.* Supplying percentages of defects is the basic function of an inspection or survey. *Id.* This function is only accomplished when the inspector carefully counts the defective items in a representative sample taken from a load as a whole, and the inspector describes the type of defects or damage in the report. *Id.* And, we do not rely on photographs as evidence of percentage of defects or damage. *Id.* at 1669.

Like the inspection report in *Ontario International*, Respondent's one page inspection report does not have any indication of the percentage of

defects.<sup>21</sup> Without a statement of the percentages of defects or damage, it is impossible for us to determine whether the defects and damage that are present are abnormal or normal for shipments from California to Sweden. Further, the inspector may not have utilized a representative sample. The sample size utilized in the inspection was very small, 0.44% of the entire load. In previous cases, we have declared inspections taken on small samples as inadequate. *See Borton & Sons v. Firman Pinkerton Co.*, 51 Agric. Dec. 905, 910 (1992) (discussing a sample size of 0.36%). Finally, the close-up pictures, which graphically display serious condition problems in the grapes photographed, are insufficient evidence that the entire load suffered from similar defects and damage.

Therefore, Respondent has failed to show that Complainant breached the warranty of suitable shipping condition.

### **III. Respondent Has Not Proven that Complainant Agreed to a New Contract.**

Respondent has also claimed that it formed a new agreement with Complainant, which it fully performed. The burden of showing a new contract is on the party alleging it, which in this proceeding is Respondent. *See Turbana Corp. v. Tom Lange, Co.*, 49 Agric. Dec. 1221, 1226 (1990). The new agreement supposedly allowed Respondent to sell the grapes on Complainant's behalf. (*See* Declaration of Mathias Mentges at 10.) The evidence of this new agreement is in Mathias Mentges's and Michael Mentges's declarations and a "claim liquidation" which appears to be an accounting of a purported sale of the grapes. (Declaration of Michael Mentges at 3-4; Declaration of Mathias Mentges at 9, Ex. 4 at 2.)

Respondent's specific assertions of a new agreement are largely unanswered by Complainant. Complainant's Nick Bikakis does not

---

<sup>21</sup> Respondent refers to a 15-page inspection report at many places in the declarations and other filings. For example, Mathias Mentges purportedly had delivered on December 22, 2004, "the fifteen page Official Swedish Survey and Report" to Complainant. (Declaration of Mathias Mentges at 8; *see also* Objections to Opening Statement at 8.) However, the report in evidence is plainly a single page of text. If there is a larger report, with more than one page of text, Respondent has not introduced it. There are photographs that accompany the report, but they vary from thirteen pages in Exhibits 60-6aa of the Report of Investigation to five pages in Exhibit 4 as attached to the Answer.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 913  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

mention the purported post-delivery agreement at any point in the Opening Statement or the Statement in Reply. Nor does Nick Bikakis discuss the meeting on January 3, 2005, where Respondents purportedly received an instruction to liquidate the fruit on Complainant's behalf. However, Nick Bikakis has insisted that he did not accept the inspection report as sufficient evidence which would warrant an adjustment to the contract. (*See* Opening Statement at 3, 4; Statement in Reply at 1.)

It is possible that the original contract could have been modified by the parties if there was mutual assent to the modification. *See Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 479 (2000). However, with no written agreement showing a contract modification, determining whether Complainant agreed to an "open" sale is based entirely on the credibility of Respondent's witnesses. As noted in *Farris Farms*, 59 Agric. Dec. at 480, the trier of fact in a written procedure case is heavily dependant on the verified statements of witnesses to develop the facts that establish the parties' claims. Subtleties in those statements must be considered. *Id.* Particularly when an attorney appears to have written the statements, and those statements contain closely reasoned legal arguments, we give those statements less weight than clear statements by the witnesses themselves. *See id.*

In this case, Respondent's declarations have a number of tendencies that make it difficult to give full credit to Respondent's witnesses. For example, Mathias Mentges asserted that on January 3, 2005:

The meeting concluded with an instruction from Mr. Bikakis to liquidate the fruit and remit a customary liquidation accounting. I understood (and in the context of his statement, it was clear Mr. Bikakis intended me and Michael Mentges, as officers of EURO-PACIFIC, to understand) that EURO-PACIFIC was being tasked on [Complainant's] behalf to perform the liquidation on an 'open' price basis.

(Declaration of Mathias Mentges at 10.) Michael Mentges's description is identical, except that "Michael" is "Mathias" in his declaration. (Declaration of Michael Mentges at 4.) Nor is this the only example of similarities; whole paragraphs of the declarations have substantially similar

wording, with only minor variations. Further, the Mentgeses' statements delve into specific declarations of law. For instance, both witnesses (incorrectly) insist that the breach of the warranty of suitable shipping condition is determined by the laws of the European Union. (Declaration of Michael Mentges at 2; Declaration of Mathias Mentges at 3.)

Further, Respondent's witnesses "understood" that a new contract was formed. (*See* Declaration of Mathias Mentges at 10.) The Mentgeses' "understanding" seems little more than an assumption that the Mentgeses ought to have clarified. Instead, the meeting is left in ambiguous terms. That ambiguity undermines Respondent's insistence that Complainant agreed to a new contract.

The accounting is the only written proof that the parties later agreed to different terms than the original contract. Respondent makes no effort to refer to or to explain the accounting in its Brief or in the Declarations. The accounting may be little more than Respondent's settlement offer. Complainant has unequivocally rejected that offer and the checks that accompanied it.

In this case, the similarities in the witnesses' statements naturally lead to the conclusion that Respondent's counsel prepared the declarations. The written evidence of a new agreement is ambiguous. This is a close question, but on balance, Respondent's assertions of a new contract are less credible than Complainant's assertions that the inspection report did not provide a basis for contract adjustments. This, coupled with Complainant's rejection of the settlement checks, leads to the conclusion that Respondent has failed to prove that the parties formed a new contract.

#### **IV. Complainant Is Due Damages from Respondent's Breach**

Complainant has proven that Respondent breached the contract, and Respondent has not presented a successful defense. All that remains is to determine the amount Complainant is due from Respondent's breach.

In the Complaint, Complainant requested that Respondent pay \$36,233.16 as the amount remaining unpaid from the total sale price of \$61,800.72. (Complaint at 2.) No amount of the \$61,800.72 has been paid because Complainant never cashed the checks for \$25,567.56 that Respondent delivered to Complainant. Complainant brought this fact to the attention of the Department belatedly, on April 5, 2006, more than a year after the checks were issued, and well after the Complaint was filed.

ALBERT GOOD D/B/A CASTLE ROCK VINEYARDS 915  
v. EURO-PACIFIC FRUIT EXPORT, INC.  
66 Agric. Dec. 891

(Letter.) However, Complainant's most recent filing continues to seek payment for \$36,233.16 with interest. (Statement in Reply at 2.) While an award of the full amount of \$61,800.72 as the amount unpaid and owing would be appropriate if Complainant had timely amended the Complaint, Complainant currently does not seek the full \$61,800.72. Therefore, we are constrained to award the amount requested in Complainant's formal filings of \$36,233.16.

Section 5(a) of the PACA requires that we award to the person or persons injured by a violation of Section 2 of the PACA "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. *PGB International, LLC, v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Decision on Reconsideration, 65 Agric. Dec. 669 (2006).<sup>1</sup>

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 PACA is liable to the injured party for its handling fees.

**Order**

---

<sup>1</sup> See Notice of Change of Interest Rate Awarded in Reparation, 71 Fed. Reg. 25,133 (April 28, 2006).

916 PERISHABLE AGRICULTURAL COMMODITIES ACT

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as reparation, \$36,233.16 with interest thereon at the rate of 4.96% per annum from January 1, 2005, until paid, plus \$300.00 reimbursement for Complainant's handling fee.

Copies of this Order shall be served upon the parties.

---

**SOUTHERN SPECIALTIES, INC. v. AMERIFRESH, INC.**

**PACA Docket No. R-07-039.**

**Reparation Decision.**

**Filed June 21, 2007.**

**Evidence – Normal Transportation.**

While acknowledging that a negative inference may be taken when a receiver neglects to retrieve a temperature recorder from the truck, held that such failure is nevertheless insufficient cause to conclude that the buyer failed to sustain its burden to prove normal transportation where there were no other factors present indicating that the transportation conditions were not normal.

Presiding Officer Leslie Wonk.

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

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$15,600.00 in connection with one truckload of asparagus shipped in the course of 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.

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, 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. Respondent filed an Answering Statement. Complainant also submitted a Brief.

### **Findings of Fact**

1. Complainant, Southern Specialties, Inc., is a corporation whose post office address is 6830 Artesia Boulevard, Buena Park, California, 90620. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Amerifresh, Inc., is a corporation whose post office address is 17767 N. Perimeter Drive B103, Scottsdale, Arizona, 98106-5452. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about September 16, 2005, Complainant, by oral contract, sold to Respondent, and shipped from loading point in the state of Florida, to Respondent's customer, Courchesne Larose Limitee, in Montreal, Quebec, Canada, 1,200 boxes of small green asparagus at \$14.75 per carton, or \$17,700.00, plus \$23.50 for a temperature recorder, for a total f.o.b. contract price of \$17,723.50.

4. On September 19, 2005, at 7:59 a.m., a Canadian Food Inspection Agency inspection was performed on the asparagus at the place of business of Courchesne Larose Limitee, in Montreal, Quebec, Canada, the report of which disclosed 17% average defects, including 7% spreading, 5% shriveled, 1% flabby, 1% decay at cupped ends, and 3% decay at tips. Pulp temperatures at the time of the inspection were 2 degrees Celsius (35.6 degrees Fahrenheit).

5. On October 14, 2005, Respondent's customer, Courchesne Larose Limitee, accounted to Respondent for the asparagus as follows:

918 PERISHABLE AGRICULTURAL COMMODITIES ACT

20 CTN	@ \$10.00	\$200.00
780 CTN	@ \$5.00	\$3,900.00
240 CTN	@ \$4.00	\$960.00
100 CTN	@ \$3.00	\$300.00
<u>60 CTN</u>	@ \$1.00	<u>\$60.00</u>
1200		\$5,420.00
	Less 15%	<u>\$813.00</u>
		\$4,607.00
	Inspection Cost	<u>\$ 94.35</u>
	CDN \$	<u>\$4,512.65</u>
	U.S. \$	\$3,760.54
	Less Freight	<u>\$1,500.00</u>
	Net in U.S.	\$2,260.54
	Remitting in U.S.	\$2,400.00

6. Respondent paid Complainant \$2,123.50 for the asparagus, thereby leaving an unpaid invoice balance of \$15,600.00.

7. The informal complaint was filed on November 18, 2005, which is within nine months from the accrual of the cause of action.

**Conclusions**

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of asparagus sold to Respondent. Complainant states Respondent accepted the asparagus in compliance with the contract of sale, but that it has since paid only \$2,123.50 of the agreed purchase price thereof, leaving a balance due Complainant of \$15,600.00. In response to Complainant's allegations, Respondent asserts in its sworn Answer that the asparagus failed to meet the contract specifications, as a result of which Respondent handled the asparagus on a consignment basis.

Review of the record discloses that following arrival of the asparagus at the place of business of Respondent's customer, Courchesne Larose Limitee (hereafter "Courchesne"), in Montreal, Quebec, Canada, Courchesne unloaded the asparagus and called for an inspection. The unloading or partial unloading of the transport is an act of acceptance. See 7 C.F.R. §

46.2 (dd)(1). We therefore find that Courchesne accepted the asparagus. Once Courchesne accepted the asparagus, Respondent was precluded from rejecting the asparagus to Complainant. Accordingly, we find that Respondent also accepted the asparagus.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. See U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

The asparagus was sold under f.o.b. terms,<sup>2</sup> which means that the warranty of suitable shipping condition is applicable. The Regulations (7 C.F.R. § 46.43(j)) define “suitable shipping condition” as meaning:

... that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.<sup>3</sup>

---

<sup>2</sup> The Regulations (7 C.F.R. § 46.43(i)) define “f.o.b.” as meaning:

... that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition... , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.

<sup>3</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without *abnormal* deterioration”, or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the

The warranty of suitable shipping condition is, by definition, only applicable when the transportation service and conditions are normal. While Complainant does not specifically allege that the transportation conditions were abnormal, Complainant does assert that “the warranty of suitable shipping condition... was waived in this case because Respondent has failed, neglected and refused to provide Complainant with a copy of the temperature recorder on this shipment after numerous requests.”<sup>4</sup> Complainant bases this allegation on its invoice, which bears a statement that reads: “THE WARRANTY OF SUITABLE SHIPPING CONDITION, DUE TO CONDITION DEFECTS, SHALL BE DEEMED WAIVED IF, ON F.O.B. SHIPMENTS, WHICH WERE SIGNED FOR BY THE DRIVER, THE RECEIVER DOES NOT RECOVER THE TEMPERATURE RECORDER(S) INCLUDED WITH THE LOAD.”<sup>5</sup> We note, however, that the invoice also bears a statement that reads: “THE PRODUCE DESCRIBED ON THIS INVOICE IS FOR DOMESTIC SHIPMENT ONLY,” and there is no dispute that Respondent purchased the asparagus for shipment to its customer in Montreal.<sup>6</sup> We are therefore

---

federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

<sup>4</sup> See Opening Statement, paragraph 5.

<sup>5</sup> See Formal Complaint, Exhibit No. 1.

<sup>6</sup> See Respondent’s Answering Statement Affidavit of Mark Krauter, Respondent’s Sales Associate, paragraph 2.

hesitant to conclude that the stipulations listed on the invoice were made a part of the contract negotiated between the parties.

Nevertheless, a negative inference may be taken when a receiver, who should have access to the recorder when the load arrives at the contract destination, neglects to retrieve the recorder from the truck.<sup>7</sup> We hasten to point out, however, that there are no other factors present indicating that the transportation conditions were not normal. The bill of lading for the shipment shows that the asparagus was shipped at 9:58 p.m., on September 16, 2005. The Canadian inspection was requested at 5:51 a.m., on September 19, 2005. Thus, it took approximately two days to ship the product from Florida to Montreal. We consider this to be a timely delivery. The inspection of the asparagus disclosed a pulp temperature of 35.6 degrees Fahrenheit, which is less than two degrees above the 34 degree Fahrenheit temperature listed under temperature instructions on the bill of lading. Finally, we note that the defects listed on the inspection indicate nothing other than the normal deterioration of the product. Therefore, since there is no indication that the asparagus was exposed to abnormal conditions in transit, we are not inclined to find that the warranty of suitable shipping condition is void simply because the recorder tape was not secured by Respondent's customer.

Next we will consider whether the Canadian inspection establishes a breach by Complainant of the warranty of suitable shipping condition. The United States Standards for Grades of Asparagus<sup>8</sup> provide a tolerance at shipping point of ten percent for stalks in any lot that fail to meet the requirements of the U.S. No. 1 grade, including therein not more than five percent for defects causing serious damage and one percent for stalks affected by decay. Although there is no indication that the asparagus in question was sold as a specified grade, these tolerances nevertheless apply to the condition defects disclosed by the inspection. For commodities sold

---

<sup>7</sup> Failure to submit a temperature tape when asked to do so raises the negative inference that the tape would show abnormal transit. *Sharyland, LP v. Lloyd A. Miller*, 57 Agric. Dec. 762 (1998); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce, Inc. v. A&J Produce Corp.*, 43 Agric. Dec. 563 (1984).

<sup>8</sup> 7 C.F.R. §§ 51.3720 through 51.3733. Grade standards may also be accessed via the Internet at [www.ams.usda.gov/standards/stanfrfv.htm](http://www.ams.usda.gov/standards/stanfrfv.htm).

f.o.b., we increase these percentages to allow for normal deterioration in transit. The amount of the increase depends upon the time in transit. The asparagus in question was in transit for approximately two days, in which case we allow 11% average defects, including 6% serious damage and 1% decay. The Canadian inspection, which was performed at 7:59 a.m. on September 19, 2005, or approximately two and half days after shipment, disclosed 17% average defects. Given that the inspection performed two and a half days after shipment disclosed defects that exceed the two-day allowance by 6%, we conclude that the inspection results establish that the asparagus was not in suitable shipping condition.

Complainant's failure to ship asparagus in suitable shipping condition constitutes a breach of warranty for which Respondent is entitled to recover provable damages. Before we determine Respondent's damages resulting from this breach, we must consider Respondent's allegation that Complainant authorized a consignment handling of the asparagus following the inspection.<sup>9</sup> Complainant, in its Opening Statement, denies authorizing a consignment handling of the asparagus.<sup>10</sup> Respondent did not submit any other evidence, aside from the sworn testimony which has been rebutted by Complainant, to substantiate its allegation that a consignment handling was authorized. Consequently, we find that Respondent has failed to sustain its burden to prove that the contract terms were changed to consignment.

Returning to our determination of Respondent's damages resulting from Complainant's breach, the general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. See U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent submitted an account of sales showing that its customer sold the asparagus between September 21 and 29, 2005, for prices ranging from \$1.00 to \$10.00 per box (CAD).<sup>11</sup> By comparison, the Agriculture and

---

<sup>9</sup> See Respondent's Answering Statement Affidavit of Mark Krauter, Respondent's Sales Associate, page 2.

<sup>10</sup> See Opening Statement, paragraph 7.

<sup>11</sup> CAD = Canadian Dollars. See Report of Investigation, Exhibit No. 4d.

Agri-Food Canada Daily Wholesale to Retail Market Price Report, of which we take official notice, shows that on Monday, September 19, 2005, the first date the asparagus in question was available for resale, green asparagus originating from Peru was selling for \$36.90 to \$39.75 per box (CAD). The sales prices reported by Respondent's customer are extremely low in comparison to the reported market prices. This discrepancy is particularly troubling given that the defects disclosed by the inspection do not exceed the suitable shipping condition allowance by a significant margin. In addition, we note that the inspection of the asparagus was completed at 9:59 a.m. on Monday, September 19, 2005, but that Respondent's customer did not effect its first sale until two days later, on Wednesday, September 21, 2005. There is no explanation in the record for this delay. Asparagus is a highly perishable commodity, so an additional two days in storage for product that was already damaged could have a significant impact on its marketability. Therefore, under the circumstances, we cannot accept the reported resales as the best available evidence of the value of the asparagus as accepted.

An alternative means of determining the value of the asparagus as accepted is to reduce the value the asparagus would have had if it had been as warranted by the percentage of condition defects disclosed by the inspection. See *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994). For the value the asparagus would have had if it had been as warranted, we refer once again to the Agriculture and Agri-Food Canada Daily Wholesale to Retail Market Price Report for September 19, 2005, which shows that green asparagus originating from Peru was selling for \$36.90 to \$39.75 per box, or an average of \$38.325 per box (CAD). See *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). For the 1,200 boxes of asparagus in question, this amounts to a total of \$45,990.00 (CAD). When we reduce this amount by 17%, or \$7,818.30, to account for the condition defects disclosed by the Canadian inspection, we find that the asparagus had a value as accepted of \$38,171.70 (CAD).

As we mentioned, Respondent's damages are measured as the difference between the value the asparagus would have had if it had been as warranted, \$45,990.00, and its value as accepted, \$38,171.70, or \$7,818.30 (CAD). In addition, Respondent may recover the \$94.35 (CAD) Canadian inspection

fee as incidental damages. With this, Respondent's total damages amount to \$7,912.65 (CAD). As this amount is in Canadian Dollars, we must convert Respondent's damages to U.S. Dollars before we deduct them from the contract price of the asparagus. On Monday, September 19, 2005, one Canadian Dollar was equivalent to 0.855359 U.S. Dollars. Respondent's damages in U.S. Dollars therefore amount to \$6,768.16.<sup>12</sup> When we deduct Respondent's damages from the \$17,723.50 contract price of the asparagus, there remains an amount due Complainant for the asparagus of \$10,955.34. Respondent paid Complainant \$2,123.50 for the asparagus. Therefore, there remains a balance due Complainant from Respondent of \$8,831.84.

Respondent's failure to pay Complainant \$8,831.84 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. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (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

---

<sup>12</sup> \$7,912.65 (CAD) x 0.855359 = \$6,768.16.

SOUTHERN SPECIALTIES, INC. v. AMERIFRESH, INC. 925  
66 Agric. Dec. 917

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$8,831.84, with interest thereon at the rate of 4.98 % per annum from October 1, 2005, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.  
Done at Washington, DC.

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**MISCELLANEOUS ORDERS**

**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.**

**Stay Order.**

**Filed September 20, 2006.**

**PACA – Perishable agricultural commodities – Stay Order.**

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.

Order issued by William G. Jenson, Judicial Officer.

On April 20, 2006, I issued a Decision and Order: (1) concluding Coosemans Specialties, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license; (3) concluding Eddy C. Creces and Daniel F. Coosemans [hereinafter Petitioners] were responsibly connected with Coosemans Specialties, Inc.; and (4) subjecting Petitioners 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)).<sup>1</sup>

On June 13, 2006, Respondent and Petitioners filed a petition for review of *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (Apr. 20, 2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), with the United

---

<sup>1</sup>*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (Apr. 20, 2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006).

States Court of Appeals for the District of Columbia Circuit. On September 20, 2006, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, and the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, filed a Motion for Stay requesting a stay of the order in *In re Coosemans Specialities, Inc.*, 65 Agric. Dec. 539 (2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), pending the outcome of proceedings for judicial review. On September 20, 2006, Respondent and Petitioners informed the Office of the Judicial Officer, by telephone, that they have no objection to the Motion for Stay.

In accordance with 5 U.S.C. § 705, the Motion for Stay is granted.

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

#### **ORDER**

The order in *In re Coosemans Specialities, Inc.*, 65 Agric. Dec. 539 (2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), is 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: 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.**

**Stay Order.**

**Filed September 22, 2006.**

**PACA – Perishable agricultural commodities – Stay order.**

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, for Respondent and Petitioners.

Order issued by William G. Jenson, Judicial Officer.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license; (3) concluding Michael H. Hirsch and Barry J. Hirsch [hereinafter Petitioners] were responsibly connected with Respondent; and (4) subjecting Petitioners 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)).<sup>1</sup> On April 24, 2006, Respondent and Petitioners filed a petition to reconsider *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), which I denied.<sup>2</sup>

On July 26, 2006, Respondent and Petitioners filed a petition for review of *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the District of Columbia Circuit. On August 2, 2006, Respondent and Petitioners filed a "Motion on Consent for Stay" requesting a stay of the orders in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman &*

---

<sup>1</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006).

<sup>2</sup>*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider).

*Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Respondent's and Petitioners' Motion on Consent for Stay is granted.

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

### ORDER

The orders in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (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: DONALD R. BEUCKE.**  
**PACA-APP Docket No. 04-0009.**  
**Stay Order.**  
**Filed November 6, 2006.**

**PACA-APP – Perishable agricultural commodities – Stay order.**

Charles L. Kendall, for Respondent.  
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner.  
Order issued by William G. Jenson, Judicial Officer.

On September 28, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner 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)).<sup>1</sup>

---

<sup>1</sup>*In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006).

930 PERISHABLE AGRICULTURAL COMMODITIES ACT

On November 3, 2006, Petitioner filed "Petitioner Donald Beucke's Expedited Motion To Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review" and "Order Staying Imposition of Licensing and Employment Restrictions Pending Judicial Review" stating Petitioner intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Petitioner's motion for stay is granted.

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

**ORDER**

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), is 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: KOAM PRODUCE, INC.**  
**PACA Docket No. D-01-0032.**  
**Stay Order.**  
**Filed November 14, 2006.**

**PACA – Perishable agricultural commodities – Stay order.**

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.  
Paul T. Gentile, New York, NY, for Respondent.  
Order issued by William G. Jenson, Judicial Officer.

On June 2, 2006, I issued a Decision and Order concluding KOAM Produce, 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.<sup>1</sup> On

---

<sup>1</sup>*In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 620 (2006).

July 17, 2006, Respondent filed a "Petition to Reconsider," which I denied.<sup>2</sup>

On October 19, 2006, Respondent filed a petition for review of *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the Second Circuit. On November 14, 2006, James R. Frazier, Acting 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 Koam Produce, Inc." [hereinafter Motion for Stay Order], requesting a stay of the orders in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review. On November 14, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant's Motion for Stay Order.

In accordance with 5 U.S.C. § 705, Complainant's Motion for Stay Order is granted.

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

#### ORDER

The orders in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (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.

---

<sup>2</sup>*In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider).

**In re: DONALD R. BEUCKE.**  
**PACA-APP Docket No. 04-0014.**  
**In re: KEITH K. KEYESKI.**  
**PACA-APP Docket No. 04-0020.**  
**Stay Order as to Donald R. Beucke.**  
**Filed November 28, 2006.**

**PACA-APP – Perishable agricultural commodities – Stay order.**

Charles L. Kendall, for Respondent.  
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner Beucke.  
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Beucke 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)).<sup>1</sup>

On November 20, 2006, Petitioner Beucke filed “Petitioner Donald Beucke’s Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review” stating Petitioner Beucke intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Petitioner Beucke’s motion for stay is granted.

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

### **ORDER**

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), is stayed pending the outcome of proceedings for judicial review. This Stay

---

<sup>1</sup>*In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006).

Order as to Donald R. Beucke shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

---

**In re: DONALD R. BEUCKE.  
PACA-APP Docket No. 04-0014.  
In re: KEITH K. KEYESKI.  
PACA-APP Docket No. 04-0020.  
Stay Order as to Keith K. Keyeski.  
Filed November 30, 2006.**

**PACA-APP – Perishable agricultural commodities – Stay order.**

Charles L. Kendall, for Respondent.  
Paul W. Moncrief, Salinas, CA, for Petitioner Keyeski.  
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Keyeski 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)).<sup>1</sup>

On November 29, 2006, Petitioner Keyeski filed “Petitioner Keith K. Keyeski’s Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review” stating Petitioner Keyeski intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. §705, Petitioner Keyeski’s motion for stay is granted.

---

<sup>1</sup>*In re Donald R. Beucke*, 65\_Agric. Dec. 1372 (2006).

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

**ORDER**

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Keith K. Keyeski shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

---

**In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.  
PACA Docket No. D-06-0012.  
Order Denying Petition to Reconsider.  
Filed March 19, 2007.**

**PACA –Perishable agricultural commodities – Admissions in bankruptcy filing – Default– Due process – Failure to pay – Publication of facts and circumstances.**

The Judicial Officer denied Respondent's petition to reconsider *In re Judith's Fine Foods International, Inc.*, \_\_ Agric. Dec. \_\_ (Jan. 31, 2007). The Judicial Officer rejected Respondent's contention that it was deprived of a right to a hearing, stating the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139), based on Respondent's admissions, did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

Jonathan Gordy, for Complainant.  
John M. Lohner, Santurce, PR, for Respondent.  
Initial decision issued by Peter M. Davenport, 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 May 2, 2006. 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: (1) during the period January 2005 through August 2005, Judith's Fine Foods International, Inc. [hereinafter Respondent], failed to make full payment promptly to eight sellers<sup>2</sup> of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (2) on October 10, 2005, Respondent filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Puerto Rico; (3) Respondent admitted in a document filed in the United States Bankruptcy Court, District of Puerto Rico, that the eight produce sellers referred to in the Complaint hold unsecured claims for \$338,942.07; and (4) Respondent's failure to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>3</sup> On July 10, 2006, Respondent filed an answer in which Respondent denied it willfully violated the PACA, as alleged in the Complaint.<sup>4</sup>

On August 17, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Admissions [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. On October 24, 2006, Respondent filed objections to Complainant's Motion for Default Decision

---

<sup>2</sup>Complainant identified these eight produce sellers as: (1) A & J Produce Corp., Bronx, New York; (2) Wada Farms Marketing Group, Idaho Falls, Idaho; (3) Herbs Unlimited, Inc., Miami, Florida; (4) K & R Farms Produce, Inc., Orlando, Florida; (5) Tristen's Brokerage Co., Inc., Los Angeles, California; (6) Mann Packing Co., Inc.; (7) Freedom Fresh, LLC; and (8) C.H. Robinson Co. (Compl. ¶ III).

<sup>3</sup>Compl. ¶¶ III-V.

<sup>4</sup>Response to Compl.

and Complainant's Proposed Default Decision.

On October 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision]: (1) finding, during the period January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,942.07 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (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.<sup>5</sup>

On December 12, 2006, Respondent appealed to the Judicial Officer.<sup>6</sup> On January 11, 2007, Complainant filed a response to Respondent's appeal petition.<sup>7</sup> On January 16, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 31, 2007, I issued a Decision and Order affirming the ALJ's Initial Decision.<sup>8</sup> On February 28, 2007, Respondent filed a petition to reconsider *In re Judith's Fine Foods International, Inc.*, \_\_ Agric. Dec. \_\_ (Jan. 31, 2007).<sup>9</sup> On March 9, 2007, Complainant filed a response to Respondent's Petition to Reconsider. On March 13, 2007, 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.

#### **CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION**

---

<sup>5</sup> Initial Decision at 4-5.

<sup>6</sup> Appeal of Decision Against Defendant.

<sup>7</sup> Response to Appeal of Respondent.

<sup>8</sup> *In re Judith's Fine Foods International, Inc.*, \_\_ Agric. Dec. \_\_ (Jan. 31, 2007).

<sup>9</sup> Petition for Reconsideration of Decision Against Defendant [hereinafter Petition to Reconsider].

Respondent contends it was deprived of a right to a hearing.

Complainant alleges, during the period January 2005 through August 2005, Respondent failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.<sup>10</sup> On October 10, 2005, Respondent filed a voluntary petition under chapter 7 of the Bankruptcy Code in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005). Respondent admitted in Schedule F - Creditors Holding Unsecured Nonpriority Claims filed in this bankruptcy proceeding that it owed \$338,942.07 to the eight produce sellers identified in the Complaint.<sup>11</sup>

As Respondent admitted the material allegations of the Complaint, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and I conclude *In re Judith's Fine Foods International, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Jan. 31, 2007), was properly issued in accordance with the default provisions in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in 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.<sup>12</sup>

For the foregoing reasons and the reasons set forth in *In re Judith's Fine Foods International, Inc.*, \_\_\_ Agric. Dec. \_\_\_ (Jan. 31, 2007), Respondent's

---

<sup>10</sup> Compl. ¶ III.

<sup>11</sup> A copy of Schedule F - Creditors Holding Unsecured Nonpriority Claims is attached to Complainant's Motion for Default Decision and marked Exhibit A.

<sup>12</sup> 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).

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 Judith's Fine Foods International, Inc.*, \_\_ Agric. Dec. \_\_ (Jan. 31, 2007). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order *in In re Judith's Fine Foods International, Inc.*, \_\_ Agric. Dec. \_\_ (Jan. 31, 2007), 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 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 Order Denying Petition to Reconsider 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 in this Order Denying Petition to Reconsider.<sup>1</sup> The date of entry of the Order in this Order Denying Petition to Reconsider is March 19, 2007.

---

**In re: TUNG WAN COMPANY, INC.  
PACA Docket No. D-06-0019.  
Order Denying Late Appeal.  
Filed April 25, 2007.**

#### **PACA – Perishable agricultural commodities – Late appeal.**

The Judicial Officer denied Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing stating the Judicial Officer has no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed 41 days after Chief Administrative Law Judge Marc R. Hillson's decision had become final.

Jonathan Gordy, for Complainant.  
John R. Solter, Jr., Baltimore, MD, for Respondent.  
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 administrative proceeding by filing a Complaint on July 26, 2006. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the

---

<sup>1</sup> See 28 U.S.C. § 2344.

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 Respondent violated the PACA.<sup>1</sup> The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 4, 2006.<sup>2</sup> Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated September 6, 2006, informing Respondent that an answer to the Complaint had not been filed within the time required in the Rules of Practice. Respondent did not respond to the Hearing Clerk's September 6, 2006, letter.

On October 12, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a 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]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 16, 2006.<sup>3</sup> 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). The Hearing Clerk sent Respondent a letter dated December 7, 2006, informing Respondent that objections to Complainant's Motion for Default Decision had not been filed within the time required in the Rules of Practice and the Hearing Clerk would refer the proceeding to an administrative law judge for consideration and decision. Respondent did not respond to the Hearing Clerk's December 7, 2006, letter.

On January 9, 2007, pursuant to section 1.139 of the Rules of Practice

---

<sup>1</sup> Compl. ¶¶ III-VI.

<sup>2</sup> United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4087 9344.

<sup>3</sup> United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4346.

(7 C.F.R. § 1.139), Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] filed a Decision Without Hearing by Reason of Default [hereinafter Decision and Order] concluding Respondent violated the PACA as alleged in the Complaint and ordering publication of the facts and circumstances of Respondent's violations of the PACA.<sup>4</sup>

On January 10, 2007, the Hearing Clerk served Respondent with the Chief ALJ's Decision and Order and a service letter.<sup>5</sup> Respondent failed to file an appeal petition within 30 days after service as required by section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)). On February 13, 2007, the Hearing Clerk served Respondent with a Notice of Effective Date of Decision Without Hearing by Reason of Default<sup>6</sup> stating the Chief ALJ's Decision and Order became final February 13, 2007.

On March 27, 2007, Respondent filed a Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing. On April 3, 2007, Complainant filed a Reply to Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing. On April 4, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

### **CONCLUSION BY THE JUDICIAL OFFICER**

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service; therefore, Respondent was required to file its appeal petition with the Hearing Clerk no later than February 9, 2007. The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes

---

<sup>4</sup> Decision and Order at second and third unnumbered pages.

<sup>5</sup> United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4797.

<sup>6</sup> United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4933.

final.<sup>7</sup> Pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ's Decision and Order became final on February 14, 2007. Respondent filed its Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing with the Hearing Clerk on March 27, 2007, 41 days after the Chief ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

**Rule 4. Appeal as of Right—When Taken**

**(a) Appeal in a Civil Case.**

**(1) Time for Filing a Notice of Appeal.**

***(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.***

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a

---

<sup>7</sup> See, e.g., In re *Tim Gray*, 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); In re *Jozset Mokos*, 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); In re *David Gilbert*, 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); In re *Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); In re *Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); In re *David McCauley*, 63 Agric. Dec. 639 (2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final).

mandatory and jurisdictional prerequisite which this court may neither waive nor extend. See, e.g., *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.<sup>[8]</sup>

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.<sup>9</sup> The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs

---

<sup>8</sup>*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating, since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed and the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 264 (1978) (stating, under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating, under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing).

<sup>9</sup>Fed. R. App. P. 4(a)(5).

Act”). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act (“Hobbs Act”) requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.<sup>10</sup>

Accordingly, Respondent’s Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing must be denied, since it is too late for the matter to be further considered.

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

### ORDER

Respondent’s Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed March 27, 2007, is denied. Chief Administrative Law Judge Marc R. Hillson’s Decision and Order, filed January 9, 2007, is the final decision in this proceeding.

---

**In re: HUNTS POINT TOMATO CO., INC.  
PACA Docket No. D-03-0014.**

---

<sup>10</sup> *Accord Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court’s baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant’s petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied* sub nom. *Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

**Order Lifting Stay Order.  
Filed June 1, 2007.**

**PACA – Perishable agricultural commodities – Order lifting stay.**

Andrew Y. Stanton, for Complainant.  
Paul T. Gentile, New York, NY, for Respondent.  
*Order issued by William G. Jenson, Judicial Officer.*

On November 2, 2005, I issued a Decision and Order concluding Hunts Point Tomato Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Hunts Point Tomato Co., Inc.'s violations.<sup>1</sup> On December 13, 2005, Hunts Point Tomato Co., Inc., filed a petition to reconsider, which I denied.<sup>2</sup>

Hunts Point Tomato Co., Inc., filed a petition for review of *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), 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 the Associate Deputy Administrator], requested a stay of the Orders in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), pending the outcome of proceedings for judicial review. Hunts Point Tomato Co., Inc., informed the Office of the Judicial Officer that it had no objection to the Associate Deputy Administrator's motion for stay, and on June 2, 2006, I granted the Associate Deputy Administrator's motion.<sup>3</sup>

On November 13, 2006, the United States Court of Appeals for the

---

<sup>1</sup> *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005).

<sup>2</sup> *In re Hunts Point Tomato Co. (Order Denying Pet. to Reconsider)*, 65 Agric. Dec. 696 (2006).

<sup>3</sup> *In re Hunts Point Tomato, Co. (Stay Order)*, 65 Agric. Dec. 696 (2006).

Second Circuit denied Hunts Point Tomato Co., Inc.'s petition for review.<sup>4</sup> On April 25, 2007, the Associate Deputy Administrator requested that I lift the June 2, 2006, Stay Order and reinstate the November 2, 2005, and January 9, 2006, Orders. Hunts Point Tomato Co., Inc., failed to file a response to the Associate Deputy Administrator's motion to lift stay, and on May 30, 2007, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the Associate Deputy Administrator's motion.

Proceedings for judicial review are concluded, and Hunts Point Tomato Co., Inc., has filed no objection to the Associate Deputy Administrator's motion to lift stay. Therefore, the Associate Deputy Administrator's motion to lift stay is granted; the June 2, 2006, Stay Order is lifted; and the Orders in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), are effective, as follows:

#### **ORDER**

Hunts Point Tomato Co., Inc., 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 Hunts Point Tomato Co., Inc.'s violations shall be published. The publication of the facts and circumstances of Hunts Point Tomato Co., Inc.'s violations shall be effective 7 days after service of this Order on Hunts Point Tomato Co., Inc.

---

<sup>4</sup>*Hunts Point Tomato Co. v. U.S. Dep't of Agric.*, 204 F. App'x 981 (2d Cir. 2006).

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**DEFAULT DECISIONS**

**In re: TUNG WAN COMPANY, INC.**  
**PACA Docket No. D06-0019.**  
**Default Decision.**  
**Filed January 8, 2007.**

**PACA – Default.**

Jonathan Gordy for AMS.  
Respondent Pro se.

*Default Decision 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.*) (“PACA”), instituted by a Complaint filed on July 26, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of December 2003 through September 2005, Respondent Tung Wan Company, Inc. (“Respondent”) failed to make full payment promptly to 9 sellers of perishable agricultural commodities of the agreed purchase prices in the total amount of \$237,178.44 for 33 lots of perishable agricultural commodities that Respondent purchased, received and accepted in the course of interstate commerce. In addition, the Complaint alleged that Respondent, while acting as a dealer, made, for a fraudulent purpose, false and misleading statements when Respondent failed to account truly and correctly to a seller of perishable agricultural commodities by underreporting the sales price of 1,152 cartons of broccoli by \$8,039.81 to the seller. Finally, the Complaint also alleged that Respondent failed to maintain adequate records in violation of Section 9 of

the Act.

A copy of the Complaint was served upon Respondent by certified mail on August 4, 2006. Respondent has not answered the Complaint. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision without Hearing by Reason of Default, the following decision and order is issued without further investigation or hearing pursuant to Section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et. seq.*) (“Rules of Practice”).

### **Findings of Fact**

Respondent was a corporation organized and existing under the laws of the State of Maryland. Respondent’s business address was 1201 67<sup>th</sup> Street, Baltimore, Maryland 21237.

1. At all times material to this order, Respondent was licensed or subject to the provisions of the PACA. License number 19990513 was issued on February 10, 1999. This license was renewed annually until February 10, 2005 when it terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499a) when Respondent failed to pay the required annual renewal fee. Respondent continued to operate subject to the PACA until license number 20050645 was issued to Respondent on April 14, 2005. License number 20050645 terminated on April 14, 2006, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499a) when Respondent failed to pay the required annual renewal fee.

2. During the period of December 25, 2003, through September 28, 2005, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of \$237,178.44 for 33 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

3. Respondent, on or about October 15, 2004 through November 29, 2004, while acting as a dealer, made, for a fraudulent purpose, false and misleading statements in connection with a transaction involving 1,152 cartons of broccoli, which is a perishable agricultural commodity, that Respondent received, accepted, and sold in interstate commerce on behalf of All-American Farms, Inc. of Boca

Raton Florida. Respondent failed to account truly and correctly to All American Farms, Inc. for the 1,152 cartons of broccoli when Respondent sold the 1,152 cartons of broccoli to buyers and under-reported the sales price by \$8,039.81.

4. During the period December 2003 through September 2005, Respondent failed to maintain adequate records that fully and correctly disclose all transactions involved in its business, in that Respondent failed to: 1) disclose all transactions in the business in sufficient detail as to be readily understood and audited; 2) keep an adequate receiving record; 3) provide sales tickets with printed serial numbers on cash tickets; 4) assign lot numbers to each shipment; 5) account for dumped produce; 6) provide evidence of dumping; and 7) maintain complete and detailed records of Respondent's commission sales as more fully described in 7 C.F.R. §46.29(a).

### **Conclusions**

Respondent's failure to make full payment promptly regarding the 33 lots of produce, which is described 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)). Respondent's false and misleading statements in connection with a the sale of a perishable agricultural commodity, which is described in Finding of Fact No. 4 above, constitutes a willful, flagrant and repeated violation of Section 2(4) of the Act. Respondent's failures to keep adequate records, which is described in Finding of Fact No. 5 above, constitutes a willful, flagrant and repeated violation of Section 9 of the Act (7 U.S.C. § 499i). Therefore, Respondent has willfully, flagrantly and repeatedly violated Section 2(4) and Section 9 of the PACA (7 U.S.C. §§ 499b(4), 499i), and the facts and circumstances of those violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary 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 of this Decision shall be served upon the parties.

950 PERISHABLE AGRICULTURAL COMMODITIES ACT

Done at Washington, D.C.

---

**In re: ORIENT FARMS, LLC.**  
**PACA Docket No. D-05-0013.**  
**Default Decision.**  
**Filed January 10, 2007.**

**PACA – Default.**

Christopher Young Morales for AMS.  
F. DeArmond for Respondent.  
*Default Decision by Administrative Law Judge Peter M. Davenport.*

**DECISION WITHOUT HEARING**

**Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on May 31, 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 2003 through November 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 3 sellers, 173 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$566,256.30.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On March 7, 2006, documents were sent by Respondent to Complainant which indicated that the 3 sellers listed in the Complaint were still owed \$166,256.30. Based on the documents provided by Respondent on March 7, 2006, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued; Respondent did not answer the Motion. As the Respondent had requested an oral

hearing, a teleconference was conducted on November 29, 2006, at which time the Complainant was represented by Christopher Young-Morales, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondent was represented by F. DeArmond Sharp, Esquire, Robison, Balaustegui, Sharp & Low of Reno, Nevada. During the course of the conference, counsel for the Respondent indicated that his client was not opposed to relief being granted and the parties were directed to submit an appropriate agreed order by December 8, 2006. As no Order has submitted, as directed, this Decision and Order is being issued at this time.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998),

"PACA requires full payment promptly, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case .... In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked."

*Id.* at 548-549.

According to the Judicial Officer's policy set forth in Scamcorp, in this case, Respondent had 120 days from the date the complaint was served upon it, or until November 10, 2005, to come into full compliance with the PACA. The admissions contained in the documents submitted by Respondent indicate that \$ 166,256.30 remained unpaid to the 3 produce creditors listed in the PACA complaint over 120 days after service of the complaint. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that

952 PERISHABLE AGRICULTURAL COMMODITIES ACT

Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and ordering that Respondent's violations be published.

As Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent is a corporation organized and existing under the laws of the state of Nevada. Its business address was Mile Marker 60, State Route 447, Empire, Nevada 89405. Its mailing address is P.O. Box 40, Empire, Nevada 89405.

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 20010671 was issued to Respondent on February 6, 2001. On February 6, 2006, Respondent failed to renew its license by paying the required annual license renewal fee, thus its PACA license terminated on that date, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph III of the Complaint, during the period October 2003 through November 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 3 sellers, 173 lots of fruits and vegetables, all being perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, in the total amount of \$566,256.30.

4. Respondent failed to pay the produce debt described above and to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

**Conclusions of Law**

Respondent's failure to make full payment promptly with respect to the 173 transactions set forth in the above Findings of Fact, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b), for which the Order below is issued.

**Order**

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

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

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

Copies hereof shall be served upon parties.

Done at Washington, D.C.

---

**In re: FRESH AMERICA CORP.  
PACA Docket No. D-06-0002.  
Default Decision.  
Filed January 19, 2007.**

**PACA – Default.**

Charles Spicknall for AMS.  
Respondent Pro se.  
*Default Decision by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the Motion of the Complainant for a Decision Without Hearing By Reason of Default. Opposition to the current Motion and a prior similar Motion has been filed by Cheryl A, Taylor, the Respondent's Executive Vice President, Chief Financial Officer and Secretary. In the two pleadings, Ms. Taylor through counsel, asserts that there are insufficient grounds to conclude that the Respondent has ever been served. Although the Motion for a Decision

Without Hearing By Reason of Default has been responded to by Ms. Taylor, no answer has been filed by the Respondent corporation.

This action is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.), (hereinafter referred to as the "Act"), instituted by a Complaint filed on October 25, 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 February 2002 through February 2003, Respondent Fresh America Corp., ("Respondent"), failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149 transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

A copy of the Complaint was sent to Respondent Fresh America at its last known business address at 1049 Avenue H E, Arlington, Texas 76011 by certified mail on October 26, 2005. Because Fresh America was no longer operating at its former address, the Complaint was returned to the Hearing Clerk. The postal service had no forwarding address on file for Fresh America and was unable to forward the Complaint. On December 20, 2005, the Hearing Clerk sent the Complaint by regular mail to the same address. On December 29, 2005, the Hearing Clerk notified Complainant that its attempts to serve the Complaint had been unsuccessful with the mail being returned by the postal service as other than "unclaimed" or "refused."

On January 26, 2006, Complainant filed a "Response to Unsuccessful Service Notice" which informed the Hearing Clerk's Office that Fresh America was no longer operating and that its assets had been liquidated to satisfy creditors, including produce creditors, but that the corporation could be served via its registered agent, CT Corporation System ("CT System"), 350 N. St. Paul St., Dallas, Texas 75201. CT System is a company that provides registered agent services for corporations. Among the other benefits listed on its website, CT System notes that it helps its clients to avoid default judgments. See <http://ctadmin.stadvantage.com>.

On March 8, 2006, the Hearing Clerk served the Complaint on CT System via certified mail. CT System forwarded the Complaint to Fresh America's counsel at the law firm McCarron & Diess, which received the Complaint on March 14, 2006. By letter dated March 23, 2006, McCarron & Diess returned the Complaint to the Hearing Clerk stating that the firm

was not authorized to accept service of process on behalf of Fresh America. On August 9, 2006, Complainant moved for a default decision asserting that the time for an answer to the Complaint had expired. On September 5, 2006, Ms. Taylor filed her opposition to Complainant's motion for default decision arguing, *inter alia*, that service of the Complaint on the corporation's registered agent in the State of Texas had not been effective because Fresh America had failed to maintain its registered agent. She also argued that service of the Complaint on the corporation's former officers and directors was equally ineffective.

The argument that service has not been effectuated through the corporation's registered agent is without merit. At the time that the Hearing Clerk served Respondent's registered agent, and at least until October 12, 2006, Fresh America, which has not been granted dissolution by the State of Texas, continued to designate CT System as its registered agent with the Texas Secretary of State.<sup>1</sup> Texas corporations, like Fresh America, are required to maintain a registered agent for service of process. See Tex. Bus. Corp. Act, Articles 2.09(A)(2) and 2.11(A). "Registered agents exist to receive process; they are in the business of receiving legal correspondence." See *Barr v. Zurich Insurance Co.*, 985 F. Supp. 701, 703 (S.D. Tex. 1997).

A corporation's registered agent is a "representative of record" for purposes of service of process under the Rules of Practice which states that a complaint served via registered or certified mail "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the . . . last known principal place of business of the . . . representative of record of such party. . . ." See 7 C.F.R. § 1.147(c)(1).<sup>2</sup> In this case, good service, via certified mail as required by the Rules of Practice, was made by the Hearing Clerk on CT System at its

---

<sup>1</sup> There is no indication that CT Corporation ever notified the Texas Secretary of State that it was no longer serving as the corporation's registered agent.

<sup>2</sup> See also, *e.g.*, *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Independent School Dist.*, 180 S.W.3d 903, 905 (Tex. App. Ct. 2005) (a Texas corporation may be served through registered agent); *Harold-Elliott Co., Inc. v K.P./Miller Realty Growth Fund I*, 853 S.W.2d 752, 754 (Tex. App. Ct. 1993) (same).

valid mailing address in the State of Texas on March 13, 2006. The Complaint was accepted by CT System and was not “returned marked by the postal service as unclaimed or refused,” which would have necessitated reservice by regular mail. See 7 C.F.R. § 1.147(c)(1). In fact, CT System forwarded the administrative Complaint to Respondent Fresh America’s counsel of record in several actions that are now pending against Respondent in the United States District Court for the Northern District of Texas thereby giving Respondent actual notice of this proceeding.

Even if service on Fresh America’s registered agent was in some way defective, in response to Respondent’s objections to service through the corporation’s registered agent, Complainant took the additional step of serving the Complaint on Fresh America through the Texas Secretary of State. When a Texas corporation like Fresh America fails to maintain a registered agent for service of process, the Texas Secretary of State becomes the corporation’s agent for purposes of service of process. See Tex. Bus. Corp. Act, Art. 2.11(B). Complainant served the administrative Complaint on Respondent’s substitute agent for process, the Texas Secretary of State, via certified mail, on or by October 31, 2006.<sup>3</sup> The Texas Secretary of State is as a “representative of record” for purposes of service of an administrative complaint on a Texas corporation under section 1.147(c)(1) of the Rules of Practice. See 7 C.F.R. § 1.147(c)(1). Despite this additional service on the Secretary of State, Fresh America has still failed to file an answer to the Complaint.

Respondent’s objections to service of the Complaint through the corporation’s officers and directors are equally without merit. Service of the Complaint in this case was made through Fresh America’s last known individual representatives of record, including many of the corporation’s directors and officers in conformity with sections 1.147 (c)(1) and (c)(3) of the Rules of Practice. Under Texas law, where Fresh America is incorporated, “[t]he president and all vice presidents of the corporation . . . shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.” See Tex. Bus. Corp. Act, Art. 2.11(A). Any president or vice

---

<sup>3</sup> The return receipt from the Texas Secretary of State was not dated. However, it was returned to Charles Spicknall, Attorney for Complainant, on October 31, 2006, showing that the Complaint was served on the Secretary of State at least by that date.

president of a Texas corporation is a proper “representative of record” for purposes of service of process under the Rules of Practice. The Rules of Practice expressly authorize service of an administrative complaint on corporate representatives of record, including officers and directors. See 7 C.F.R. § 1.147(c)(3).

The Complaint was successfully served by the Hearing Clerk, via certified mail, on Fresh America through the corporation’s Executive Vice President Cheryl Taylor. At least until October 12, 2006, Fresh America continued to report Cheryl Taylor as the corporation’s Executive Vice President in its filings with the Texas Secretary of State. The return receipts from the Hearing Clerk’s certified mailing to Cheryl Taylor show that she received the Complaint on June 5, 2006. The Complaint was also served on Fresh America, via Cheryl Taylor, a second time in accordance with section 1.147(c)(3)(i) and (ii), in her capacity as a representative of record and as an officer of Fresh America, by non-mail means, via Federal Express. The Complaint was also served on Ms. Taylor as an attachment to a letter notifying her of the PACA Branch’s initial determination that she was responsibly connected to Respondent Fresh America. Cheryl Taylor has proceeded to challenge her status as responsibly connected, proving that service of the Complaint via Federal Express was effective. After receiving Ms. Taylor’s opposition to Complainant’s motion for a default decision, Complainant served Ms. Taylor with the Complaint again, at the same address, via Federal Express, on October 26, 2006.

The Hearing Clerk also served the Complaint via certified mail on the Fresh America’s former chief executive officer, Mark Prowell, and a former member of the Fresh America’s board of directors, Arthur Hollingsworth. The return receipts from the certified mailings to Fresh America’s principals show that the Complaint was received by Mark Prowell on June 14, 2006, and received by Arthur Hollingsworth on June 8, 2006. Complainant also served the Complaint on Fresh America’s president of record with the Texas Secretary of State, Colon Washburn, and another corporate vice president, Steven Finberg, via Federal Express. As with Cheryl Taylor these individuals were served with the Complaint in November of 2005 and notified that they had been determined responsibly connected to the failed company. Like Cheryl Taylor, Steven Finberg proceeded to challenge his status as responsibly connected, proving that service of the Complaint via

Federal Express was effective.

Finally, in response to Respondent's opposition to Complainant's default motion, Complainant once again served the Complaint on Fresh America, via Steven Finberg, who continued to be reported as Fresh America's vice president of record to the Texas Secretary of State as of October 12, 2006. The Complaint was served by non-mail means, in accordance with section 1.147(c)(3)(i) and (ii) of the Rules of Practice, on November 2, 2006. Complainant also served the Complaint on Luke Sweetser, who was a member of Fresh America's last known board of directors by Federal Express on October 26, 2006. Luke Sweetser served on Fresh America's board of directors, which was comprised of five individual directors from October 15, 2001 until January 24, 2003, when Fresh America ceased operations.

Service of the Complaint in this case has been exhaustive. Service has been made on Fresh America's registered agent and substitute agent for process in the State of Texas pursuant to the requirements of section 1.147(c)(1) of the Rules of Practice. Service of the Complaint has also been made on Fresh America through numerous individual representatives, directors and officers in conformity with sections (c)(1) and (c)(3) of Rule 1.147. Given the foregoing, it is abundantly clear that Respondent Fresh America has received notice of the Complaint and been afforded an opportunity to answer and interpose a defense to the allegations of the Complaint. Contrary to practice in other forums, motions to dismiss or the interposing of other defenses do not toll the requirement to file an answer. The time for filing an answer has long since expired and the Respondent is in default. See 7 C.F.R. § 1.136(c). Accordingly, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice. See 7 C.F.R. § 1.139.

#### **FINDINGS OF FACT**

1. Respondent Fresh America is a corporation organized and existing under the laws of the State of Texas.
2. Pursuant to the licensing provision of the PACA, license number 1990-0329 was issued to Respondent on December 12, 1989. This license terminated on December 12, 2003, when Respondent failed to pay the required annual fee pursuant to section 4(a) of the PACA (7 U.S.C. §

499d(a)).

3. As more fully set forth in paragraph III of the Complaint, incorporated by reference herein, during the period February 2002 through February 2003, Respondent failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149

transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

### CONCLUSIONS OF LAW

Respondent Fresh America's failure to make full payment promptly with respect to the 1,149 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

1. A finding is made that the Respondent Fresh America Corp. has committed willful 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.

2. This Order shall take effect on the eleventh day after this Decision becomes final.

3. 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.

Done at Washington, D.C.

---

**In re: BEST FRESH, LLC.**  
**PACA Docket No. D-06-0020.**  
**Default Decision.**  
**Filed February 7, 2007.**

**PACA – Default. PACA – Default.**

Christopher Young Morales for AMS.  
Respondent Pro se.  
*Default Decision by Administrative Law Judge Peter M. Davenport.*

#### **DEFAULT DECISION AND ORDER**

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 an amended complaint filed on October 20, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The amended complaint alleges that during the period February 6, 2005 through May 23, 2005, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 53 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$411,375.80.

A copy of the amended complaint<sup>1</sup> was mailed by the Hearing Clerk to Respondent by certified mail on October 24, 2006, and was signed for by Jackie Deane, Respondent's 100 percent shareholder, on November 7, 2006. Therefore, Respondent was served with a copy of the amended complaint pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (hereinafter "Rules of Practice") (7 C.F.R. § 1.147) as of November 7, 2006. Respondent did not file an answer to the amended complaint within the 20

---

<sup>1</sup> Prior to the filing of the amended complaint, a copy of the original complaint was served upon respondent in October 2006. Respondent did not answer that complaint.

day time period prescribed by Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). The Complainant has 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 amended 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 proceedings pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **FINDINGS OF FACT**

1. Best Fresh, LLC, (hereinafter "Respondent") is a corporation organized and existing under the laws of the state of Washington. Respondent ceased operating in May of 2005. Its last known business address was, and its current mailing address is, 334 Sunny Slope Heights Road, Wenatchee, Washington 98801-9664.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20031473 was issued to Respondent on September 8, 2003. This license terminated on September 8, 2005, 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 February 6, 2005 through May 23, 2005, Respondent purchased, received, and accepted, in interstate and foreign commerce, from seven (7) sellers, 53 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$411,375.80.

### **CONCLUSIONS OF LAW**

1. The Secretary has jurisdiction in this matter.

2. For the reasons set forth in the above Findings of Fact, the Respondent's failure to make full payment promptly to seven (7) sellers for 53 lots of perishable agricultural commodities in the total amount of \$411,375.80 constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

**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.

Done at Washington, D.C.

---

**In re: MCDONALD FARMS, INC.**  
**PACA Docket No. D-06-0015.**  
**Default Decision.**  
**Filed March 12, 2007.**

**PACA – Default.**

Christopher Young Morales for AMS.

Respondent Pro se.

*Default Decision 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 CPACA or the "Act"), instituted by a complaint filed on June 5, 2006, 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 November 2002 through February 2004, Respondent McDonald Farms, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 16 sellers of the agreed purchase prices in the amount of \$608,877.66 for 568 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

A copy of the complaint, filed on June 5, 2006, was sent to Respondent at 2313 Middle Road, Winchester, Virginia 22601 by certified mail on June 5, 2006. The complaint was returned to the Hearing Clerk's office "unclaimed." The complaint was then mailed to Respondent at another address, 117 Clark Road, Stephens City, Virginia 22655, where it was served on July 17, 2006.

No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

### **Findings of Fact**

1. Respondent McDonald Farms, Inc. is a corporation organized and existing under the laws of the state of Virginia. Its business mailing address was 2313 Middle Road, Winchester, VA 22601.

2. At all times material to the allegations of the complaint, Respondent was licensed under the provisions of PACA. License number 19940815 was issued to Respondent on March 15, 1994. This license terminated on March 15, 2004 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when it was not renewed.

3. Respondent, during the period of November 2002 through February 2004, failed to make full payment promptly to 16 sellers of the agreed purchase prices in the amount of \$608,877.66 for 568 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the 568 lots of perishable agricultural commodities set forth in Finding of Fact No. 3 above, constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. c 499b(4)), for which the order below is issued.

### **Order**

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

This Order shall take effect on the eleventh day after this Decision becomes final.

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

Issued at Washington, D.C.

---

**In re: CARIBE TROPICAL FOODS, INC.; ALBERTINO PINA and MARIA I. PINA, d/b/a CARIBE TROPICAL FOODS, INC.**

**PACA Docket No. D-07-0028.**

**Default Decision.**

**Filed May 11, 2007.**

**PACA – Default.**

Jonathan Gordy for AMS.

Respondent Pro se.

*Default Decision by Administrative Law Judge Peter M. Davenport.*

### **DEFAULT DECISION AND ORDER**

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a, et seq.) ("PACA"), instituted by a Complaint filed by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing

CARIBE TROPICAL FOODS, INC.;  
ALBERTINO PINA and MARIA I. PINA,  
d/b/a CARIBE TROPICAL FOODS, INC.  
66 Agric. Dec. 966

965

Service, United States Department of Agriculture. The Complaint alleges that during the period of March 2004 and October 2004, the Respondents failed to make full payment promptly to a seller of the agreed purchase prices in the total amount of \$614,945.83 for 139 invoices of perishable agricultural commodities which the Respondents purchased, received, and accepted in the course of interstate and foreign commerce.

Copies of the Complaint were sent to the Respondents by certified mail on November 21, 2006; however, the Post Office returned the mailings as “unclaimed” on December 20, 2006. In accordance with Rule 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.147(c)), the Hearing Clerk re-mailed copies of the Complaint to the Respondents by regular mail on December 20, 2006.

The Respondents failed to file an Answer as required by Rule 1.136 (7 C.F.R. § 1.136) within the time allotted. On February 7, 2007, the Hearing Clerk received a facsimile transmission from Russell D. Raskin, Esquire, Raskin & Berman, Providence, Rhode Island, indicating that the Complaint was contested as to both “defendants” and indicating that Maria Pina “has already been determined by the Federal District Court for the District of Rhode Island not to be responsibly connected with Caribe Tropical Foods, Inc. *Turbana Corporation vs. Caribe Tropical Foods, Inc., Albertino Pina and Maria I. Pina A/K/A Maria E. Pina*, C.A. No. 04-4631 (D.R.I. 2004)[.]”<sup>1</sup>

Even assuming, pro arguendo, that the facsimile had been received within the time allotted for the filing of an answer, the letter received on February 7, 2007 is not denominated as an answer, it does not bear the docket number assigned to this action and fails to admit, deny, or explain the allegations set forth in the Complaint. See 7 C.F.R. § 1.136. It is well settled that entry of default is appropriate where, as in this case, the Respondent has failed to deny the material allegations of the Complaint. *In re: Barnesville Livestock Sales Co., et al.* 60 Agric. Dec. 804, 805 (2002);

---

<sup>1</sup> The facsimile transmission does not bear the docket number of this action and indicates that it was previously sent on December 18, “but inadvertently to the Department of Agricultural [sic] only.

*In re Van Buren Fruit Exchange, Inc.* 51 Agric. Dec. 744 (1992). As the Respondent's letter [Answer] failed to clearly deny the material allegations of the Complaint, it fails to meet with the specific requirements for an Answer under the Rules of Practice (See 7 C.F.R. § 1.136(b)). The material facts alleged in the complaint are accordingly admitted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

### FINDINGS OF FACT

1. Respondent Caribe Tropical Foods, Inc. ("Caribe") was incorporated as a Rhode Island corporation on September 9, 1991, but whose corporate charter was revoked on or before June 30, 1993. Notwithstanding the revocation of its charter, Respondent Caribe continued to operate under the name Caribe Tropical Foods, Inc., having a business address at 53 Hawes Street, Central Falls, Rhode Island 02863, under the direction of its owners, the individual Respondents at all times material to this Decision.

2. By virtue of the revocation of its corporate charter, at all times material to this Decision, Respondent Caribe was an unincorporated partnership or general association, owned, operated, directed by, and under the control of the individual Respondents, Albertino Pina and Maria I. Pina, whose business and home address is 53 Hawes Street, Central Falls, Rhode Island 02863.

3. At all times material to this Decision, Respondent Caribe was licensed by PACA under PACA License No. 2000-0870. The said license was terminated on May 2, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) for failure to pay the annual license renewal fee.

4. At all times material to this Decision, Respondent Caribe and the individual Respondents conducted business subject to the PACA.

5. During the period March 4, 2004 to October 3, 2004, the Respondents failed to make full payment to the Turbana Corporation of the agreed purchase prices for 139 lots of perishable agricultural commodities in the total amount of \$614,945.83, which the Respondents purchased, received, and accepted in interstate and foreign commerce.

### CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. For the reasons set forth in the Findings of Fact, the Respondents willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### ORDER

1. The Respondents, Caribe Tropical Foods, Inc., Albertino Pina, and Maria I. Pina committed willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 4, 2004 through October 3, 2004, and the facts and circumstances shall be published.

2. This Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals 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 of this Decision and Order shall be served on the parties.

Done at Washington, D.C.

---

**In re: DAE WON NY, INC., d/b/a YONKERS PRODUCE.**  
**PACA Docket No. D-06-0018.**  
**Default Decision.**  
**Filed June 6, 2007.**

**PACA – Default.**

Gary F. Ball For AMS  
Respondent Pro se.

*Default Decision by Administrative Law Judge Peter M. Davenport.*

### DEFAULT DECISION AND ORDER

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 14, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of January through December 2004, Dae Won, NY, Inc. (hereinafter the “Respondent”), failed to make full payment promptly to ten sellers of the agreed purchase prices in the total amount of \$191,207.53 for fifty-three lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the Complaint was sent to the Respondent’s president, director, and sole shareholder, Mr. Serk Hon Lee, at 441 Piermont Road, Cresskill, NJ 07626, by Federal Express overnight courier. The Complaint was received and signed for by the Respondent at the above addresses on January 27, 2007. 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 procedure 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**

1. The Respondent is a corporation organized and existing under the laws of the State of New York. Respondent’s business address was 311 Manida Street, Bronx, NY 10474. 2.

At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2003-1497 was issued to Respondent on September 12, 2003. This license terminated on September 12, 2005, when Respondent failed to pay the annual fee as required by section 4(a) of the Act (7 USC § 499d(a)).

3. During the period January through December 2004, Respondent purchased, received and accepted in interstate commerce, from ten sellers, fifty-three lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$191,207.53.

### **CONCLUSIONS OF LAW**

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly with respect to the fifty-three 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**

1. The Respondent is found to have 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.
2. 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).
3. Copies hereof shall be served upon the parties.

Done at Washington, D.C.

970 PERISHABLE AGRICULTURAL COMMODITIES ACT

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**Consent Decisions**

Angelo Hinojosa and Jesse Hinojosa, Inc., PACA D-06-0010, 2/13/07.

Krass-Joseph, Inc., PACA D-07-0120, 06/05/07.

Dom's Wholesale and Retail Center, Inc., PACA D-05-0010, 06/22/07.

Stokes-Shaheen Produce, Inc., PACA-D-07-0149, 6/27/07.