AGRICULTURE DECISIONS

Volume 67

July - December 2008
Part Three (PACA)
Pages 1387 - 1513

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AGRICULTURE DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

DONALD R. BEUCKE v. USDA.
Nos. 06-75358, 07-70033.
Court Decision.
Filed August 6, 2008.
(Cite as: 314 Fed.Appx. 10).

PACA – Responsibly connected – Payment, failure to make prompt – Corporate actions deemed responsibly connected – Presumptions statutory, if greater than 10% ownership – Suspension, delayed application – "Jencks" evidence error not controlling to decision.

Before: W. FLETCHER and TALLMAN, Circuit Judges, and BERTELSMAN, FN* District Judge.

FN* The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

Donald Beucke petitions for review of the decisions of the Secretary of Agriculture affirming the administrative law judge's decision that he was "responsibly connected" to Garden Fresh Produce and to Bayside Produce. The Secretary had found that those companies had violated 7 U.S.C. § 499b(4), a provision of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a499s, by failing to pay produce suppliers. Beucke also alleges a series of procedural errors by the Secretary over the course of the administrative hearings.

We " 'review final decisions in PACA cases under the deferential standard of the [APA]. Under that standard, we must "uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." ' " *Kleiman & Hochberg, Inc. v. Dep't of Agric.*, 497 F.3d 681, 686 (D.C.Cir.2007) (citations omitted). Agency factual

findings are reviewed under the substantial evidence test. *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). This review means that the record must support an agency determination in the form of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

We review for abuse of discretion agency decisions regarding the production of a report pursuant to the Jencks Act. *Blackfoot Livestock Comm'n v. Dep't of Agric.,* 810 F.2d 916, 923 (9th Cir.1987). We review de novo due process claims relating to administrative proceedings. *Carpenter v. Mineta,* 432 F.3d 1029, 1032 (9th Cir.2005).

We first conclude that the Judicial Officer's ("JO") decision that Beucke was "responsibly connected" to Bayside Produce was supported by substantial evidence; Beucke did not rebut the presumption created by his 33-1/3 percent ownership of the company. *See* 7 U.S.C. § 499a(b)(9)(B) (providing that an individual is presumed to be responsibly connected if serving as an "officer, director, or holder of more than 10 per centum of the outstanding stock" of the violating company). First, Beucke did not "demonstrate by a preponderance of the evidence that [he] was not actively involved in the activities resulting in" the PACA violation. *Id.* § 499a(b)(9). Instead, he purchased produce on more than 30 occasions during the violations period. Second, Beucke did not demonstrate that he was only "nominally a partner, officer, director, or shareholder" of Bayside Produce. *Id.* Instead, Beucke had a stock certificate issued in his name; attended the formal Bayside Produce meetings; was authorized to draw funds on Bayside Produce's bank accounts; and signed 20 checks for Bayside Produce during the violations period.

In contrast, we conclude that the JO's decision that Beucke was responsibly connected to Garden Fresh Produce was not supported by substantial evidence. Instead, Beucke successfully rebutted the presumption created by his 20 percent ownership interest in the

company. Beucke demonstrated that he was not "actively involved" in the transactions forming the basis for the PACA violation. *See Maldonado v. Dep't of Agric.,* 154 F.3d 1086, 1087-88 (9th Cir.1998). The JO found that "[t]he record does not contain evidence that Petitioner was directly involved in any of the transactions" for which Garden Fresh had been held liable. Indeed, the produce suppliers consistently testified that Beucke had an impeccable reputation in the produce business. Further, Beucke demonstrated that he was only nominally an officer of Garden Fresh and "lacked any 'actual, significant nexus with the violating company [.]' " *Id.* at 1088 (citations omitted). Beucke had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay ($1,500) in the company's first year; and signed no checks within the violations period. Because we so hold, we need not address Beucke's contention that the agency violated his due process rights when using evidence from another individual's hearing to support its finding that Beucke was responsibly connected to Garden Fresh.

We also conclude that the JO did not abuse its discretion in holding that the licensing and employment restrictions on Beucke pursuant to 7 U.S.C. §§ 499d(b) and 499h(b) did not begin running upon the ALJ's decision in his case or in the related underlying cases against Garden Fresh and Bayside. The JO relied on sources such as PACA Rule, 7 C.F.R. § 1.142(c)(4) (providing that ALJ decisions are not final if there is an appeal to the Judicial Officer), and on the remedial purposes of the PACA. The fact that the agency potentially could have chosen to make the date retroactive does not mean that it was required to do so, given the Secretary's discretion to "fashion [ ] ... an appropriate and reasonable remedy[.]" *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973); *see also Frank Tambone, Inc. v. Dep't of Agric.,* 50 F.3d 52, 54-56 (D.C.Cir.1995).

Beucke also objects to the agency's refusal to provide him with a copy of a report referred to during one of his administrative hearings. He relies on the PACA Rules of Practice for Disciplinary Hearings, 7 C.F.R.

§ 1.141(h)(1)(iii), which requires the production of certain documents in conformity with the Jencks Act, 18 U.S.C. § 3500. *Norinsberg Corp. v. Dep't of Agric.*, 47 F.3d 1224, 1228 n.3 (D.C.Cir.1995). We do not reach the question of whether the agency abused its discretion in not compelling the production of the investigative report. Even if there were a Jencks Act error, it was harmless, because the Secretary did not base its responsibly connected decision on information in the report. *Blackfoot,* 810 F.2d at 923.

Beucke points to other due process violations, but he had no right to any of the procedures to which he points. *Cf. Kleiman,* 497 F.3d at 691 n. 7.

The petition for review is **DENIED** in Case No. 07-70033 and **GRANTED** in Case No. 06-75358. Each party shall bear its own costs.

B.T. PRODUCE CO., INC. v. USDA.
Nos. 07-1240 - 07-1242.
Court Decision.
Filed September 15, 2008.
Rehearing En Banc Denied Dec. 5, 2008.

(Cite as: 296 Fed.Appx. 78).

PACA – Responsibly connected – Failure to not control bribery – Revocation of license.

Responsibly connected parties appeal a increase in the penalty imposed when Judicial Officer (JO) found that there was a duty to not bribe governmental officials. Even thought the bribes were secretive and not within the scope of employment, the JO found that the responsibly connected parties are liable for the acts of their employees. The *Kleiman & Hotchberg Inc.,* (497 F.3d 681) decision is controlling.

United States Court of Appeals,
District of Columbia Circuit.

Before: SENTELLE, Chief Judge, and HENDERSON and KAVANAUGH, Circuit Judges.

JUDGMENT

This appeal was considered on the record of the United States Department of Agriculture and on the briefs filed by the parties. *See* Fed. R.App. P. 34(a)(2); D.C.Cir. Rule 34(j).

For the reasons set forth in the attached memorandum, it is **ORDERED AND ADJUDGED** that the decision of the Department of Agriculture be affirmed.

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

MEMORANDUM

In 1999, the United States Department of Agriculture ("USDA" or "Agency") uncovered widespread corruption in the USDA produce inspection system at Hunts Point Terminal, a wholesale produce market in the Bronx. As part of the investigation, a USDA inspector-previously arrested for taking bribes-cooperated with the Agency and conducted inspections while wearing recording devices to document the bribes he received. During the five months he worked undercover, the inspector reported receiving 42 bribes from the produce buyer for B.T. Produce. As a result, the Agricultural Marketing Service of the USDA ("AMS") brought a complaint against B.T. Produce, alleging that the company failed, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce, in violation of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §

499b(4). The AMS also determined that Nat Taubenfeld and Louis Bonino, the company's president and vice president, respectively, were responsibly connected to B.T. Produce while the company violated the PACA, making them subject to individual discipline. *See* 7 U.S.C. §§ 499a(b)(9), 499h(b).

The Chief Administrative Law Judge ("CALJ") held a ten-day hearing on the three consolidated cases. After hearing all the evidence, the CALJ concluded that B.T. Produce committed 42 willful and flagrant violations of section 499b(4) by paying bribes to the USDA inspector. Although this conclusion authorized the CALJ to revoke B.T. Produce's PACA license, the judge instead imposed a civil penalty of $360,000. The CALJ also held that Taubenfeld and Bonino were responsibly connected to the company. All parties appealed the CALJ's decision to the Judicial Officer ("JO"), to whom the Secretary of Agriculture has delegated final authority in adjudicative proceedings. *See* 7 C.F.R. § 2.35. The JO affirmed the CALJ on every issue except the sanction against B.T. Produce, which the JO increased to the maximum sanction of license revocation. B.T. Produce, Taubenfeld, and Bonino petitioned this court for review of the JO's decision that the company violated the PACA and that the officers were responsibly connected to the company.

Before us, B.T. Produce argues that it did not violate the PACA because the Agency may not interpret section 499b(4) to include a duty not to bribe the USDA inspector, the implied duties clause of section 499b(4) applies only between parties to a contract, the Agency was required to proceed under section 499n(b) and prove actual falsification of specific inspection certificates, and the bribes were secretive and not in the scope of employment. Each of these issues is governed by our decisions in *Kleiman & Hochberg, Inc. v. USDA,* 497 F.3d 681 (D.C.Cir.2007) and *Coosemans Specialties, Inc. v. USDA,* 482 F.3d 560 (D.C.Cir.2007), which require us to reject B.T. Produce's arguments. Taubenfeld and Bonino argue that they were not responsibly connected to the company because of the secret nature of the produce buyer's bribes, and Taubenfeld argues that the USDA violated the

Administrative Procedure Act by not giving him notice and opportunity to halt the illegal conduct before it brought sanctions against him. As with the other issues in this case, *Kleiman & Hochberg* and *Coosemans Specialties* govern and reject these arguments. Finally, Taubenfeld and B.T. Produce argue that holding them responsible violates the Fifth Amendment to the Constitution, but *Kleiman & Hochberg* and *Coosemans Specialties* also dispositively decide this issue against them.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATIONS, INC. and PERFECTLY FRESH SPECIALTIES, INC.
PACA Docket No D-05-0001-3.
and
JAIME O. ROVELO; JEFFREY LON DUNCAN; and THOMAS BENNETT.
PACA-APP Docket No 05-0010-15.
Decision and Order.
Filed October 28, 2008.

PACA – Willful, repeated and flagrant – Responsibly connected – Full payment, failure to make.

Chris Young-Morales for AMS.
Respondent, pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION

In this decision involving nine consolidated cases, I find that Perfectly Fresh Consolidation, Inc., Perfectly Fresh Farms, Inc., and Perfectly Fresh Specialties, Inc., each committed willful, repeated and flagrant violations of the Perishable Agricultural Commodities Act. I further find that Jaime Rovelo was responsibly connected with each of the above three companies; that Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., but was not responsibly connected to Perfectly Fresh Specialties, Inc.; and that Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc.

Procedural History

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant"), filed separate disciplinary complaints against Perfectly Fresh Consolidation, Inc. ("Consolidation"), Perfectly Fresh Farms, Inc. ("Farms"), and Perfectly Fresh Specialties, Inc, (Specialties"). Each complaint alleged that the respondent had committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act ("Act"), 7 USC §§ 499a et seq. by failing to make full payment promptly to sellers of perishable agricultural commodities. Each respondent had received a PACA license which had expired subsequent to the date of the alleged violations. Each respondent had filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the complaints.

In particular, the three separate complaints alleged that Consolidation, during the period November 17, 2002 through February 15, 2003, failed to make full payment of the agreed purchase prices promptly to 24 sellers in the total amount of $373,944.19 for 286 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; that Farms, during the period October 27, 2002 through February 21, 2003, failed to make full payment of the agreed purchase prices promptly to 14 sellers in the total amount of $442,023.12 for 142 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; and that Specialties, during the period November 1, 2002 through February 20, 2003, failed to make full payment of the agreed purchase prices promptly to 28 sellers in the total amount of $263,801.40 for 796 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

The complaints were finally served on each of the three respondents on May 22, 2006.[1] Each respondent answered on June 8, 2006, denying

[1] Judge Peter M. Davenport granted Complainant's motions for default decisions with respect to Consolidations and Specialties on March 31, 2005, and subsequently (continued...)

the commission of any alleged violations.

Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, USDA, issued six letters informing three individuals that he was finding that they were responsibly connected to one or more of the respondent corporate entities at the time the alleged violations that were the subject of the disciplinary complaints were committed. Thus, Jaime O. Rovelo was found by the PACA Chief to have been responsibility connected to each of the three corporate entities, Thomas Bennett was found to be responsibly connected to Farms, and Jeffery Lon Duncan was found to be responsibly connected to Consolidation and Specialties. Rovelo, Bennett and Duncan each filed a Petition for Review of each of the PACA Chief's responsibly connected determinations. Eventually, the three disciplinary cases and the six responsibly connected cases were consolidated for hearing pursuant to Rule 1.137 of the Rules of Practice. Following the deployment of Judge Davenport to Iraq, I re-assigned the matter to myself.

I conducted a hearing in these consolidated cases in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales, Esq. and Tonya Keusseyan, Esq. represented Fruit and Vegetable Programs, AMS, Complainant in the disciplinary proceedings and Respondent in the responsibly connected proceedings. Christopher S. Bryan, Esq., represented the respondents in the disciplinary proceeding and Petitioner Duncan in his responsibly connected hearing. Douglas B. Kerr, Esq., represented Petitioner Bennett in his responsibly connected hearing[2]. Petitioner Jaime O. Rovelo did not respond to any motions or orders after filing his initial petitions, and did not appear at the hearing.

Eight witnesses, including Petitioners Duncan and Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency

[1](...continued)
vacated his decision via an order dated April 19, 2006 upon discovery that the original complaints with respect to those two parties were not properly served. Pursuant to his order, the three respondents were served/re-served.

[2] Subsequent to the hearing, Jonathan Barry Sexton also appeared on behalf of Petitioner Bennett.

records" in the responsibly connected cases, were received in evidence. The parties filed simultaneous opening and reply briefs, with the final brief being filed on March 7, 2008.

Statutory and Regulatory Background

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

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

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

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of

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

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

> (aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, that the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

The Act also imposes on every licensee the duty to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." 7 U.S.C. § 499i.

In addition to penalizing the violating merchant, dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who

was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

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

7 U.S.C. § 499a(b)(9).

Facts

The Investigation

Upon receiving notification that four related companies, Specialties, Farms, Consolidated, and Perfectly Fresh Marketing, Inc. (which was also known as Perfectly Fresh Florals, LLC), had filed for bankruptcy, the PACA Branch assigned Senior Marketing Specialist Mary Kondora to investigate whether violations of the PACA had occurred. By the time she began her investigation in April 2003, the companies had all ceased doing business, and much of the assets of the companies had been purchased by another company, Hidden Villa. In late April Ms. Kondura spoke to Phil Brundt, the chief financial officer of Hidden Villa and he informed her that Hidden Villa was in possession of all documents of the four companies. Tr. 33-35, 163. Ms. Kondura faxed him a Notice of Investigation (CX-5) and traveled to Los Angeles in early May to meet with Mr. Brundt. He directed her to 50 boxes of records stacked on two pallets in the corner of a cold room, Tr. 43, and she proceeded to review and copy the accounts payable for the four companies. *Id*. She conducted an exit interview with Gary and Erin

Tice, who were officers in each of the corporations, and Gary Tice indicated to her that the companies owed a total of about $1.2 or $1.3 million in produce debt. Tr. 46-48.

Ms. Kondura examined a large number of invoices and matching vouchers, which generally indicated that one of the three respondent companies had purchased the produce in question.[3] She prepared a "no-pay" table for each of the three companies.[4] According to her tables, Farms owed 14 creditors a total of $442.123.12 for 142 lots of perishable agricultural commodities (CX-01-7); Consolidation owed 24 creditors a total of $373,944.19 for 286 lots of perishable agricultural commodities (CX-02-07); and Specialties owed 28 creditors a total of $263.801.40 for 796 lots of perishable agricultural commodities (CX-03-7). She also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of those companies, and found that the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those creditors. Tr. 131-132.

Ms. Kondura also secured written sworn statements from a number of the creditors to document that the transactions she cited were sold in interstate or foreign commerce. Tr. 189-195. She verified with these creditors that the amounts listed in the vouchers were still unpaid before she prepared her no-pay list. Tr. 186-187. She also indicated that these creditors generally believed they were dealing with an entity they called "Perfectly Fresh" and did not realize the existence of the individual corporate entities. Tr. 184-186.

Ms. Kondura also testified that each of the three respondents had its own PACA license and each filed its own separate tax return.

A follow-up investigation conducted by Senior Marketing Specialist Josephine Jenkins confirmed that as of July 25, 2007, each of the three entities still owed significant amounts of produce debt to the creditors listed in the complaint, and that approximately 52% of the amount recognized and owed at the time of the approval of the order allowing

[3] The large majority of the Complainant's exhibits consist of these paired invoices and vouchers.

[4] There were no apparent unpaid invoices under the name of Marketing/Florals.

the PACA Trust Claims at the conclusion of the bankruptcy proceedings remained unpaid.

Formation and Organization of the Perfectly Fresh Companies

In June 2001, Gary Tice, who had a long and successful career in the produce industry, started Perfectly Fresh Marketing, LLC (Marketing) with Jeffery Lon Duncan, who had been in the produce business for about fifteen years. Tice had expertise in managing and owning businesses, and had more recently helped other companies he worked for with strategic planning and with modernizing their business techniques. Tr. 295-300. In 2000-2001 he worked as a consultant for Fresh Point, where he met Respondent Duncan, whose principal job involved servicing the produce needs of cruise lines. Tr. 300-301. They worked together on special projects involving inventory and purchasing. While Tice had been a manager for many years, Duncan did not, in Tice's opinion, perform managerial duties, although he thought Duncan's managerial skills were "quite adequate." Tr. 305-307. Tice wanted Duncan as a partner to take advantage of his sales skills with cruise lines, while Tice was working on developing a relationship supplying tomatoes to Taco Bell. Tr. 307-309. Marketing's PACA license indicated that 51% was owned by Tice, Inc., which was a company developed by Tice and his wife, Erin Tice, and that 49% was owned by Duncan. Tice testified that he managed the day to day accounts payable and receivable with Duncan. Tr. 309.

In July 2002, the operating agreement of Marketing was amended and three new related companies were created. RX 13. The allocation of ownership shares was changed to reflect the addition of a new partner, Perfectly Fresh, LLC, with a 50% equity share in Marketing, while Tice, Inc. now owned 30% and Duncan now owned 20%.[5] Perfectly Fresh, LLC was owned by John Norton, who was planning to invest approximately $2 million in the new operation, principally to make improvements on the facility and to fund the new companies until they became profitable. Tr. 317-320, 330. John Norton was granted

[5] However, documents filed with the four companies' bankruptcy documents indicated that Duncan owned 49% of Marketing/Florals.

preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors. RX 13, p. 5, paragraph 3.4, Tr. 328. Gary Tice testified that the plan to set up the three operating companies was devised by himself, Duncan, and attorney Steve Calvello. Tr. 325.

Specialties was formed on July 18, 2002 and received PACA license 021539. CX-03-3. That license indicates that Marketing owned 90% of Specialties. The license does not account for the remaining 10% ownership. Respondent Duncan is listed as the Chief Financial Officer and as a director, Gary Tice is listed as Secretary and director, and Erin Tice is listed and President and director. Specialties was set up to sell produce directly to supermarkets, including large supermarket chains such as Ralph's and Safeway. Tr. 336-338.

Consolidation was the second company formed on July 18, 2002 and received PACA license 021540. CX-02-3. The license indicates that Respondent Duncan owned 10% of the stock in Consolidation, and was President and a director; that Marketing owned 90% of the stock, with Gary Tice as the Secretary and a director, and Erin Tice as the Chief Financial Officer and a director. The purpose of Consolidation was basically to sell to cruise lines, carrying on and expanding the same type of business that was Duncan's forte.

Farms was the third company formed on July 18. 2002 and received PACA license 021541. That license indicated that Marketing owned 90% of Farms, and that Tom Bennett owned the remaining 10%, and was the President and a director. Gary Tice was listed as Secretary and director, and Erin Tice was listed as Chief Financial Officer and director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. Tr. 615.

There was a general understanding that the four companies were to be run as one entity, with Marketing essentially managing the overall operations, and the three other entities handling sales, each in its own sphere of specialization. Tr. 320-322. Tice indicated that the management of Marketing was generally under his control, although Norton had some control. Tr. 413-414. Tice, Bennett and Duncan all considered that the three respondents were sales entities, with Marketing

handling all the operations including the purchasing; Marketing would buy all the produce and transfer it to the appropriate company; Marketing leased all the warehouse space; and Marketing handled the receiving when produce arrived at the warehouse. Tr. 354-358. None of the entities ever held a board meeting. Tr. 387.

It appears that customers knew of the companies as "Perfectly Fresh" and were not aware that in reality four different companies existed. The accounting and payment systems were designed by Rovelo with input from Tice, and generally checks from customers went first into the individual companies bank accounts, but were then transferred into Marketing's account to keep the other accounts at a virtual zero balance. Tr. 366-369. According to Tice all the purchasing was done by Marketing, even though the accounts payable documents examined by Ms. Kondura and admitted into evidence generally linked each purchase to a specific company, and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched up with those same records, in terms of which company purchased which lot of produce. Tr. 354.

Shortly after John Norton entered the scene and the new companies were formed, Norton placed Jaime A. Rovelo as the head of the accounting department and Chief Financial Officer for all four entities. Tr. 372-377. Although the PACA licenses indicate otherwise, Tice testified there was no CFO before Rovelo, and that Rovelo wrote all the checks for the companies on a day-to-day basis, and that Rovelo reported to Tice, not to Duncan or Bennett. *Id.* Until the businesses began to collapse in December, Rovelo made the decisions on who to pay; subsequent to that date those decisions were made by Tice.

Apparently John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Reddy-Pac, a large supplier of produce to chain stores. Norton apparently had some issues with Reddy-Pac and its CEO, and apparently getting back at Reddy-Pac was a significant aspect of his motivation for investing in Perfectly Fresh. Tr. 317-320, 330. Further, Erin Tice, the spouse of Gary Tice, was an officer with Reddy Pac and came over to Specialties (and became a co-owner of all four companies as a result of her co-ownership of Marketing with her husband) with the idea of using her

personal relationships with Reddy-Pac clients to bring those customers over to Specialties. Tr. 336-338. When she joined Specialties, Reddy-Pac became concerned that the employees she had managed there would move with her, and attempted to get them to sign contracts. Specialties ended up hiring 15 or 16 Ready-Pac employees to work this aspect of the business, even though they had planned to hire employees at a much slower rate as the business expended. Tr. 336-338.

At around the same time, the entire warehouse where Marketing had rented a small amount of space became available, and Marketing took that over. Much of the money Norton invested was devoted to improving the warehouse. Tr. 331-333.

The Short Road to Bankruptcy

The collapse of the Perfectly Fresh entities was swift, barely 5 months having elapsed between the time the respondent companies starting doing business and the bankruptcy filing. Ready Pac filed suit against Norton and the Tices for tampering with their employees. [6] According to Tice, the CEO of Ready-Pac was seeking to bankrupt Perfectly Fresh, Tr. 343. During the litigation, which was settled in November, 2002, Norton decided that he wanted to be treated as a lender, rather than as an owner/shareholder. Tr. 343-345.

With funding from Norton stopped as of November, Tice began an effort to attract additional investors. Tr. 349. He was never able to get to the point of serious negotiations. He felt the companies were still in good financial condition at the end of November, with Consolidation doing particularly well. Tr. 349-350. However, in December, with no new funding coming in and Farms having significant problems due to issues with Hawaii Pride, it became difficult to pay debts. *Id.* Tice testified that at first Rovelo made the decisions as to which creditors should be paid, but that sometime in December he made all those decisions on his own. Tr. 380-381. He further testified that Respondents Bennett and Duncan had no role in deciding who would be paid. *Id*.

[6] The litigation, while frequently mentioned, was never officially documented in the record, so the descriptions are solely based on the testimony at the hearing.

With no funding immediately at hand, Tice retained bankruptcy counsel on behalf of all four Perfectly Fresh entities on January 31, 2003 (RX 2), and the companies filed for bankruptcy a few days later[7]. The same day (February 3), the four companies moved that their separate bankruptcy petitions be consolidated for "joint administration." RX 4. There is no evidence that Bennett or Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or Jaime Rovelo.

As part of the bankruptcy filing, Farms, Specialties and Consolidation each filed a "Schedule F, Creditors Holding Unsecured Nonpriority Claims." These schedules included both produce and non-produce payables. Every one of the creditors listed in the three disciplinary complaints is listed in the corresponding Schedule F, in an amount equal to or less than that alleged in the complaint to be unpaid.

In filing for bankruptcy, Tice indicated that he thought all the creditors would be paid off from the proceeds of the bankruptcy auction, but the attorneys representing the creditors negotiated for a 60% cash payment of the amounts owed. Tr. 405-409. Tice also stated, in a letter to Ms. Kondora (RX 1, p. 5):

> The employees of our company and our other principals should not be held responsible for the results of not paying for our produce within terms, it was not their decision as I had taken control. Lon Duncan, Erin Tice, Tom Bennet[t], and our employees conducted business as I directed and it would be very unfair if actions where [sic] taken against them as individuals. The only other persons having a final say in the ultimate outcome of Perfectly Fresh was John Norton and the attorneys of Rynn & Janowsky.

The Petitioners in the Responsibly Connected Cases

1. Jaime Rovelo—After filing his three petitions to review the determination of the PACA Branch Chief that he was responsibly connected to each of the respondents in the disciplinary cases, Mr.

[7] Shortly before filing for bankruptcy, Marketing transferred its operations to Florals, based on advice from counsel. Tr. 354.

Rovelo had no further contact with the Hearing Clerk's office and did not file any other documents in this matter. After he filed his petitions, Rovelo apparently relocated without notifying the Hearing Clerk, and without leaving a forwarding address. He did not participate further in the proceedings. Since the petitioner carries the burden of proof in a responsibly connected proceeding, and since no evidence was presented that would indicate that Rovelo was not responsibly connected to the three companies, I must find, if I find in favor of Complainant in the disciplinary cases, that Respondent Rovelo was responsibly connected to the three companies. In any event, the evidence demonstrated clearly that he was: the Chief Financial Officer of each of the three respondents in the disciplinary case; the individual who set up and administered the accounting system and signed the great majority of checks; a participant in many of the decisions as to whom to pay when money became tight; and he was the signatory of many of the bankruptcy related documents. Tr. 372-381.

2. Jeffery Lon Duncan—Respondent Duncan is a high school graduate who has been working in the produce industry since 1986. Tr. 703-706. He had a variety of jobs in the industry and gradually became a specialist in cruise line sales, a very exacting business given that ships are in port for a very short time, and are more demanding than other customers. Tr. 708-710. He testified that he had no managerial responsibilities before he joined up with Tice. Tr. 706. He was a participant in Perfectly Fresh Marketing, LLC, when it was first organized, and was an officer, director and 49% shareholder in the company. After the operating agreement was amended in July 2002, Duncan's ownership share was reduced to 20%. He testified that even though he was listed as supplying capital for several companies, he did not actually put up any money. Tr. 898. He basically indicated that his work at Perfectly Fresh, both when it was only Marketing, and then later when he was put in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines. Tr. 850-851.

Duncan indicated that he had many discussions with Tice before they decided to join forces and form their own company, and that he was impressed with Tice's vast knowledge and success in the produce industry. Tr. 715, He stated he was not involved in filing for the PACA

licenses, either for Marketing or Consolidation, and that basically he was not involved with keeping the books or managing the warehouse or the employees. He did write some checks, but most of the check-writing was handled by Tice. Tr. 833-840.

Duncan did not have any role in bringing Norton into the picture, although the modified business plan, including the decision to set up the three new corporate entities was discussed with him. Tr. 833-834. He understood that Norton was going to invest substantial funds in the companies and become a partner in Marketing. *Id*. He did not recall being involved in any discussions concerning the amended operating agreement that he signed in July, 2002, stating that he probably perused it. Tr. 846. He did not have any role in the plan to take over the Ready-Pac business, but he did know about it. Tr. 853-854. When Ready-Pac filed suit, neither Duncan nor Bennett was a party to the litigation. Tr. 856-857.

While he testified that his role in Consolidation was not managerial, but was essentially to continue the cruise produce sales business he had been working on before he came to Perfectly Fresh, he would have received more money, as a partial owner, if Consolidation was profitable. Tr. 865. In fact, it appears that his end of the business was profitable, and that Consolidation's profits were used in effect to subsidize the other companies. Tr. 899-900. He did have check signing authority, but apparently signed only one check in October 2002, prior to the period covered by the complaint, probably because no one else was around. Tr. 951.

Duncan first became aware that his suppliers were not getting paid in a timely manner in December 2002 or January 2003. Tr. 890. He said when he received a call about late payment, he would get the invoice and bring it to Rovelo and tell Rovelo to take care of it. He did not write the checks himself. Rovelo told him that creditors were not getting paid due to lack of money caused by overhead, and that Gary Tice told him that he was working on other investors and reassured him that he would find the investors. Tr. 890-892. He had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Respondent Bennett had been in the produce industry for 42 years at the time of the hearing. He had known Gary

Tice on a professional level for 25 years. Tr. 1085-1086. When Bennett was running Francisco Distributing as General Manager, Tice (actually Marketing) was renting some office space from Francisco. Tr. 1037-1039. When Fresh America, the company that owned Francisco, decided to close down the Los Angeles Division, and Bennett was basically told to shut down the company, he told Tice that the building was going to be available, and Tice successfully negotiated with the landlord for lease of the warehouse space. Tr. 1037-1038. After that, Tice offered him the position as President of Farms, along with a ten percent ownership interest in the company. Tr. 1039. Bennett did not pay anything for the shares, and stated that he was basically just involved in sales, and that the title of President was just to allow him to deal with a higher level of personnel at the companies to which he would be selling. Tr. 1039.

He said he considered the Tices to be his immediate supervisors, Tr. 1042. When the Farms corporation was being formed, he basically signed all the documents that he was told to sign, without negotiating. Tr. 1044. He did not believe he had check signing authority and testified that he had never signed a check on behalf of Farms[8]. Tr. 1045. When he saw empty cooler space at the warehouse, he started a storage facility where outside shippers could bring their produce to Los Angeles and store it in the warehouse, and spent most of his time working with the rental clients. Tr. 1041-1042.

He stated that he did not recall having any involvement in the obtaining of the PACA license for Farms, did not know of Norton's involvement until a few months after he began working for Farms, and did not really understand how the accounting system worked or how the vouchers and invoices were coordinated. Tr. 1048-1049. He began hearing about slow payment issues from his salesmen in December; when he would go to Tice or Rovelo. He was told not to worry and that the receivables would catch up. Tr. 1049-1050. He thought he could probably have found out more about the financial condition of the company had he asked, although he did not have access to the accounts of the entities other than Farms and was not told about them. Tr. 1050.

[8] However, he did in fact sign a card authorizing him to write checks. Bennett RC 23.

When it became evident to him that the business was not doing well, he sensed that it was time to leave. Tr. 1055. He suggested to Tice in early January that it was time for him (Bennett) to resign. Tr. 1056-1057. He stated that he resigned orally but that he subsequently wrote a letter to Tice attorney asking that his name be removed from all corporate documents.[9] Tr. 1058. He stated that he was concerned for his reputation and did not want to be part of a sinking ship. Tr. 1056-1057.

Discussion

I. Each of the three Respondents has violated the Act by failing to make full payment promptly to sellers of perishable agricultural commodities.

With respect to the disciplinary counts, Complainant has introduced numerous documents Ms. Kondura discovered in well-organized boxes clearly identified as payables, and which generally contained matching invoices and vouchers confirming the existence of each of the debts alleged in the complaint. Further, Complainant introduced bankruptcy schedules, prepared by the three disciplinary respondents, which confirmed that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, respondents admitted that they filed the bankruptcy scheduled referred to by the complaints, but also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. The respondent companies contend that the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Marketing/Florals, which is not a party to this action. For the reasons discussed below, I reject the notion that the debts were not incurred by each of the respondent companies, and find that Farms, Consolidation and Specialties each violated the PACA by failing to make full payment promptly for produce as listed in the three complaints.

1. The companies' own records clearly establish the unpaid debts. Each of the respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase

[9] However, he testified that he did not have a copy of that letter.

of produce. While the invoices generally indicated that the produce was sold to "Perfectly Fresh," the corresponding vouchers identified which of the entities was considered the purchaser of the produce. In most cases, the quantities of the produce and the dollar amounts involved matched up. Respondents are put in the peculiar position of denying the validity of their own records.

Gary Tice, who was clearly the single person most responsible for setting up and operating the three Perfectly Fresh respondents, admitted in a May 16, 2003 letter to Ms. Kondura that from September 1, 2002, when the operations of the three respondent companies started, Marketing did none of the actual buying and selling of produce. RX 1. This was inconsistent with his attempts at the hearing to explain away this statement, and his contention that Marketing did all the buying and the other operations did all the selling. No explanation for this glaring inconsistency was offered other than Tice's blanket statement that in reality Marketing "incurred all debts." Since this statement is flatly inconsistent with Tice's letter and the documentary evidence gathered by Ms. Kondura, it is not entitled to much credibility. Indeed, the written statement, prepared a month after Tice met with Ms. Kondura, is more consistent with the large majority of evidence received at the hearing.

The testimony of both Respondents Bennett and Duncan also supports the contention that the entities they ran were not making full prompt payments. Thus, Respondent Bennett testified that he was made aware by his salesman in early December that some of Farms' customers were not getting paid on time; he inquired of Tice, and sometimes Rovelo, and was told not to worry, and that receivables would catch up with payables. Tr. 1049-1050. Similarly, Respondent Duncan began receiving calls from the creditors that he dealt with complaining about slow payments in December and January; he would get the invoice and give it to Rovelo and tell him to take care of it. Tr. 890-892.

One of the principal arguments made by counsel for the respondents, and for Petitioners Duncan and Bennett, is that the law firm handling the bankruptcy advised Tice and Rovelo to associate payables with receivables for each of the three entities, Tr. 402-403, because they could not have "one company with nothing but debt and three

companies with nothing but assets, and it was just as I recall, it was a way to be able to put the asset to the debt." Tr. 461. Tice's testimony in this regard is simply not credible. Other than his unsupported statements, the evidence shows that the bankruptcy law firm was retained on Friday, January 31, 2003, and that the bankruptcies were filed three days later. If Respondents are trying to imply that over that weekend an entire voucher system was created along with the more than one thousand vouchers that were linked with the pre-existing invoices, they are entirely unpersuasive. Tice's uncertain and entirely unconvincing testimony in this regard is directly contradicted by the existence of these linked documents, which clearly establish that for each unpaid invoice there is a voucher that indicates which of the three respondent entities purchased the produce for which full timely payment was not forthcoming.

Thus, the accounts payable documents of each of the three respondent companies establishes that, at the time of the investigation conducted by the PACA Branch, each company had outstanding produce debts as alleged in the complaint.

2. The bankruptcy filings, while not necessarily dispositive, constitute persuasive evidence of the validity of Complainant's claims, particularly when they are confirmed by the voucher/invoice system of each respondent. The filings were signed under penalty of perjury. Respondents' arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts, or that they indicate that Marketing and not the entity filing the Schedule F actually incurred the debt are unconvincing and inconsistent with what the documents demonstrate in black and white and under oath. Moreover, these arguments are inconsistent with established Agency precedent holding that documents filed in bankruptcy proceedings may constitute an admission against the interest of the filing party.

The fact is that the creditors listed as holding unsecured claims in each of the Schedule F's are remarkably similar to the creditors listed in the accounts payable. Further, in each of their answers, Respondents admitted the allegations of paragraph IV of the complaint, which alleged, e.g., that "Respondent admits in its bankruptcy schedules that all 28 sellers listed in paragraph III of this complaint . . . hold unsecured

claims for unpaid produce debt totaling of $263,801.40. In the case of each of the 28 sellers listed, the amounts identified in the bankruptcy schedules for unpaid produce debt are greater than or equal to the amounts alleged in paragraph III of this complaint[10]. . .” While this would appear to present an open and shut case,[11] Respondents, in their answer, also denied the allegations that they failed to make full payment promptly. Although Respondents contend otherwise, I find that the admissions in the bankruptcy filings do constitute an admission that these debts for produce did exist at the time of the filings, and that their denial in their answers of the allegations regarding making full payment promptly are in fact inconsistent with their admissions.

Documents filed in bankruptcy cases which list creditors holding unsecured nonpriority claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. *In re: Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1610 (1993); *In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 8894 (1997), *In re: Coronet Foods, Inc.*, 65 Agric. Dec. 474 (2006). Respondents contend that these and other cases cited by Complainant are distinguishable because only a single entity was involved in the cited cases, and do not apply when there are multiple entities involved, and that application of these rulings to a situation where multiple entities have allocated their debt would be an unwarranted “dramatic extension of the law.” (reply br., pp. 3-5). However, I agree with Complainant that the cases actually do support a finding that when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then they have admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion, raised by respondents and Petitioner Duncan in their reply brief (pp. 3-6) that the statement in each Schedule F that “Creditors listed on the attached sheets with an asterisk are creditors who may have statutory trust interests in the receipts generated

[10] I am quoting the Specialties complaint, but the same language, other than the number of sellers and the total indebtedness, is in all three complaints, and the response is the same for all three answers.

[11] Complainant filed a Motion for Expedited Decision Without Hearing in the consolidated cases on this issue.

by the operation of the debtor's business pursuant to . . . [the PACA]" constitutes "clear" evidence that the produce creditors listed in the schedule were not creditors of the respondent who listed them as a creditor. Just because those who sold produce to the various entities generally thought they were selling to "Perfectly Fresh" and might not have known there were separate entities does not change the fact that the purchases were in fact made by the specific entities and recorded as such in the entities own books. Similarly, the fact that the cases were consolidated at respondents request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered it an indicator that the bankruptcy schedules filed with by respondents meant something other than they plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in these consolidated matters.

3. I also find that there is considerable merit to the assertion, raised by Complainant in its reply brief, that respondents should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning quite the opposite of what they indicate on their face. "The doctrine of judicial estoppel bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position "either as a preliminary matter or as part of a final disposition." *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir.1990). Judicial estoppel is an "equitable doctrine meant to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Id.* Judicial estoppel, however, should be applied with caution to "avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Id*.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the United States Supreme Court laid out the three principal factors a court must examine to determine whether judicial estoppel should apply. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.*, at 750. I find that the respondents' position in the disciplinary

case—that all the debts were incurred by Marketing—is inconsistent with the bankruptcy filings where each of the companies acknowledged its produce debts. "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *Id*., citing *Edwards v. Aetna Life Insurance*, 690 F. 2d 595, 599 (C.A. 6, 1982). Here, if I find that all the debts were only owed by Marketing, and that the other entities are debt free, I would be making a finding utterly inconsistent with the documents respondents filed with the bankruptcy courts, as well as with the decision of the bankruptcy court itself. "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. Here, if I were to find that each respondent in fact did not owe creditors for purchases of produce, then they would not be liable for violations of the PACA, a position that would make it difficult for Complainant to ensure that it carries out its statutory mandate of policing the produce industry. Respondents cannot be allowed to list one set of creditors in the bankruptcy courts and totally repudiate that list in the current proceedings. This would undermine the integrity of the judicial process.

4. The violations were willful, flagrant and repeated. Respondents vigorously contend that even if there were violations, they were not willful or flagrant. However, the long-standing case law interpreting these terms makes it clear that the violations do meet the criteria of being willful and flagrant, as well as obviously being repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re: Frank Tambone, Inc*., 53 Agric. Dec. 703, 714-15 (1994). *In re: Scamcorp*, 57 Agric. Dec. 527, 549 (1998). From the time it became apparent that they were having trouble timely paying their creditors in full, until they closed their doors for good, the fact that each of the three respondents continued to order and receive, and not pay for, produce, putting

numerous growers and sellers at risk, establishes they were "clearly operat[ing] in disregard of the payment requirements of the PACA," *Id.*, and have committed willful violations. Principals of the companies involved, including Tice, Bennett and Duncan, knew that payments were not being made in a timely fashion. Bennett and Duncan in particular did little more than inquire of Rovelo and Tice concerning the status of their creditors, and took no actions to correct the situation. The fact that the companies were attempting to acquire a new investor, and appeared to be sincerely concerned about paying the creditors back in full does not alter the fact that their conduct, particularly the continued purchase of produce when they were already facing financial uncertainty, meets the definition of "willful" as previously construed under the Act.

Likewise, the conduct of respondents was flagrant as that term is used in the Act. In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re: N. Pugatch, Inc*., 55 Agric. Dec. 581 (1995), *In re: Scamcorp,* 57 Agric. Dec. 527 (1998). The number of violations (142 for Farms, 286 for Consolidation, and 796 for Specialties), the amount unpaid (over $442,000 for Farms, over $373,000 for Consolidation, and over $263,000 for Specialties) and the multi-month period over which these violations occurred establish that the violations were flagrant. Likewise, the large number of violations establishes that they were repeated.

5. The investigation was conducted in a proper fashion. Respondents attacked some aspects of the investigation, both in terms of methodology and thoroughness. The government investigation in this case followed the same general methodology employed in numerous other non-payment cases, and has been approved at the Agency level in Judicial Officer decisions as well as by the courts. Receipt by the PACA Branch of either bankruptcy or reparation filings is frequently a trigger for the commencement of an investigation. Respondents' contended in their reply brief that it was "amazing" for complainant to rely on Ms. Kondura's findings to establish that the various respondents had entered into the transactions that are the subject of these consolidated matters because she had no first-hand knowledge of the companies' operations

(reply br. at 8). Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that the companies had ceased doing business by the time the investigation was commenced. Instead, Ms. Kondura ascertained the location of the records of the companies, painstakingly reviewed and copied records, determined that each unpaid invoice was linked with a voucher identifying the specific Perfectly Fresh company that purchased the produce, interviewed both Gary and Erin Tice, received letters from Gary Tice, contacted and prepared affidavits for a number of the creditors who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no- pay tables indicating which creditors were not paid by the respective entity and in what amount. That the creditors she talked with did not necessarily know which Perfectly Fresh entity they were dealing with, or that they generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that they confirmed that the particular Perfectly Fresh entity that they dealt with owed them money. This information, combined with each entity's own voucher and invoice records, and the filings made under oath with the bankruptcy court, strongly support the no-pay tables she created. There is no basis for a finding other than that Ms. Kondura's investigation was appropriate.

II. The Responsibly Connected Cases

A. Petitioner Rovelo was responsibly connected to each of the three Respondent companies. Jaime Rovelo was notified by the PACA Branch Chief that he was found to be responsibly connected to each of the three Respondent companies. In June 2005 he filed a Petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings, and did not notify the Hearing Clerk or any other participants in the proceeding. Since the burden of proof is on the petitioner in a responsibly connected case, and since Mr. Rovelo did not put on any evidence that would refute the PACA Branch Chief's determinations, I find that Mr. Rovelo was responsibly connected to Farms, Consolidation and Specialties.

B. **Petitioner Jeffrey Lon Duncan was responsibly connected to Perfectly Fresh Consolidation.** Petitioner Duncan, who was President,

a board member and 10% direct shareholder in Consolidation (he was also a 20% shareholder in Marketing/Florals, which owned 90% of Consolidation, making him effectively a 28% shareholder in Consolidation) has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Duncan.

Mr. Duncan is a high school graduate who has spent his entire career, beginning in 1986, in the produce business. He was initially involved as a 49% owner of Marketing when that company was established, and signed off on the Amended Operating Agreement that changed the organization of that company on July 28, 2002 and reduced his share of ownership to 20%, with the addition of John Norton to the ownership team. In joining with Marketing, and in the decision to form the three additional companies, Duncan relied heavily on the expertise and experience of Gary Tice. Both Petitioner and Mr. Tice portrayed Petitioner as somewhat naïve in the area of founding and managing a business. Petitioner testified that he signed whatever documents that Tice or Tice's attorney told him to sign, and that all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. He stated that he might have perused the amended agreement, but that he believed Tice and his attorney would not take advantage of him. Tr. 846-849. He was in his office most days, and basically managed the cruise business.

Under the new operating agreement, Duncan was appointed President of Consolidation, and a director, and was made 10% owner of the company. He testified that he never made any capital investment in Consolidation (or in Marketing), so that any documentation indicating that he had paid for his shares would be incorrect. He stated he would share in the profits once Consolidation became profitable. Tr. 865.

James Hinderer, a department head at Produce International who sold produce to Perfectly Fresh and dealt almost exclusively with Duncan, understood that Duncan was taking care of his own cruise accounts, and stated that Duncan had his own strong customer base. Hinderer also

speculated that his company quit selling to Perfectly Fresh relatively early, but that he thinks they still got paid in full because Duncan "took care of us." Tr. 801. He speculated that Duncan "exerted pressure somehow" to keep the payments coming. Tr. 802.

When Consolidation creditors began complaining about slow payments in December or January Petitioner Duncan would get the invoices and give them to Rovelo and tell him to take care of the customer. Tr. 890-892. Even though he knew the company was not making payments promptly he continued working on his sales. Tr. 893-894. He indicated that he did not decide which creditors should be paid, but he did go to Rovelo with individual invoices and ask him to take care of things. No evidence was introduced at to whether Rovelo did in fact pay the customers that Duncan requested.

I find that Jeffery Lon Duncan was actively involved in matters resulting in violations of the Act. While he clearly was not principal decision maker for Consolidation, his participation in the day-to-day management of Consolidation, particularly including continuing to order produce after he knew Consolidation's creditors were not getting paid either fully or promptly, is sufficient to constitute active involvement. In *In re: Michael Norinsberg*, 58 Agric. Dec. 604, 608-609 (1999), the Judicial Officer held:

> 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.

In particular, the buying and selling of produce at a time when creditors were not getting paid pursuant to the requirements of the Act has been held to constitute involvement in matters resulting in a

violation of the Act. *In re: Janet S. Orloff, et al*., 62 Agric. Dec. 281 (2003). That Duncan had employees working under his direction who continued to carry on the business of ordering produce for Consolidation during this period, as evidenced by Consolidation's own invoice/voucher system and the filings in bankruptcy court, is further evidence of his participation in activities resulting in a violation of the Act. Basically, each of the unpaid obligations listed in Consolidation's own records and in their bankruptcy filing constituted a debt incurred when Duncan was managing the sales operations of Consolidation. In this position, Duncan inherently exercised "judgment, discretion, or control" as those terms are used in *Norinsberg*. This is more than enough to constitute active involvement under the Act.

Even if Petitioner Duncan were to be found not actively involved in the matters that constituted violations of the Act, he failed to meet his burden of proving that he was only a nominal President, director and 10% owner of Consolidation. Respondent, whose entire 15 year career (as of the time Marketing was formed) was in the produce industry, voluntarily entered a business relationship with Gary Tice, an experienced businessman with expertise in the produce business, and elected to rely substantially on Tice's judgment and expertise. Duncan was hardly a novice in the business, and although much has been made of Tice's dominance in decision making matters, I find that Petitioner Duncan was not in the position of someone who is given a title with no expectation of working in the business. Someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business may be found to be nominal. *Minotto v. USDA,* 711 F. 2d 406, 409 (D.C. Cir. 1983). However, Petitioner Duncan was an experienced operator who entered partnership with Tice in order to earn more money when the business became profitable.

While originally a 49% owner of Marketing, Petitioner Duncan acquiesced in amending the operating agreement after Tice enlisted Norton's financial support to set up and fund the three new entities. As a result of the amended operating agreement, Duncan's share of Marketing was reduced to 20%, plus he was made President of Consolidation with a 10% ownership stake. That he elected to rely

totally on the representations of Tice and the attorney who drafted the amended agreement, only electing to peruse it rather than to fully inform himself of his potential rights and obligations, indicates that perhaps he was too trusting and naïve, but does not reflect on whether his ownership was nominal. Clearly, he could have objected to the new arrangement, or opted out of it, or at least attempted to have some say in the matter, particularly with respect to Consolidation where he was effectively a 28% owner. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re: Joseph T. Kocot*, 57 Agric. Dec. 1544, 1545 (1998) and cases cited thereunder. Here, Petitioner knew he was a 28% stockholder in Consolidation, through his 10% direct ownership and his 20% ownership of Marketing, which in turn owned 90% of Consolidation. That he chose not to exercise the authority inherent in his three positions of President, director, and shareholder does not relieve him of the duty to do so, and does not sustain his claim that his position was nominal. He was no mere figurehead, but in fact ran the cruise business that Consolidation was set up to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before during the violative period, he did not handle the check-writing duties[12].

C. **Petitioner Jeffrey Lon Duncan was not responsibly connected to Perfectly Fresh Specialties.** Unlike with Consolidation, where Duncan basically ran the day-to-day operations of the cruise supply business, Respondent Duncan had no apparent day-to-day involvement in Specialties. Specialties was considered the business of Erin Tice, who left her prior position with Ready-Pac to engage in a similar business running Specialties. Duncan had no direct ownership in Specialties, and owned 18% of Specialties indirectly through his 20% ownership in Marketing which owned 90% of Specialties. While he is listed as the Chief Financial Officer and a Director on the PACA application, it is undisputed that Jaime Rovelo acted as Chief Financial

[12] He did not, contrary to the suggestion of Complainant, attend any meetings as a director.

Officer during the periods when the violation was taking place, and that no board of directors meetings of Specialties ever occurred. There is no evidence that Duncan was even aware he was a director or the CFO of Specialties and, other than his indirect 18% ownership of the company, he appears to be truly a nominal owner as that term has been recognized in PACA decisions.

There is no evidence that Duncan ordered any produce on behalf of Specialties, and the record is overwhelmingly clear that he had no expertise in this specialized aspect of the produce business. Unlike the business of supplying cruise ships, where Duncan was unquestionably the expert and manager of the business, and where Duncan or those under his direction continued to order produce well after it was known to them that produce suppliers were not being paid fully and promptly, Specialties presents a situation where Duncan had no control over pertinent events. The employees at Specialties were all brought over by Erin Tice and had no demonstrable connection whatsoever with Duncan.

While Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice's Reddy Pack employees were coming over to Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Norton wielded the majority vote of Marketing, and that he had no knowledge or planned role in the business. Basically, the fact that Duncan was only an indirect shareholder in Specialties, coupled with the fact that he never acted as, nor was aware of, his listed titles as CFO and director of Specialties, and the fact that he had absolutely no discernible role in the operation of that business supports a finding that he was only a nominal director, shareholder and officer in that company.

D. **Thomas Bennett was Responsibly Connected to Perfectly Fresh Farms**. Petitioner Bennett, who was a 10% shareholder, President and a director of Perfectly Fresh Farms, has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies

with Mr. Bennett.

Petitioner Bennett had been in the produce industry for 42 years at the time of the hearing. He had built and sold a restaurant chain, had been a produce buyer for 11 years at Cisco, and then ran Francisco distributing for 11 years. He had known Gary Tice on a professional level. Tice (actually Perfectly Fresh Marketing) was leasing space from Francisco when Bennett was told that Francisco was closing down; Bennett told Tice that the whole building would be available, and Tice offered a position to him and some of the sales force that he had managed at Francisco. He was offered the position of President of Perfectly Fresh Farms, along with a 10% ownership share in the new company. He never actually put up any money nor did he ever see any physical manifestation of the shares he owned. He did sign a number of corporate documents when Farms started up, basically signing whatever documents Tice and Tice's attorney told him to sign. He signed a card authorizing him to sign checks, although he had no recollection of that fact and there is no evidence that he ever signed a check.

While he classified his work at Farms as "kind of a glorified babysitting job," Tr. 1041, it is evident that he had a major role in the day-to-day business of Farms. He came in most mornings at 5 and checked the markets, mostly with regard to citrus, Hawaiian papayas and chilies. He stated that he was given the title of President to give him the apparent authority to call higher officials of potential clients. He did not generally contact clients, but the sales staff who worked for him did. When he realized that Farms had excess storage space, he started an outside storage business on behalf of Farms on his own, and spent more time working on that then on Farms' produce business. Tr. 1041-1042. He stated that he first heard about slow payments from his salesmen in December, and that he would go to Tice or Rovelo who told him not to worry. He testified that he probably could have found out more about the financial condition of Farms and the other companies had he asked. Tr. 1049-1050. David Hewitt, one of Farms former employees, confirmed that Bennett hired him (he was one of the Francisco employees that Bennett brought over) and was his manager, and oversaw the operations of Farms, although he also stated that Bennett apparently reported to others. Tr. 604-607, 612.

I find that Thomas Bennett was actively involved in matters resulting in violations of the Act. As the President of Farms, he managed the significant aspects of the business, as well as the outside storage business which he apparently pursued on his own initiative. While some of the transactions that resulted in failure to pay occurred after his apparent resignation,[13] a significant number of these purchases were made while he was serving as President of Farms. Like Petitioner Duncan, he allowed his employees to continue ordering produce even after he became aware that his customers were getting paid slowly, if at all. This, in itself, would constitute active involvement.

Even if Petitioner Bennett could be found not to be actively involved in matters resulting in violations of the Act, he would only avoid responsibly connected status if his positions as President, director and 10% shareholder in Farms were nominal. I find that his positions as President and 10% shareholder were not nominal as that term is used and interpreted in the PACA case law; I make no ruling on his position as director since it is not clear whether he even knew he was a director and there were no meetings of the board of directors while he was affiliated with Farms.

With his lifetime of experience in the produce business, Bennett was a knowledgeable and seasoned veteran, who should have understood the obligations that the PACA imposes upon a significant shareholder and officer in a produce company. Like, Duncan, he was hardly the type of unknowledgeable, powerless individual the court was contemplating in the *Minotto* decision. In fact, he alerted Tice that the building that Marketing was leasing some office space in was going to be vacated by Francisco, his then current employer. As a result of ensuing discussions with Tice, Bennett ended up as the President and 10% shareholder in Farms, and found immediate employment for many of the people who worked for him at Francisco, who would otherwise be terminated when that operation ceased. Such was the extent of his participation in the operation of Farms that, on his own, he sub-leased space on behalf of Farms to other produce businesses that were looking for storage space. This action in itself belies that he was acting in a nominal capacity for

[13] He stated he resigned in early January 2003 but there is no evidence supporting a specific date.

Farms.[14] In addition, as a 10% shareholder, he was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Petitioner Bennett played a lesser overall role with respect to Farms than Petitioner Duncan did with respect to both Consolidation and Marketing/Florals and that both Petitioners were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Petitioner was able to demonstrate that they were not actively involved in the violative matters. And neither Petitioner was able to demonstrate that their roles as President and 10% shareholder (more, in Duncan's case) were nominal.

Findings of Fact

1. Perfectly Fresh Marketing, LLC (Marketing) was a California corporation established in June 2001 to engage in the produce business. Initially, 51% of the company was owned by Tice, Inc (which was owned by Gary and Erin Tice), and 49% was owned by Petitioner Jeffery Lon Duncan.

2. In July 2002, the operating agreement of Perfectly Fresh Marketing was amended so that 50% of the company was owned by Perfectly Fresh, LLC, a holding company controlled by John Norton, 30% was owned by Tice, Inc. and 20% was owned by Jeffery Lon Duncan. Gary Tice, John Norton and Jeffery Lon Duncan each signed the amended agreement on July 18, 2002.

3. Respondent Perfectly Fresh Farms, Inc. (Farms), a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Thomas Bennett, was the holder of PACA license 20021541 from August 2002 until the license expired on August 21, 2003.

4. Between October 27, 2002 and February 21, 2003, Farms failed to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $442,023.12.

5. Respondent Perfectly Fresh Consolidation, Inc. (Consolidation),

[14] In some areas, Bennett did not have much leverage, as when he tried to convince Tice to cease Farms' relationship with Hawaii Pride.

a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Jeffery Lon Duncan, was holder of PACA license 20021540 from August 2002 until the license expired on August 21, 2003.

6. Between November 17, 2002 and February 15, 2003, Consolidation failed to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $373,944.19.

7. Respondent Perfectly Fresh Specialties, Inc. (Specialties), a California corporation 90% owned by Perfectly Fresh Marketing (and whose PACA license did not account for the remaining 10% ownership) was holder of PACA license 20021539 from August 2002 until the license expired on August 21, 2003.

8. Between November 1, 2002 and February 20, 2003, Specialties failed to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $263, 801.40.

9. Thomas Bennett was President and a 10% shareholder in Farms during much of the time period when Farms' was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing he had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Farms throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10. Petitioner Jeffery Lon Duncan was President and a 10% shareholder in Consolidation from the time the company was created through the time it filed for bankruptcy. He was also an owner of an additional 18% of Consolidation through his 20% ownership in Perfectly Fresh Marketing, LLC. As of the date of the hearing he had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Consolidation throughout the period of its existence, signing numerous corporate documents, including the Amended Operating Agreement, occasionally signing checks, and was involved in decisions consistent with a position of

responsibility.

11. Petitioner Jeffery Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc. during the time that entity committed violations of the PACA. Even though the PACA license application listed him as CFO and a director of Specialties, his role with that company, if any, was purely nominal.

Conclusions of Law

1. Respondent Perfectly Fresh Farms, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities in the amount of $442,023.12 between October 2002 and February 2003.

2. The appropriate sanction for Perfectly Fresh Farms, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Respondent Perfectly Fresh Consolidation, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities in the amount of $373,944.19 between November 2002 and February 2003.

4. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

5. Respondent Perfectly Fresh Specialties, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of $263,801.40 between November 2002 and February 2003.

6. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

7. Petitioner Jaime Rovelo was responsibly connected to Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc., during the time those three entities committed violations of the PACA. As such, he is subject to the licensing and

employment restrictions of the PACA.

6. Petitioner Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc., during the time Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

7. Petitioner Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., during the time Consolidation committed violations of the PACA. As such he is subject to the licensing and employment restrictions of the PACA.

8. Petitioner Jeffery Lon Duncan was not responsibly connected to Perfectly Fresh Specialties, Inc., during the time Specialties committed violations of the PACA.

Order

The facts and circumstances of the violations committed by Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc. shall be published. Jaime Rovelo, Thomas Bennett and Jeffery Lon Duncan are each found to be responsibly connected to one or more Perfectly Fresh Respondents and are subject to the employment restrictions imposed by the Act.

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

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

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In re: TUSCANY FARMS, INC., d/b/a GENOVAS.
PACA Docket No. D-04-0015.
In re: JOE GENOVA & ASSOCIATES, INC.
PACA Docket No. D-04-0016.
In re: GENCON CONSULTING, INC.
PACA Docket No. D-06-0017.
In re: JOE A. GENOVA.
PACA-APP Docket No. 06-0005.
In re: NICOLE WESNER.
PACA-APP Docket No. 06-0006.
Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova.
Decision and Order.
Filed October 15, 2008.

PACA – PACA-APP – Willful, flagrant, and repeated violations – Facts and circumstances published – Responsibly connected – Licensing restrictions – Employment restrictions – Preponderance of evidence – Failing to make full payment promptly.

Eric Paul and Jonathan Gordy, for Associate Deputy Administrator and Acting Chief, AMS.
Douglas B. Kerr and Jonathan Barry Sexton for Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova.
Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO TUSCANY FARMS, INC.; JOE GENOVA & ASSOCIATES, INC.; AND JOE A. GENOVA

On June 2, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], issued a Complaint against Tuscany Farms, Inc., d/b/a Genovas [hereinafter Tuscany Farms], alleging that, during the period August 2002 through November 2002, Tuscany Farms committed willful violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly to three sellers of the agreed purchase

prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities, which Tuscany Farms purchased, received, and accepted in interstate commerce. Tuscany Farms filed an Answer denying the alleged violations.

On June 3, 2004, the Associate Deputy Administrator issued a Complaint against Joe Genova & Associates, Inc. [hereinafter Joe Genova & Associates], alleging that, during the period February 2002 through November 2002, Joe Genova & Associates committed willful violations of the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. Joe Genova & Associates filed an Answer denying the alleged violations.

On January 12, 2006, Karla D. Whalen, Acting Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, United States Department of Agriculture [hereinafter the Acting Chief], informed Douglas B. Kerr, counsel to Nicole Wesner, that she had determined that Ms. Wesner was responsibly connected with Tuscany Farms during the period when Tuscany Farms violated the PACA. On that same day, the Acting Chief issued a similar determination with respect to Joe A. Genova. Both Ms. Wesner and Mr. Genova filed timely Petitions to review the Acting Chief's January 12, 2006, determinations.

Also, on January 12, 2006, counsel for the Associate Deputy Administrator and the Acting Chief moved to set the matters for a consolidated hearing. On April 11, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] consolidated the two disciplinary proceedings with the two responsibly connected proceedings, as required under the rules of practice applicable to the proceedings.[1]

On July 13, 2006, the Associate Deputy Administrator issued a

[1]The rules of practice applicable to these proceedings are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Chief ALJ consolidated the two disciplinary proceedings with the two responsibly connected proceedings in accordance with 7 C.F.R. § 1.137(b).

Notice to Show Cause to Gencon Consulting, Inc. [hereinafter Gencon], providing Gencon with an opportunity to show cause why it should not be denied a license under the PACA. The Notice to Show Cause alleged that Joe Genova, Jr., the principal of Gencon, was the same individual who was a 100 percent owner of Joe Genova & Associates at the time Joe Genova & Associates violated the PACA and was the secretary, the treasurer, a director, and a 24 percent shareholder of Tuscany Farms at the time Tuscany Farms violated the PACA. Gencon filed a timely response. While the PACA provides that the license applicant shall be given an opportunity for hearing within 60 days from the date of the license application to show cause why the license should not be refused,[2] the parties agreed to consolidate the Gencon hearing with the other four consolidated cases.

The Chief ALJ conducted a hearing on the five consolidated cases in Santa Ana, California, from September 12-15, 2006. Eric Paul and Jonathan Gordy represented the Associate Deputy Administrator and the Acting Chief. Douglas B. Kerr and Jonathan Barry Sexton represented Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova. The Associate Deputy Administrator and the Acting Chief called seven witnesses. These witnesses were David Studer, the lead Agricultural Marketing Service investigator, and six industry witnesses who testified they had engaged in transactions covered by the PACA with Tuscany Farms and Joe Genova & Associates without receiving full payment promptly. Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova called three witnesses, including Joe A. Genova. The Associate Deputy Administrator and the Acting Chief then called John Koller as a witness concerning what sanctions would be appropriate.

During the hearing, counsel for Nicole Wesner stipulated that she was responsibly connected with Tuscany Farms. (Tr. 689.)

On August 24, 2007, the Chief ALJ issued a Decision addressing the five consolidated cases. In the Decision, the Chief ALJ concluded: (1) Tuscany Farms and Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly for produce it purchased; (2) Nicole Wesner and Joe A.

[2]7 U.S.C. § 499d(d).

Genova were responsibly connected with Tuscany Farms during the time Tuscany Farms violated the PACA; and (3) Gencon failed to show cause why the Secretary of Agriculture should not refuse Gencon a PACA license. On October 26, 2007, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova filed a timely appeal of the Chief ALJ's Decision.[3]

I have carefully reviewed the Chief ALJ's Decision and the filings submitted by all parties. I have read the transcript of all four days of the hearing and examined each document placed into evidence. Based on my review of the record, I find the Chief ALJ's Decision is supported by the evidence and well reasoned. Therefore, I adopt the Chief ALJ's Decision as my own decision in its entirety. I write to address the issues raised on appeal.

APPEAL ISSUES

In their Appeal Petition, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova raise two issues. First, they argue that no credible evidence was presented to show that Tuscany Farms and Joe Genova & Associates violated the PACA. (Appeal Pet. at 2.) I find this argument without merit. Tuscany Farms and Joe Genova & Associates correctly note that the Associate Deputy Administrator must prove the allegations that Tuscany Farms and Joe Genova & Associates violated the PACA by a "preponderance of the evidence" standard. (Appeal Pet. at 2.)

> **Preponderance of Evidence**. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not. [Citation omitted.] With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.

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[3]Neither Nicole Wesner nor Gencon appealed the Chief ALJ's Decision. Therefore, the Decision of the Chief ALJ, regarding Ms. Wesner and Gencon, is final.

Black's Law Dictionary 1064 (5th ed. 1979). To apply this standard, I balance the weight of the evidence entered into the record by the Associate Deputy Administrator with the weight of the evidence entered by Tuscany Farms and Joe Genova & Associates.

The Associate Deputy Administrator entered evidence into the record demonstrating that Tuscany Farms and Joe Genova & Associates owed significant debt to produce suppliers. This evidence included:

> A list, provided by counsel for Tuscany Farms and Joe Genova & Associates, that identified all of Tuscany Farms' and Joe Genova & Associates' vendors, including the amount of money owed to these vendors by Tuscany Farms and Joe Genova & Associates. (CX 7.)
>
> The accounts payable printout for Tuscany Farms and Joe Genova & Associates. (CX 8-CX 9.)
>
> Copies of invoices and other documents evidencing transactions in produce between Tuscany Farms and three different vendors and between Joe Genova & Associates and nine different vendors. (CX 10-CX 21.)
>
> The testimony of six representatives of produce companies owed money by Tuscany Farms and Joe Genova & Associates. (Tr. 133-250, 307-69, 457-531, 691-721.)

Tuscany Farms and Joe Genova & Associates called two witnesses to testify regarding accounts payable for Tuscany Farms and Joe Genova & Associates. First, Salvatore Mangano, the comptroller at Joe Genova & Associates, testified that, due to a failure in the software program designed to track the finances of Tuscany Farms and Joe Genova & Associates, including the payables and receivable, huge numbers of exception reports[4] were generated that indicated that Tuscany Farms and Joe Genova & Associates owed far less money than alleged.

[4]The exception reports are documents that would list purported adjustments to invoices.

(Tr. 614-15.) However, no such exception reports were provided to the Agricultural Marketing Service investigator. (Tr. 907.) Furthermore, during the hearing, no exception reports or any other documents supporting Mr. Mangano's claim that the amounts owed by Tuscany Farms and Joe Genova & Associates were lower than the amounts shown in invoices and accounts payable statements were offered into evidence by Tuscany Farms or Joe Genova & Associates.

Second, Paul Roper, a business consultant "retained to create reliable data for the financial statements" (Tr. 724), stated that "the raw data from which the accounting firm was trying to prepare financial statements and balance the books was simply incomprehensible." (Tr. 725.) Mr. Roper discussed the existence of exception reports but found that "it wasn't a complete and accurate list." (Tr. 727.) Mr. Roper also indicated that he found the exception reports "unreliable." (Tr. 762-63.) Neither Mr. Mangano nor Mr. Roper testified that produce suppliers were not owed money by Tuscany Farms and Joe Genova & Associates.

Tuscany Farms and Joe Genova & Associates raise three points in arguing their appeal. First, they state that Tuscany Farms and Joe Genova & Associates "had ceased operations before the Government's investigation." (Appeal Pet. at 2.) The cessation of the operation of the two companies before the Agricultural Marketing Service commenced its investigation into the failure of the companies to make full payment promptly for produce, is not relevant to the decision whether the companies violated the PACA. Cessation of operations does not exempt a company from the statutory requirements of the PACA. Furthermore, Tuscany Farms and Joe Genova & Associates' contention that, prior to shutting down, the companies "reached accord and satisfactions on each and every debt" (Appeal Pet. at 3) offers them no solace.[5] An accord is:

> An agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing is entitled to accept.

[5]Tuscany Farms and Joe Genova & Associates' claim that there were "genuine disputes due to discrepancies" in documentation is belied by testimony from their vendors. *See, e.g.*, testimony of Lawrence Heidecker (Tr. 475).

Black's Law Dictionary 16 (5th ed. 1979). I have long held, even though the creditor is willing to accept less than owed from a debtor, such an agreement does not meet the requirements of full payment promptly under the PACA. *See In re Kanowitz Fruit and Produce Co.*, 56 Agric. Dec. 917, 928 n.7 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999).)

Tuscany Farms and Joe Genova & Associates' second point is that "Government witness testimony was unreliable." (Appeal Pet. at 4.) I read the entire hearing transcript and examined each document in relation to the testimony concerning that document. The testimony of Tuscany Farms and Joe Genova & Associates' witnesses, Mr. Mangano and Mr. Roper, showed a dysfunctional, poorly run company. I found the testimony of Joe A. Genova to be very evasive and unreliable. Based on my review of the transcript and exhibits, I find the testimony of the government witnesses to be reliable. Therefore, I relied on the testimony of the government witnesses significantly more than Tuscany Farms and Joe Genova & Associates' witnesses.

Tuscany Farms and Joe Genova & Associates' final point was that "[t]he evidence collected by the Government was incomplete." (Appeal Pet. at 7.) The Agricultural Marketing Service could only collect documents to which it was given access. Tuscany Farms and Joe Genova & Associates are more likely to have documents to support their position than the government. The Associate Deputy Administrator presented his case using invoices and testimony of creditors to make a prima facie case. Tuscany Farms and Joe Genova & Associates then had the opportunity to rebut the prima facie case with their own evidence. Here the rebuttal evidence could have been the exception reports mentioned above, credit memoranda, or any other evidence demonstrating Tuscany Farms and Joe Genova & Associates owed no money to their produce suppliers. Tuscany Farms and Joe Genova & Associates failed to present any such evidence.

Balancing the evidence in the record, both testimony and documents, and taking into account the claims that some evidence was not accurate, the weight of the evidence causes me conclude that it is more probable than not that Tuscany Farms and Joe Genova & Associates failed to make full payment promptly to companies that sold them perishable

agricultural commodities. Therefore, I conclude that Tuscany Farms and Joe Genova & Associates each violated the PACA.

I deny the appeal, and I find that, during the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. I further find that, during the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce.

The second issue raised on appeal is whether Joe A. Genova was responsibly connected with Tuscany Farms during the time when Tuscany Farms committed willful, flagrant, and repeated violations of the PACA. The Chief ALJ found that Mr. Genova was responsibly connected and I agree. Mr. Genova's arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I stated above, I adopt the Chief ALJ's well-reasoned decision as my own. However, I take a moment to discuss the concept of responsibly connected and the standard applied for making the determination whether an individual is responsibly connected with a company that violated the PACA.

The PACA imposes licensing and employment restrictions on any person found to be responsibly connected with a licensee who violated the PACA. (7 U.S.C. §§ 499d(b), 499h(b).) "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." (7 U.S.C. § 499a(b)(9).)

In 1995, Congress amended the definition of "responsibly connected." (Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected the

opportunity to demonstrate that he is "not responsible" for the violation of the PACA. (H. R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.)

> 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 reviewed my first application of the revised definition. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), *final decision on remand*, 58 Agric. Dec. 604 (1999). The Court articulated the test for determining if an individual is responsibly connected. First, the United States Department of Agriculture makes an initial determination whether the individual is "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).) The evidence in the record amply supports a finding that Mr. Genova was an officer and holder of 24 percent of the outstanding stock of Tuscany Farms.

Next, the Court held, if the individual fits the statutory 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 a violation of the PACA and that the individual was a nominal officer, nominal director, and nominal shareholder of the violating company. In the alternative to proving that the individual was only a nominal officer, nominal director, and nominal shareholder of the violating company, 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.

In the *Norinsberg* remand decision, I presented 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. 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.

In re: Michael Norinsberg, 58 Agric. Dec. 604, 610-11 (1999).

Applying this standard to Joe A. Genova, he is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions, unless he demonstrates by a preponderance of the evidence that: (1) he was not actively involved in any of the activities resulting in Tuscany Farms' PACA violations; and (2) he was either a nominal shareholder and nominal officer of Tuscany Farms or he was not an owner of Tuscany Farms which was the alter ego of its owners.[6]

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. I only add that Mr. Genova's claims of ignorance of, and lack of involvement with, the operations of Tuscany Farms are significantly discounted because his testimony lacked credibility.

"In order to prove that one was only a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company[.]'" *Hart v. Department of Agric.*, 112 F.3d 1228,

[6]The two prongs of the test are joined by the conjunctive "and." If Joe A. Genova fails to show that he was not actively involved, he cannot meet his burden and he will be deemed responsibly connected. Equally so, if his ownership interest and his position as corporate officer are not nominal, even if he could prove that he was not actively involved, he would fail the statutory test and be deemed responsibly connected with Tuscany Farms.

1231 (D.C. Cir. 1997), quoting *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983). It is important to note that under the PACA, no court has found an individual who owns more than 10 percent of a violating company to be a "nominal" shareholder. In fact, the United States Court of Appeals for the District of Columbia Circuit noted that for such substantial shareholders, "the likelihood of their being found 'nominal' was remote." *Bell v. Department of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994). I agree with the United States Court of Appeals for the District of Columbia Circuit and hold that under the PACA, absent rare and extraordinary circumstances, ownership of more than 10 percent of the outstanding shares of a licensed entity preclude a finding that the holder of that substantial of an interest in the PACA licensee is a nominal shareholder.

Joe A. Genova owned 24 percent of Tuscany Farms.[7] There is no dispute about that. Therefore, as the owner of more than 10 percent of the outstanding stock of Tuscany Farms, a company that willfully, flagrantly, and repeatedly violated the PACA, Joe A. Genova is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions under the PACA.

CONCLUSIONS

1. During the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. The appropriate sanction for Tuscany Farms, since it is no longer in business, is publication of the facts and circumstances of its violations.

2. During the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the

[7]This ownership interest bars Mr. Genova from utilizing the "alter ego" defense. I have consistently held that the "alter ego" defense is not available to individuals who have an ownership interest in the violating company. *See In re: Benjamin Sudano and Brian Sudano*, 63 Agric. Dec 388, 411 n.5 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005).

PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. The appropriate sanction for Joe Genova & Associates, since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

ORDER

1. Tuscany Farms 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 the violations committed by Tuscany Farms shall be published, effective 60 days after service of this Order on Tuscany Farms.

2. Joe Genova & Associates 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 the violations committed by Joe Genova & Associates shall be published, effective 60 days after service of this Order on Joe Genova & Associates.

3. I affirm the Acting Chief's January 12, 2006, determination that Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Joe A. Genova 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 Joe A. Genova.

RIGHT TO JUDICIAL REVIEW

Tuscany Farms, Joe Genova & Associates, and Joe A. Genova have

the right to seek judicial review of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Tuscany Farms, Joe Genova & Associates, and Joe A. Genova must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova.[8] The date of entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova is October 15, 2008.

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[8]28 U.S.C. § 2344.

PERISHABLE AGRICULTURE COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

EVANS SALES, INC. D/B/A HORIZON MARKETING, INC. v. WEST COAST DISTRIBUTING, INC.
PACA R-04-070.
Decision and Order.
Filed June 3, 2008.

Proof, Burden of
Complainant, who submitted invoices for grapes from Complainant to Respondent, corresponding bills of lading, and corresponding work orders for 30 grape transactions occurring between August 20, 2002 and November 26, 2002, as *prima facie* evidence of a sale between Complainant and Respondent as to the 30 grape transactions, failed to rebut evidence from Respondent that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full. Accordingly, Complainant did not meet its burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract.

Proof, Burden of-
Respondent, who provided evidence from the informal and formal stages of the proceeding that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full, met its burden of establishing through a preponderance of the evidence an affirmative defense to Complainant's claims that it was owed money from Respondent for the 30 transactions.

Evidence-
Invoices, in and of themselves, are not conclusive evidence of existence of a contract or sale, particularly where Respondent has provided evidence that no sale existed, and Complainant has failed to rebut Respondent's evidence.

Evidence-
Where Respondent failed to object to invoices sent by Complainant and received in the normal course of business, Respondent provided a credible explanation for its lack of

objection and provided evidence that the sale did not take place, the failure of Respondent to object to the invoices did not create a sale between Complainant and Respondent.

Fees, Attorney's-
Where Respondent's attorney made a claim for fees and expenses relating to travel to the hearing in California from New Jersey, the state where the attorney's office is located, and back, fees for time spent on travel were disallowed.

Fees, Attorney's- Where Respondent's attorney made a claim for fees and expenses relating to travel within the state of California during the hearing for the purpose of interviewing witnesses scheduled to testify at hearing the following day, fees for time spent on travel were disallowed.

Fees, Attorney's-
Where Respondent's attorney made a claim for fees and expenses relating to time spent preparing a post trial brief, fees for time spent in preparation of the brief were disallowed as they were not in connection with the oral hearing, and would have been incurred had the case been decided by documentary procedure.

Fees, Attorney's-
Fees and expenses of Respondent's non-attorney representative who appeared as a voluntary witness at hearing were reasonable and allowed.

Fees, Attorney's-
Fees and expenses of an attorney who appeared voluntarily as a personal attorney of certain of Respondent's witnesses, and who served no real purpose at hearing other than to protect the personal interests of his clients, were not reasonable, and therefore disallowed.

SYLLABUS:

Complainant provided at hearing, as evidence of a sale by Complainant to Respondent, invoices for grapes from Complainant to Respondent, corresponding bills of lading, and corresponding work orders for 30 grape transactions occurring between August 20, 2002 and November 26, 2002. Complainant argued that this was *prima facie* evidence of a sale between Complainant and Respondent as to the 30 grape transactions, and *prima facie* evidence that Respondent owed Complainant for the 30 transactions. Respondent argued, *inter alia*, that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full. Based on the aggregate of evidence in the case, including evidence from the informal and formal stages of the proceeding, and the testimony of all witnesses who testified at hearing, Complainant failed to meet the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a

contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. Respondent met its burden to prove its claim that payment in full for the grape transactions identified in the Complaint was made to the grower and owner of the grapes. Attorney's fees and expenses were awarded to Respondent as the prevailing party to the extent that they were reasonable.

Christopher Young-Morales, Presiding Officer
Complainant, *Thomas R. Oliveri*
Respondent, *Mark C.H. Mandell*
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. ¶ 499a et seq.) (hereinafter, "PACA"). A timely Complaint was filed with the Department on January 19, 2004, in which Complainant sought a reparation award against Respondent in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments[1] of grapes sold to Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability and requesting an oral hearing.

An oral hearing was held in Bakersfield, California, on February 23-25, 2007. At the hearing, Complainant was represented by Thomas R. Oliveri, of the Western Growers Association in Irvine, California. Respondent was represented by Mark C.H. Mandell, Esq., of the law office of Mark C.H. Mandell in Annandale, New Jersey. Christopher Young-Morales, Esq., Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. Complainant submitted thirty-two exhibits into evidence, CX 1,a,b through CX 30,a,b and CX

[1] We note that the Formal Complaint references 31 shipments of grapes; however, this is an error. Complainant tallied up the shipments incorrectly when it attached its exhibits to the Complaint. The correct number of shipments is 30.

31. Respondent submitted twelve exhibits into evidence, RX A-L. Additional evidence is contained in the Department's Report of Investigation (hereinafter, "ROI").

At the hearing, two witnesses testified for Complainant and six witnesses testified for Respondent. A transcript of the hearing was prepared (hereinafter, "Tr."). The parties filed post-hearing briefs and responses to the briefs. The parties also filed claims for fees and expenses, and objections to the claims.

Findings of Fact

1. Complainant, Evans Sales, Inc., d/b/a Horizon Marketing Corporation (hereinafter "Horizon"), is a corporation whose business mailing address is or was P.O. Box 2738, Visalia, California 93279. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.[2] (*See* Complaint).

2. Respondent, West Coast Distributing, Inc. (hereinafter "West Coast"), is a corporation whose business address is 350 Main Street and whose business mailing address is P.O. Box 847974, Boston, Massachusetts 02284-7974.[3] At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA. (Tr. II, p. 376; *See* Answer, CX 1-30).

3. Horizon created invoices, dated between August 17, 2002, and November 23, 2002, reflecting the sale of numerous lots of various types of grapes to West Coast. Each invoice states that the various lots of grapes were shipped from Terra Bella, California, to various destinations on an FOB basis. (CX 1-30). Horizon Marketing owned and ran a cold

[2] Norm Evans signed the Formal Complaint as an owner of Complainant; however, he was not listed on the 2002 PACA license. The PACA license for the year 2002 indicates that Sara Evans and June Anderson are owners and officers of Complainant. (Tr I, p.113). Testimony at hearing indicated that Sara Evans was president of Horizon Marketing in name only, and that she had no knowledge of Horizon's business. For all practical purposes, Norm Evans ran Horizon. (Tr. II, p. 318, 320).

[3] West Coast also has an office in Bakersfield, California, that dealt with Horizon. (Tr. I, p. 72; Tr. II, p. 360, 376).

storage facility in Terra Bella. (Tr. II, p. 582).

4. Each Horizon invoice has an accompanying bill of lading. The "letterhead" of Marroking Sales, 17802 Ave 56, Earlimart, California, appears at the top of each bill of lading. The bills of lading list Horizon as the grower and West Coast as the buyer. Each bill of lading contains a description of the grapes being shipped, and next to each description there appears the notation "AMC". (CX 1a- 30a).

5. During the period indicated by the dates shown on the invoices and bills of lading in CX 1 through CX 30, between August 2002 and November 2002, Amanda Marroquin was the sole owner of AMC Produce sales, located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431, 505).

6. During the period indicated by the dates listed on the invoices and bills of lading, *i.e.,* between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales, located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431).

7. The grapes covered in the agreement between Amanda Marroquin and West Coast were to be grown exclusively on a ranch owned by Lawrence Chroman, called the "Chroman" or "Sunrise" ranch. (Tr. II, p. 229-231, Tr. II, p. 505-509, 522-3; RX A, RX C).

8. During the period indicated by the dates listed on the invoices and bills of lading, i.e., between August 2002 and November 2002, Gilbert Marroquin, Amanda Marroquin's father, was a grower of grapes who owned two grape ranches, "Globe King" and "El Shaddai". (Tr. II, p. 435, 571-72).

9. Gilbert Marroquin also owned and ran the Marroking Sales cold storage facility, the "cooler", in Earlimart, CA, where grapes harvested from "Globe King", "El Shaddai", and "Sunshine Ranch" were stored and packed for sale and distribution. (Tr. II, p. 511, 515). All "AMC" grapes went exclusively through the Marroking Sales cooler in Earlimart. (Tr. I, p. 94-98, 186-7, Tr. II, p. 511-517, 574; CX1a-30a).

10. Horizon was involved in running the Marroking Sales Cooler in Earlimart. (Tr. II, p. 464, 466, 511-515, 589, Tr. III, p. 715; CX1a,b-

CX30a,b).

11. All of the subject transactions listed in the Complaint (CX1-30) were processed through the Marroking Cooler in Earlimart. (Tr. I, p. 65).

12. Gilbert Marroquin filed for Chapter 11 Bankruptcy on November 20, 2000. On March 7, 2002, the United States Bankruptcy Court for the Eastern District of California, Fresno Division, issued an Order whereby Gilbert Marroquin was authorized to borrow up to $350,000.00 from Horizon, "which loan shall be secured by a crop lien on the 2002 crop to be grown on the real property" owned by Gilbert Marroquin. This real property consisted of the "Globe King" and "El Shaddai" grape ranches owned by Gilbert Marroquin, and the crop lien was for crops grown exclusively on those ranches. (RX-H1).

13. Based on the Order issued by the Bankruptcy Court, Horizon loaned Gilbert Marroquin $350,000 for a "crop loan". Horizon also made an agreement to "purchase" grapes in 2002 grown by Gilbert Marroquin, on his ranches, for a total price of $1,009,281.13.[4] (RX H1). This agreement was made between Horizon and Gilbert Marroquin, and provided that Horizon would deduct from the purchase price "cultural advances" made to Gilbert Marroquin by Horizon. (RX H1).

14. At the time that the crop loan and agreement to purchase was made, Horizon and Gilbert Marroquin entered into a Marketing Agreement, whereby the parties agreed that Horizon would market and ship all of Gilbert Marroquin's grapes delivered to the Marroking Sales cold storage facility during the 2002 season. (Tr. I, p. 88, 123-4, 141, 186, Tr. II, p. 590; RX H3).

15. On February 12, 2003, a Motion for Payment of Administrative Claims was made by Horizon in the bankruptcy case for amounts unpaid by Gilbert Marroquin of the $350,000.00 crop loan and the $1,009,281.13 grape purchase. (Tr. I, p. 141-2, 186; RX H1). A Declaration in support of the administrative claim was made by June Anderson, Horizon's controller. (RX H2). An accounting for the

[4] This amount was later revised to $880,934.91, after adjustments were made for condition problems. (RX H2, p. 4).

$350,000.00 crop loan[5] and for the purchases pursuant to the purchasing agreement were included in support of the Declaration. The accounting sets forth all transactions associated with Horizons purchase of Gilbert Marroquin's 2002 grape crop. (Tr. I, p. 145-7, 164-8, 172; RX H2).

16. In 2003, Horizon settled all amounts owed to it by Gilbert Marroquin, and Norm Evans of Horizon signed a general release of any and all claims against Gilbert Marroquin. The release included any and all current and future claims against Amanda Marroquin/AMC Produce. This document was filed with the Bankruptcy Court. (Tr. I, p. 197, 200, Tr. II, 438-445; RX J).

17. During the period indicated by the dates listed on the invoices and bills of lading, i.e., between August 2002 and November 2002, no agreement for purchase of grapes existed between Horizon and Amanda Marroquin. (Tr. I, p. 89, 124).[6]

18. Although Horizon Marketing asserted that during the period indicated by the dates listed on the invoices and bills of lading, it only engaged in "f.o.b." and "delivered" sales transactions (Tr. I, p. 29; Report of Investigation (ROI) EX 13), several transactions that are the subject of this reparation are neither "f.o.b." nor "delivered"; specifically, nine out of the thirty subject transactions are price after sale transactions (PAS). (Tr.I, p. 91, 204, 210; CX18, 19, 20, 22, 23, 24, 28, 29, 30).

19. During the period indicated by the dates listed on the invoices and bills of lading, West Coast did business with Horizon, and purchased numerous loads of produce from Horizon (other than the loads that are the subject of this reparation), including at least two grape orders, and

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[5] We note that the accounting consisted of fifteen checks totaling $350,728.00 made payable to AMC Produce Sales, the company owned by Amanda Marroquin, and not to Gilbert Marroquin. (RX H2). No explanation of this discrepancy was specifically provided by Complainant; however, Norm Evans did testify that he believed Gilbert Marroquin owned or was involved in running AMC Produce Sales. (*See infra* at 8-9).

[6] There is evidence, however, that some form of agreement existed between Amanda Marroquin and Norm Evans/Horizon to operate the Marroking cooler owned by Gilbert Marroquin. (Tr. II, p. 464, 466, 511-515, 589; CX1a,b through CX30a,b).

West Coast paid in full for each of those loads. (Tr. I., p. 131-138, Tr. I, p. 215; RXG).

20. Norm Evans of Horizon called West Coast in early 2003 and complained that the invoices in CX 1-30 had not yet been paid. He was told by a representative of West Coast that they did not owe Horizon for the invoices because they had already paid the "grower", AMC Produce Sales, in full, for the invoices contained in CX 1-30. (Tr. I, p. 72-74, 214).

21. By checks dated May 23, 2002, July 2, 2002, and June 11, 2003, West Coast paid AMC Produce Sales $100,948.11 for purchases and cultural advances that were made or to be made pursuant to the Produce Distributing Agreement between Amanda Marroquin (AMC Produce Sales) and West Coast. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

Conclusions

Complainant alleges that Respondent is liable in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments of grapes sold to Respondent in the course of interstate commerce. Norm Evans of Complainant described the purchase process as to the 30 shipments during his testimony at hearing. Norm Evans was the head salesman at Horizon. (Tr. I, p. 18). Chris Tantau and Mike Crookshanks were also salesmen employed by Horizon. (Tr. I, p. 175-6, 179). According to Norm Evans, Mike Crookshanks[7] did "most" of the sales to West Coast during the dates indicated on the invoices for the 30 shipments, but during that period, all Horizon salesmen dealt with West Coast in some fashion. (Tr. I, p. 176, 180). Jeff Case of West Coast in Bakersfield, CA, did the majority of the purchasing between West Coast and Horizon. (Tr. I, p. 19-20).

Norm Evans stated at hearing that as to each of the thirty shipments, Jeff Case, or another representative from West Coast, would agree to an amount to be paid for each commodity based on discussions between the

[7] We note that while Norm Evans stated that Mike Crookshanks did most of the business with West Coast, Mr. Crookshanks did not appear as a witness at the hearing, and Mr. Evans claimed that for many of the transactions in CX 1- CX 30, Mr. Evans himself was the salesman.

representative from West Coast in Bakersfield and a salesman at Horizon in Visalia, CA. (Tr. I, p. 22, 23-24). The agreement for each transaction, according to Mr. Evans, was "f.o.b."[8]. (Tr. I, p. 21; CX-1-30; ROI, EX 13). Mr. Evans stated that the West Coast representative, for each transaction, would also agree by phone when the price of the commodity was agreed upon to a $1.85 charge for pre-cooling and palletization. (Tr. I, p. 21).

According to Mr. Evans, once the agreement was made by phone between Horizon and West Coast for an order, a work order would be generated by Horizon, which would be sent by fax to the Marroking Cooler in Earlimart, CA. The Marroking cooler would create a bill of lading and fill the order. The Marroking cooler would fax the bill of lading to Horizon as evidence that the order had been filled. Horizon would then forward the bill of lading to West Coast in Bakersfield to confirm that the shipment had been made and to confirm the price. (Tr. I, p. 23). The work order and bill of lading would then be given to Horizon's accounting department to generate an invoice. (Tr. I. p. 62). Mr. Evans stated that he invoiced West Coast for the 30 transactions in this case, because he was entitled to the proceeds from the grapes from the Marroking cooler. (Tr. I, p. 73-79, 87). Mr. Evans stated that he had an agreement with Gilbert Marroquin, whereby Mr. Evans/Horizon would loan Gilbert Marroquin money, and then Gilbert Marroquin would "pay down" the loan with advances of grapes. (Tr. I, p. 73-79). Mr. Evans stated that "AMC" Produce Sales was cc'd on each bill of lading, and that "Marroking", "AMC", and "Gilbert" appear written on the bills of lading because Mr. Evans believed that Gilbert owned both

[8] The regulations (7 C.F.R. § 46.43 (I)), in relevant part, 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...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". *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991). In this case, Norm Evans stated at hearing that West Coast would arrange for transportation for the grapes, pick them up and load them, and that at that point, the grapes belonged to West Coast and Horizon had no more dealings with them on that transaction, other than to request payment at a later date. (Tr. I, p. 28-29)

Marroking Sales and AMC Produce Sales[9]. (Tr. I, p. 73-79, 87). Mr. Evans also stated that the AMC label was one of the labels used by Gilbert Marroquin. (Tr. I, p. 94-95).

Complainant claims that the issue in this case is a simple one: Complainant Horizon provided at hearing as evidence the invoices to Respondent West Coast, the corresponding bills of lading, and the corresponding work orders for 30 transactions occurring between August 20, 2002 and November 26, 2002. Therefore, Complainant argues, Respondent owes Complainant for the invoices that are the subject of this proceeding.

Respondent argues, *inter alia*, that Complainant did not own or have any rights to the grapes that make up the 30 transactions in this proceeding, and that West Coast has already paid the grower and rightful owner of the grapes identified in each transaction, Amanda Marroquin/AMC Produce Sales, in full.

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc*. 47 Agric. Dec. 581 (1988). *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (1975). In this case, based on the aggregate of evidence adduced at hearing, we find that Complainant has not met its burden.

Complainant argues, in its brief, that the invoices in CX1-30, on their face, are in essence *prima facie* evidence that the grapes identified in each transaction were sold to Respondent, and that Respondent therefore owes Complainant for the grapes identified in the invoices.

However, various factors may be considered when assessing the credibility of a party's allegations, *(R.L. Burden Produce Services v. Taylor Produce,* 50 Agric. Dec. 1009 (1991)), and on their face, each invoice contains information that cannot be reconciled with Norm Evans' own testimony at hearing, or with information provided in the

[9] Mr. Evans stated that the name "Mandy" appeared on many of the bills of lading for the 30 transactions, and that this notation was to Amanda Marroquin. Mr. Evans stated that her name appeared on many of the bills of lading because she worked in the sales office of Marroking Sales. (Tr. I, p. 86).

informal stages of this proceeding.

Every invoice clearly states that Norm Evans was the salesman for the transaction (CX1-CX30), but at hearing, Mr. Evans testified that this was not the case. (Mr. Evans stated at one point during the hearing that he was the salesman in every transaction, then later said that he was not)(Tr. I, p. 115, 118)). In the transactions for which Norm Evans was not the salesman, he could not say who the salesman was, or provide any other information about the sale. (Tr. I, p. 139).

Further, every invoice states that the grapes were sold f.o.b. (CX1-CX30). Norm Evans testified that all of the subject transactions were f.o.b. (Tr. I, p. 21, 29). Mr. Evans also testified that Horizon only does two types of sales: f.o.b. and delivered. (Tr. I, p. 29). Mr. Evans specifically stated by letter submitted in the informal stage of this proceeding that all of the subject transactions were f.o.b. (ROI, EX13[10]). However, as is clearly "written in" on the face of many of the invoices, and stated on many of the bills of lading in this case, several of the subject transactions were sold price after sale (PAS). At hearing, Norm Evans could not remember the specific PAS transactions. (Tr. I, p. 92). Mr. Evans stated that if the transactions were PAS, West Coast would have provided Horizon with an accounting, yet no such accounting was provided as evidence at any stage of the proceeding, and Mr. Evans could provide no explanation as to why Horizon had no accounting for the transactions. Finally, all invoices state that the product was shipped from Terra Bella, CA, yet all of the corresponding bills of lading indicate that the product contained on the invoice was shipped from the Marroking cooler in Earlimart, CA[11]. (CX1a-CX30a). Thus, Mr. Evans testimony is inconsistent with Complainant's own evidence.

Other evidence, provided by Respondent at hearing, calls into

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[10] Unsworn evidence may be treated as evidentiary pursuant to 7 C.F.R. § 47.7 if contained within the Department Report of Investigation. *Tanita Farms, Inc. v. City Wide Distributors, Inc*., 44 Agric. Dec. 1738 (1985).

[11] Mr. Evans stated at hearing that this was merely a computer error. (Tr. I, p. 26).

question whether the transactions in this proceeding were "simple" f.o.b sales between Complainant Horizon and Respondent West Coast. As noted *supra*, Respondent claimed that it has already paid in full for the transactions identified in the Complaint, and that payment was made to Amanda Marroquin/AMC Sales pursuant to the Produce Distributing Agreement between AMC and Respondent. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co*., 46 Agric. Dec 893 (1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). In this case, Respondent has met its burden to prove its claim that payment in full for the transactions identified in the Complaint was made to Amanda Marroquin/AMC Sales pursuant to the Produce Distributing Agreement between AMC and Respondent.

During the period indicated by the dates listed on the invoices and bills of lading, between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431). By checks dated May 23, 2002, July 2, 2002, and June 11, 2003, West Coast paid AMC Produce Sales $100,948.11 for purchases and cultural advances that were made or to be made pursuant to the Produce Distributing Agreement between Amanda Marroquin (AMC Produce Sales) and West Coast. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

Benjamin Foss, the controller of West Coast in Massachusetts at the time of the hearing and at the time of the subject transactions, testified at hearing that he had personal knowledge of the transactions in this case, and of the Produce Distributing Agreement between Amanda Marroquin/AMC Produce Sales. He stated that (presumably at the time of the agreement), he discussed the agreement with Jeff Case, a salesman with West Coast (Tr. II, p. 635-642), and that in the "latter stages" of the agreement, Mr. Foss conducted a full audit of the transactions between West Coast and AMC Produce Sales and generated

accountings to AMC. (Tr. II, p. 325-345).

Mr. Foss stated that an "advance" of $100,000.00 dollars was made to AMC Produce Sales pursuant to the Produce Distributing Agreement. (Tr. II, p. 325-345). Mr. Foss also stated that during the life of the agreement, 44 transactions, which included the 30 transactions that are the subject of this proceeding, occurred between West Coast and AMC, and that the amounts of each of the 44 transactions were then "credited" against the amount that had been originally advanced. (Tr. II, p. 335-337;RXD, RXE, RXF). After the amounts in the 44 transactions had been "credited" against the amount advanced to AMC pursuant to the agreement, West Coast remitted a final check to AMC in the amount of $948.11. (Tr. II, p. 325-345; RX D, RXE, RXF). Mr. Foss stated that once the demand for payment by Complainant was made (several months after the transactions in CX 1 through CX 30 took place), he conducted a personal review of all files and accountings between West Coast and AMC, and discussed the issue with the accounts payable staff at West Coast and with Jeff Case. (Tr. II, p. 385-391). Based on his review and discussions, Mr. Foss determined that the transactions claimed as outstanding and upaid by Complainant[12] were transactions West Coast considered to be contained within the agreement between West Coast and AMC, and that West Coast had already paid AMC for the transactions. (Tr. II, p. 340 357-362, 364, 387-391; RX D, RX E, RX F).

Mr. Foss also testified that during the period indicated by the dates listed on the invoices and bills of lading in CX1-CX30, between August 2002 and November 2002, West Coast did business with Horizon, purchased numerous loads of produce from Horizon (other than the loads that are the subject of this reparation), including at least two grape orders, and West Coast paid in full for each of those loads. (Tr. II, p.

[12] While Mr. Foss stated that the work orders and bills of lading (which notably stated "AMC" and "Marroking" on their face) were received by Respondent at the time each transaction occurred (RX F 1-44), he stated that the invoices submitted as evidence by Complainant as CX 1- CX 30)(which notably did not state "AMC" or "Marroking" anywhere on their face), were not received until after the Complaint was made in this case. (Tr. II, p. 383-5).

369-381; RXG). Norm Evans of Horizon acknowledges this fact. (Tr. I., p. 131-138, Tr. I, p. 215). Respondent provided evidence of roughly 63 transactions of various perishable agricultural commodities that were purchased by West Coast from Horizon during roughly the same time period as the transactions shown in CX1-30 (the subject of the proceeding), and were paid for in full by West Coast to Horizon. (RXG[13]).

We note that the two grape orders purchased by West Coast from Horizon during this period were paid for in full, and that the grape orders that were paid for did not go through the Marroking cooler, but rather through Norm Evans/Horizon cooler in Exeter, CA. (Tr. I, p. 215, RX K, RX L). We also note that of the 44 transactions that were paid for by West Coast to Amanda Marroquin/AMC Produce Sales, many produced negative returns. (Tr. II, p. 394; RX D). Respondent urges us to find that Complainant engaged in some form of fraud in "cherrypicking" the transactions that produced positive returns and creating false invoices to support Complainant's false claim. (Respondent points out that such fraud would be possible, because Horizon was involved in running the Marroking cooler, and Horizon saw, at the time they were generated, all of the bills of ladingB which included prices agreed onB created in the transactions between AMC and West Coast). We agree that Horizon and Norm Evans were involved in some fashion in the Marroking cooler, and that Horizon and Norm Evans viewed much of the "paperwork" on orders that came through the Marroking cooler. We also agree that it is interesting that the transactions in CX1-CX30 are contained within the 44 transactions paid for by West Coast to AMC, and that all of the 30 transactions claimed by Complainant as owed coincidentally produced positive returns. However, we decline to conclude that fraud on the part of Complainant was involved in this case (we find it more likely that Complainant's claim was a result of confusion caused by the agreements reached between Gilbert Marroquin and Horizon and Horizon's

[13] We note that the last check for these transactions was paid to Horizon on June 11, 2003, the same date as the last "disbursement" check paid to AMC Produce. (Tr. II, p. 381).

involvement in both the Marroking cooler and AMC Produce). *See infra*. Respondent called Amanda Marroquin, the owner of AMC (Tr. II, p. 406, 431), as a witness at the hearing. Ms. Marroquin testified that AMC and West Coast entered into a Produce Distributing Agreement for grapes grown by AMC during the 2002 season. (Tr. II, p. 503; RX A). Ms. Marroquin also testified that the grapes identified in the agreement were to be grown on Lawrence Chroman's ranch, also called the "Sunrise" ranch. (Tr. II, p. 503-4, 522). Ms. Marroquin stated that pursuant to the agreement, West Coast made advances to AMC for 2002 grapes, and that AMC "consigned" the grapes to West Coast for sale. Ms. Marroquin stated that she was paid in full by West Coast pursuant to the agreement, and that the payment consisted of the three checks paid to AMC on May 23, 2002, July 2, 2002, and June 11, 2003, totaling $100,948.11. (Tr. II, p. 505-510, 522, 530; RX E). Ms. Marroquin also stated that she and AMC had a verbal agreement with Norm Evans and Horizon to run the Marroking cooler, which was owned by her father, Gilbert Marroquin. (Tr. II, p. 512, 542-3, 550).

Respondent called Merl Ledford, an attorney who represented both Amanda Marroquin and Gilbert Marroquin in 2002 and 2003 (Tr. III, p. 430-436), as a witness to testify at hearing. Mr. Ledford testified that during the period indicated by the dates listed on the invoices and bills of lading in CX 1 through CX 30, between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales located in Earlimart, California. (Tr. III, p. 431, RX A). Mr. Ledford also testified that during that same period, Gilbert Marroquin, Amanda Marroquin's father, was a grower of grapes who owned two grape ranches, "Globe King" and "El Shaddai". (Tr. II, p. 435). Mr. Ledford stated that Gilbert Marroquin also owned and ran the Marroking Sales cold storage facility, the "cooler", in Earlimart, CA, where harvested grapes were stored and packed for sale and distribution. (Tr. II, p. 463-467).

Mr. Ledford testified that Norm Evans and Horizon were involved in running the Marroking Sales Cooler in Earlimart. Tr. II, p. 464, 466. Mr. Ledford also testified that Gilbert Marroquin filed for Chapter 11

Bankruptcy on November 20, 2000.

On March 7, 2002, the United States Bankruptcy Court for the Eastern District of California, Fresno Division, issued an Order whereby Gilbert Marroquin was authorized to borrow up to $350,000.00 from Horizon, "which loan shall be secured by a crop lien on the 2002 crop to be grown on the real property" owned by Gilbert Marroquin. This real property consisted of the "Globe King" and "El Shaddai" grape ranches owned by Gilbert Marroquin, and the crop lien was for crops grown exclusively on those ranches. (Tr. II, p. 439-470; RX-H1,RX-H2, RX-H 4, RX I, RX J). Based on the Order issued by the Bankruptcy Court, Horizon loaned Gilbert Marroquin $350,000 for a "crop loan". Horizon also made an agreement to "purchase" grapes in 2002 grown by Gilbert Marroquin, on his ranches, for a total price of $1,009,281.13.[14] This agreement was made between Horizon and Gilbert Marroquin, and provided that Horizon would deduct from the purchase price "cultural advances" made to Gilbert Marroquin by Horizon. (Tr. II, p. 439-470; RX-H1,RX-H2, RX-H 4, RX I, RX J).

Mr. Ledford testified that at the time that the crop loan and agreement to purchase was made, Horizon and Gilbert Marroquin entered into a Marketing Agreement, whereby the parties agreed that Horizon would market and ship all of Gilbert Marroquin's grapes delivered to the Marroking Sales cold storage facility during the 2002 season. (Tr. II, p. 453-457, 466-467; RX H3).

Mr. Ledford also testified that on February 12, 2003, a Motion for Payment of Administrative Claims was made by Horizon in the bankruptcy case for unpaid amounts by Gilbert Marroquin of the $350,000.00 crop loan and the $1,009,281.13 grape purchase. A Declaration in support of the administrative claim was made by June Anderson, Horizon's controller. An accounting for the $350,000.00

[14] This amount was later revised to $880,934.91, after adjustments were made for condition problems. (RX H2, p. 4).

crop loan[15] and for the purchases pursuant to the purchasing agreement were included in support of the Declaration. The accounting sets forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop. (Tr. II, p. 436-455; RX H1 RX H2). The transactions at issue in this proceeding, CX 1-CX 30, were not included in the Declaration in support of the administrative claim.[16] (Tr. II, p. 481- 483).

Mr. Ledford stated that in 2003, Horizon settled all amounts owed to it by Gilbert Marroquin, and Norm Evans of Horizon signed a general release of any and all claims against Gilbert Marroquin. The release included any and all current and future claims against Amanda Marroquin/AMC Produce. This document was filed with the Bankruptcy Court. (Tr. II, 438-445, 477; RX J). Mr. Ledford testified that Norm Evans and Horizon were aware of the Produce Distributing Agreement between AMC and West Coast, and that the general release was drawn up because during mediation of the bankruptcy proceeding, Norm Evans attempted to assert a claim against Amanda Marroquin for the net proceeds of the West Coast sales under the agreement between AMC and West Coast. (Tr.II, p. 483). Mr. Ledford also testified that

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[15] We note that the accounting consisted of fifteen checks totaling $350,728.00 made payable to AMC Produce Sales, the company owned by Amanda Marroquin, and not to Gilbert Marroquin. (RX H2). No explanation of this discrepancy was specifically provided by Complainant; however, Norm Evans did testify that he believed Gilbert Marroquin owned or was involved in running AMC Produce Sales. (*See supra* at 8-9)

[16] We note that at hearing and during the informal stage of this proceeding, Norm Evans claimed that he had paid the grower, Gilbert Marroquin, for purchases of grapes, that he had then sold to West Coast on an f.o.b. basis. Mr. Evans also testified that his "purchases" from Gilbert Marroquin were made on the basis of his loan and purchase agreement stated in the bankruptcy proceeding. If this is the case, it follows that the accounting in the Declaration should include any West Coast transactions, as the Declaration purports to set forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop, including sales thereof. (Tr. II, p. 436-455; RX H1 RX H2). However, the Declaration conspicuously does not include any West Coast transactions. (RX H2).

Norm Evans was aware[17] that West Coast had accounted to Amanda Marroquin/AMC under the Produce Distributing Agreement, and that West Coast had paid AMC in full under the agreement. (Tr. II, p. 483-484).

Respondent called Gilbert Marroquin as a witness to testify at hearing. Gilbert Marroquin corroborated the testimony of Amanda Marroquin and Merl Ledford as to both the bankruptcy issues and the relationship between Gilbert Marrroquin and Norm Evans, and Amanda Marroquin/AMC and West Coast. (Tr. II, p. 568-585). Mr. Marroquin testified that Horizon had a hand in "running" Marroking Cold Storage (Tr. II, p. 585), and that all "AMC" grapes went through the Marroking Sales cooler in Earlimart. (Tr. II, p. 584-587). Mr. Marroquin stated that "AMC" grapes belonged to West Coast, and that Mr. Marroquin took orders for purchases of "AMC" grapes. (Tr. II, p. 594).

Mr. Marroquin also testified that during the mediation in bankruptcy, he had a conversation with Norm Evans wherein Mr. Evans specifically stated that he had "an issue" with West Coast. (Tr. II, p. 578). According to Mr. Marroquin, Mr. Evans described the "issue" as West Coast's lack of payment of two loads of "seedless Thompsons", which were not grown on Mr. Marroquin's land (Globe King or El Shaddai), nor on the Chroman (or "Sunrise") ranch pursuant to the AMC agreement with West Coast. (Tr. II, p. 578).[18] According to Mr. Marroquin, Mr. Evans also specifically told Mr. Marroquin that he had no dispute with West Coast concerning the grapes grown on any of the three ranches, Globe King, El Shaddai, or Sunrise (Tr. II, p. 580), and that the seedless Thompsons were grown on Mr. Evan's own ranch. (Tr. II, p. 603, 606). Finally, according to Mr. Marroquin, Mr. Evans

[17] Norm Evans has repeatedly, at hearing and during the informal stages of this proceeding, denied that he was aware of any agreements between West Coast and AMC.

[18] We note that RX K, which is evidence of a grape transaction paid to Horizon by West Coast, is for seedless Thompsons. We also note that "AMC" conspicuously does not appear on this bill of lading, and that the cooler listed on this bill of lading is that of Norm Evans/Horizon in Exeter, CA. (RX K).

specifically told him that he was angry at West Coast, and that Mr. Evans was going to make a false claim against West Coast for numerous loads, as leverage to collect on the two loads actually owed to him by West Coast. (Tr. II, p. 578-580, 604-607).

Respondent called Jeff Case, a salesman for West Coast's Bakersfield office (Tr. III, p. 642), as a witness to testify at hearing. Jeff Case testified that he "put together" the Produce Distributing Agreement between West Coast and Amanda Marroquin/AMC Produce Sales (Tr. III, p. 643-645), and that he was involved in every transaction involving AMC grapes and West Coast. (Tr. III, p. 651-654). Mr. Case stated all AMC grapes went through the Marroking cooler, and that because Horizon was involved in running the Marroking cooler, a Horizon "number" was assigned to every file that went through the Marroking cooler. (Tr. III, p. 657-658, 715). Mr. Case also stated that he had examined the transactions in Respondent's exhibits RX F 1 through 44, and that none of those transactions, including the transactions in CX1-30 that are the subject of this proceeding, were purchased from Horizon Marketing. (Tr. III, p. 659). Mr. Case stated that he knew that West Coast did not purchase the grapes identified in CX 1-30, because he specifically recalled the individual transactions, because he recalled that during the 2002 season, West Coast got most of its grapes pursuant to the agreement with AMC, and because during the 2002 season, West Coast simply did not purchase that many grape loads from Horizon. (Tr. III, p. 726-728, 735, 743). Finally, Mr. Case stated that even when he made purchases of any type of produce from Horizon, he never talked to Norm Evans,[19] and that instead he either talked to "Chris" or Mike Crookshanks at Horizon. (Tr. III, p. 743).

At hearing, Complainant did not produce any witnesses or evidence to rebut the testimony of Benjamin Foss, Amanda Marroquin, Merl Ledford, Gilbert Marroquin, or Jeff Case, who all stated, *inter alia*, that

[19] We note that this testimony is in direct contradiction to the portion of Norm Evan's testimony (which Norm Evans himself later contradicted) that Jeff Case purchased the grapes identified in CX 1-CX 30 directly from him , and that Jeff Case called in the orders by phone to Norm Evans. (Tr. I, p. 1)

West Coast paid Amanda Marroquin/AMC Produce Sales in full for the transactions identified in CX 1- CX 30, which are the subject of this reparation.[20] Accordingly, and based on the evidence adduced by Respondent at hearing, we find that Complainant did not meet its burden to prove its case, and that Respondent did meet its burden to prove its own assertion and defense.

We note that while Respondent appears to argue that it was impossible that Horizon could have sold any AMC grapes to West Coast in 2002, because all AMC grapes were to be sold to West Coast by AMC Produce under the Produce Distributing Agreement, such a transaction *could* have occurred. The Produce Distributing Agreement stated only that AMC agreed to supply West Coast with "at least 25%" of AMC's 2002 grape crop. (RX A). Several witnesses stated that it was possible that Horizon sold AMC grapes to West Coast during 2002. (Tr. II, p. 425, 529, 532, 583-588, 628, 721, 724). However, Complainant has produced no credible evidence that it purchased the grapes in CX1-CX30 from AMC Produce, other than to provide the explanation that the grapes were "given" to him pursuant to, and as credit against, his loans to Gilbert Marroquin. (Tr. I, p.88, 123, 124, 127,141). Mr. Evans also testified that his "purchases" from Gilbert Marroquin were made on the basis of his loan and purchase agreement stated in the bankruptcy proceeding. (Tr. I, p. 141-150). If this be the case, it follows that the accounting in the Bankruptcy Declaration in support of Mr. Evans/Horizon's administrative claim in bankruptcy should include any West Coast transactions, as the Declaration purports to set forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop (including the parties to whom Horizon sold the grapes). (Tr. II, p. 436-455; RX H1 RX H2). However, the Declaration conspicuously does not include any West Coast transactions. (RX H2). As Complainant has offered no other evidence that Horizon purchased the grapes identified in CX1- CX30 from either AMC Produce Sales or Gilbert Marroquin and then sold them to West Coast, while we find that such an instance was possible, there is no evidence that it occurred in

[20] In fact, Norm Evans, Complainant's representative in this case, left the proceedings shortly after his testimony was concluded.

this case.

Complainant argued at hearing and in its brief that the invoices themselves were sent to Respondent, and that Respondent did not object to the invoices. Complainant claims that the invoices, particularly because they were not objected to by Respondent when first sent to Respondent, are evidence of a sale, for which Respondent owes Complainant. However, Respondent's witnesses provided the explanation, which we find credible, that it was known that Horizon was "running" the cooler through which the AMC grapes came, and that it was therefore unremarkable that Horizon was sending copies of invoices and bills of lading for AMC grapes to Respondent's office in Bakersfield (Respondent in Massachusetts did not see the invoices until sometime in 2003). Mr. Case stated all AMC grapes went through the Marroking cooler, and that because Horizon was involved in running the Marroking cooler, a Horizon "number" was assigned to every file that went through the Marroking cooler, including those sent to Respondent in Bakersfield. (Tr. III, p. 657-658, 715). The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co., Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988). In this case, we find that there was no existence of a sale between Complainant and Respondent for the 30 invoices claimed in the proceeding, and that Respondent provided an explanation for the lack of objection to the invoices and bills of lading sent to Respondent's office in Bakersfield (Respondent in Massachusetts did object to the invoices when they were presented in 2003, *see supra*, Finding of Fact No. 21). Therefore, the invoices and bills of lading are not conclusive evidence of a contract in this case.

Based on the foregoing, we find that Complainant has not met its burden of proving by a preponderance of the evidence all of the material allegations of its complaint, and we find for Respondent in this case.

Fees and Expenses

We find that Complainant has not carried its burden necessary to prove its case. Fees and expenses will be awarded to the prevailing

party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (2003).

Each party made claims for fees and expenses in this case. Complainant claimed $6,896.92 in fees and expenses in connection with attendance at hearing. Respondent claimed $31,425.00 for attorney's hours spent on the case and work performed in preparation for hearing, as well as $1,863.82 in costs and expenses. Attorney's hours were calculated by Respondent as 125.70 hours at $250 per hour. The total for all fees and expenses claimed by Respondent's Attorney was $33,288.82. Respondent provided a detailed itemization of its various attorney expenses in its Claim for Fees and Expenses. Respondent also submitted an affidavit, in which Benjamin Foss, West Coast's controller, representative at the hearing, and witness for Respondent at hearing, claimed fees and expenses in connection with the hearing totaling $3,262.57. Benjamin Foss also submitted a bill for $1,550.00 for the Marroquin's attorney, Mr. Fitzgerald, who attended the hearing with the Marroquins.

In this case, we find that since Complainant has failed to prove its case by a preponderance of the evidence, it is not the prevailing party and is not entitled to fees and expenses. Respondent is the prevailing party, and fees and expenses can be awarded to Respondent to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. Patapanian & Son,* 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co., 38 Agric*. Dec. 269 (1979). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes,* 48 Agric. Dec. 707 (1989).

We find that certain of the expenses claimed by Respondent's attorney in this case are not reasonable, and therefore will be disallowed. First, in examining the affidavit submitted by Respondent's attorney, it appears that he miscalculated the total hours spent on the case. Adding the hours provided on the affidavit (83.70 plus 3.4 plus 7 plus 30.6), the correct total claimed should be 124.70, instead of 125.70. Of those

124.70 hours claimed, we disallow item number 21 of the itemized breakdown attached to the affidavit, eleven (11) hours of travel to Bakersfield, California, from Annandale, New Jersey. We also disallow a portion of item number 25, specifically, the portion which includes (based on the eleven hours claimed in item number 21) eleven hours of travel to Annandale, New Jersey from Bakersfield, California. Finally, we disallow a portion of item number 22, specifically, the portion which includes travel from Bakersfield, California to Visalia, California, in preparation for hearing (Respondent's attorney states in the affidavit that this trip was made for the purpose of preparing witnesses who were to testify at hearing the following day). The distance between Bakersfield and Visalia is 80.13 miles, thus we estimate the time spent traveling from Bakersfield to Visalia and back to be 3 hours, 1.5 hours each way. The attorneys fees claimed for time spent in travel in this case, a total of 25 hours, are disallowed. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979). *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (2000).

Second, we disallow the 30.6 hours claimed by Respondent's attorney for preparation of Respondent's Proposed Findings and Conclusions. The fees and expenses provision under section 7 (a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc. v. Patapanian & Son,* 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son,* 36 Agric. Dec. 24 (1977); *East Produce, Inc. v. Seven Seas Trading Co., Inc.,* 59 Agric. Dec. 853 (2000). Accordingly, we deny the claim of Respondent's attorney for hours expended on the post hearing brief, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed. While it is true that in preparing a post hearing brief, time spent in review of the transcript and citation to same would not occur had the case been decided under the documentary procedure (as there would be no transcript to review and cite when preparing the brief), in this case, Respondent's attorney has given no indication of the portion of time

preparing the post hearing brief that was actually spent reviewing and citing to sections of the transcript in the brief. Therefore, we disallow the entire 30.6 hours claimed by Respondent's attorney for preparation of Respondent's Proposed Findings and Conclusions. However, we will allow the expense of the transcript, $180.00 claimed by Respondent's attorney, as that amount was incurred as a direct result of the hearing, and the expense would not have been incurred had the case been decided by documentary procedure. Based on the foregoing, the allowable amount of expenses claimed by Respondent's attorney is $1,863.82. The allowable amount of attorney's fees, based on time spent in connection with the oral hearing, is $17,275.00 (124.70 hours minus 25 hours travel minus 30.6 hours on the post trial brief ' 69.1 hours times $250.00 an hour). The total allowable amount for Respondent's attorney fees and expenses is $19,138.82 ($17,275.00 plus $1,863.82).

As for the fees and expenses claimed in Benjamin Foss' affidavit, we find that the portion relating to Mr. Foss, $3,262.57, are reasonable, and will be allowed. Fees are awarded to non-attorney representatives, as Mr. Foss was in this case. *See O.P. Murphy Produce Co. v. Genbroker Corp.*, 37 Agric. Dec. 1780 (1978). Moreover, fees for voluntary non-subpoenaed witnesses are allowable. *Watson Distributing v. Fruit Unlimited, Inc.,* 42 Agric. Dec. 1613, 1618 (1983). As for the portion of fees and expenses claimed by Mr. Foss relating to Mr. Fitzgerald, the personal attorney of Amanda and Gilbert Marroquin, we find that they are not reasonable, and therefore they are disallowed in this case. Mr. Fitgerald accompanied his clients, who appeared as witnesses on behalf of Respondent at the hearing, of his own accord (purportedly to "protect" his clients), and quite frankly, Mr. Fitzgerald seemed to serve no real purpose at the hearing, other than to serve his clients personal interests. Therefore, Respondent is not entitled to any fees it may have incurred due to Mr. Fitzgerald's presence at the hearing.

Order

The Complaint in this case is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $22,401.39 in attorney's

fees and expenses.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

PEARL RANCH PRODUCE, LLC v. DESERT SPRINGS PRODUCE, LLC.
PACA Docket No. R-07-051.
Decision and Order.
Filed July 10, 2008.

Contract - evidence of
The proponent of the contract has the burden to prove the elements of contract, whether established by a writing, an oral agreement, or through a course of dealing. Even where enforcement of an agreement does not require that the agreement be written, a written agreement is strong evidence of both a contract and the contract terms.

Agent - contract
When determining the contractual relationship between principals and their agents, the principles of apparent agency do not apply.

Agent - authority
Mere negotiation of contracts is inadequate to support agent's claims for commission against its principals. Agent must first demonstrate that the principal authorized the agent to act on the principal's behalf.

Equity - evidence required
Equity is not automatically available whenever plaintiff perceives a subjective unfairness in the legal outcome; equity grants relief when the law will not make plaintiff whole. Equity cannot be supported without adequate evidence of loss.

Agency - proof of contract
When evidence showed that a licensed grower and its former agent failed to reach an agreement on a grower's agent contract negotiated during the fall of 2005 for the 2006 growing season, evidence of prior course of dealing from 2000-2005, the grower's publication of the agent's name in association with the grower's entries in the Bluebook and the Redbook in the spring and fall of 2006, and written contracts with third parties that did not identify the agent as an agent for grower, were inadequate to show that grower contracted with agent for the 2006 growing season.

Agency - proof for equitable relief
An agent's mere assertion that his principal had promised to compensate him for principal's decision to contract with a different agent was inadequate to support the first agent's claims for equitable relief.

Jonathan Gordy, Presiding Officer
Bart M. Botta, Complainant's representative
David P. Lutz, Respondent's representative
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA). Pearl Ranch Produce, LLC (Complainant) timely filed a Complaint which seeks a reparation award from Desert Springs Produce, LLC (Respondent) in the amount of $249,361.74 in connection with transactions in interstate commerce involving a grower's agent agreement between Complainant and Respondent for the negotiation and sale of Respondent's onions for the 2006 growing season.

The Department did not prepare a Report of Investigation in this proceeding. A copy of the formal Complaint was served on Respondent, and Respondent timely filed an Answer denying the claims in the Complaint.

The amount in controversy exceeds $30,000 and Respondent requested an oral hearing. An oral hearing was held before Jonathan Gordy, of the Office of the General Counsel, U.S. Department of Agriculture, on September 12, 2007, in Las Cruces, New Mexico. At the hearing and in the post hearing briefs, Bart M. Botta of Rynn & Janowski LLP represented Complainant. At the hearing, Complainant presented the testimony of David Hicks,[1] who is the owner of Complainant, and Jennifer Russell, who is a former employee of Complainant. Complainant offered 19 exhibits (CX #) into evidence. James A. Roggow and David P. Lutz of Martin, Lutz, Roggow, Hosford & Eubanks, P.C., have represented Respondent throughout this

[1] David Hicks is variously identified as "Dave Hicks" in the exhibits and testimony.

proceeding; David P. Lutz represented Respondent at the hearing and on the post hearing briefs. At the hearing, Respondent presented the testimony of Dale Gillis and Mary Gillis, who are part owners of Respondent, and Monica Culpepper, who was a former bookkeeper for Respondent. Respondent offered 12 exhibits (RX #) into evidence.

Both parties filed briefs. Both parties filed requests for fees and expenses in connection with the hearing, and neither party filed objections to those requests.

Findings of Fact

Complainant Pearl Ranch Produce, LLC, is a licensed commission merchant, license no. 2002-0812 with a business mailing address of P.O. Box 720, Dona Ana, New Mexico 88032. David Hicks owns and operates Complianant Pearl Ranch Produce.

Respondent Desert Springs Produce, LLC, is an onion grower and licensed wholesale dealer, license no. 2005-0831, with a business mailing address of P.O. Box 279, Arrey, New Mexico 87930. The Gillis family owns and operates Desert Springs Produce.

Complainant was Respondent's agent for the sale of onions from 2001 to 2005. Respondent paid Complainant an 8% commission on sales for every year except 2005. In 2005, Respondent paid 6% commission on sales where Respondent billed the buyers and Respondent paid 8% commission on sales that Complainant billed the buyers. The parties never had written agreements.

During the fall of 2004 and the summer of 2005, Respondent became increasingly unhappy with Complainant's services. Respondent's unhappiness resulted from several events including: the failure of a bankrupt buyer to pay Respondent for over $100,000.00 in onions, the prices that Complainant negotiated with buyers, Complainant's use of brokers, and some buyers' failures to promptly pay Respondent.

After a tense 2005 season, Respondent attempted to negotiate a new relationship with David Hicks in the fall of 2005. Respondent offered to make David Hicks an employee with a 4% commission on sales. Under this contract, David Hicks would no longer operate Complainant

Pearl Ranch Produce. David Hicks refused.

The parties did not reach a written agreement after David Hicks refused the fall 2005 contract. Complainant negotiated contracts for the sale of Respondent's 2006 onion crop in January of 2006. Respondent did not authorize Complainant to negotiate contracts on its behalf.
On March 17, 2006, Gillis Farms, Inc., another company the Gillis family owned and operated, signed an agreement with Duda Farm Fresh Foods ("Duda Farms"). Under the agreement, Duda Farms would market the onions the Gillis family had grown and packed as Desert Springs Produce, LLC. Later, in the first week of April 2006, Respondent informed Complainant that Respondent was making arrangements to sell its onion crop through Duda Farms. The following week, Respondent informed Complainant that it would not market onions through Complainant.

In the following months Complainant and Respondent remained in contact concerning their relationship. By August 2006, however, Complainant and Respondent failed to settle their differences concerning the 2006 onion crop.

Complainant filed an informal complaint with the PACA Branch on September 25, 2006, which is within nine months of when the cause of action accrued.

Discussion

Complainant alleges that in the winter of 2005-2006, Complainant contracted with Respondent to be Respondent's agent for the sale of onions for the 2006 season. Complainant alleges that Respondent breached this agreement when Respondent chose to market onions through another grower's agent, Duda Farms. Respondent counters that Complainant did not have a contract with Respondent to represent Respondent for the 2006 growing season.

Complainant further alleges that during the winter of 2005-2006, Complainant negotiated contracts for Respondent that covered approximately 30% of the Respondent's 2006 onion crop. (Complainant's Opening Brief at 7.) In addition, Complainant pleads that it would have negotiated the remaining open market onion sales

during the summer of 2006. (*Id.*) Ultimately, however, no onions were delivered under the contracts Complainant negotiated, and Complainant did not negotiate any open market sales for Respondent during the summer of 2006. Further, David Hicks testified that Respondent promised to compensate David Hicks for its change to Duda Farms. (See TR 85; 227.) The parties agree that Complainant did not negotiate any sales after the end of April 2006.

For the reasons outlined below, Complainant has failed to prove that it entered into an enforceable contract with Respondent for the 2006 onion growing season, and Complainant has failed to show that equity would otherwise warrant reparation from Respondent.

PACA reparation decisions have often determined the terms of contract when a written agreement did not exist. Oral contracts that would not be enforceable under state statutes of frauds are sometimes enforceable in reparation.[2] In addition, the terms of a contract may be established by a course of dealing. *See Sousa v. San Joaquin Tomato Growers, Inc.*, 46 Agric. Dec. 709, 715 (1987). For instance, in *Sousa*, we determined the terms of the disputed contract based on the parties' prior course of dealing and the prior written contracts between the parties. *Sousa*, 46 Agric. Dec. at 715. In other cases, reference to the prior course of dealing between the parties has established that agents had apparent authority sufficient to bind their principals to contracts. *See, e.g., Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 288 (1954). However, Complainant has the burden to prove the elements of contract, whether established by a writing, an oral agreement, or through a course of dealing.[3]

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[2] *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 526-27 (3d Cir. 1950) (enforcing an oral contract for the sale of produce that would have been unenforceable under the Pennsylvania statute of frauds).

[3] *See Howell v. Scott*, 44 Agric Dec. 1281, 1282 (1985) ("As the proponent that there has been a breach of contract in this case, Complainant has the burden to prove the essential elements of the contract."); *Six L's Packing Co. v. Barnett*, 44 Agric. Dec. 1313, 1314 (1985) ("As the proponent that the transactions involve a sale of produce to Respondent, Complainant has the burden of proof to show the essential elements of the (continued...)

The parties in this case never had a written contract, not for 2006, nor for prior years for which the parties agree that they did have an agreement. The PACA regulations require grower's agents to obtain a written agreement, or deliver written terms to growers, on or before the first shipment of produce. 7 C.F.R. § 46.32. Thus, from 2001 to 2005 Complainant violated this regulation by failing to have a written agreement or terms with Respondent. However, because no onions were delivered in 2006, Complainant did not violate the regulation in 2006.

While not a violation of the regulations, the absence of a written agreement for 2006 does not improve Complainant's position, because a written agreement would be strong evidence of both a contract and the contract terms.

Proceeding to prove its claim without a written agreement, Complainant presented unconvincing evidence that it had an oral contract with Respondent. David Hicks, Complainant's owner and manager, did not indicate in his testimony when, or with whom, he discussed the final resolution of the agreement Complainant has alleged. In contrast, Respondent presented at the hearing a written contract offered to David Hicks in the fall of 2005 that he declined. (See RX 1, TR 53-54, 307-308, 341-42, 388-89.) Dale Gillis, one of Respondent's owners, recalled that he spoke with Mr. Hicks on very few occasions between October 2005 to August 2006; only once on the telephone and once in person. (TR at 349.) Moreover, Dale Gillis credibly testified that Respondent did not expect Complainant to do anything for Respondent after October 19, 2005. (TR 365.) Respondent's other witnesses, Monica Culpepper and Mary Gillis, agreed that Complainant never reached agreement with Respondent in the fall of 2005. (TR 323;

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[3](...continued)
contract."); *Victor D. Bendel Co. v. Prange Foods Corp.*, 43 Agric. Dec. 1655, 1657 (1984) (finding that a broker that was seeking a 3% commission had the burden of showing that a contract was entered into and what the terms of the contract were); *Hatcher v. C. H. Robinson Co.*, 42 Agric. Dec. (1983) (finding that the proponent of a claim of breach has the burden of proof); *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002, 1004 (1981)(finding the burden of proving conflicting contract terms on the proponents of the terms); *Preferred Tomato Corp. v. Columbus Fruit Co.*, 39 Agric. Dec. 1563, 1566 (1980) (finding that the burden of proving modification of a written contract through course of dealing was on the proponent of the modification).

387-89.)

Complainant has presented no direct evidence, besides the empty assertions of its owner, that there was a contract between Complainant and Respondent for the 2006 onion growing season. Instead, Complainant presented three kinds of circumstantial evidence to show the existence of an agreement: testimony and evidence on the prior course of dealing between the parties, Bluebook and Redbook listings from 2006, and purported written contracts that Complainant negotiated on Respondent's behalf.

First, Complainant argues that the evidence of the prior course of dealing between these parties from 2000 to 2005 showed that the parties had a contract in 2006. Complainant cites cases that have used evidence of course of dealing to prove agency, or otherwise prove the terms of an established contract.[4] Primarily, Complainant cities cases establishing that agents have apparent authority to act on behalf their principals, because the agents had previously been agents of their principals and the principals failed to tell the injured third party that the agency had terminated. *E.g. Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 288 (1954).[5] The other cases that Complainant cites use course of dealing evidence to establish contract terms, not to establish the contract itself. In *Sousa*, for instance, the existence of a contact was undeniable

[4] Some of these cases include: *Phillips A. Hawman v. G&T Terminal Packing Co.*, 19 Agric. Dec. 1544 (1987) (finding that a prior course of dealing demonstrated that a broker had the authority to negotiate for the produce purchaser); *Woodrow Johns Co. v. Sikeson Fruit & Produce*, 19 Agric Dec. 547 (1960) (finding that a respondent produce purchaser could not to deny agency when the agent had previously negotiated a purchased for the purchaser from the complaining produce seller); *Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283 (1954) (finding that the prior instances where an agent had inspected fruit for the produce purchaser demonstrated that the agent had at least the apparent authority to inspect fruit for the respondent produce purchaser).

[5] Complainant has also argued that "at a minimum there was an implied agency relationship" between complainant and respondent. (Complainant's Opening Brief at 25.) From this argument, we suppose that Complainant wishes us to draw an inference from the facts available, and not actually invoke the doctrine of "implied authority."

because there was a consignment of onions, and the only issue to be settled through prior course of dealing was the contract's terms. *Sousa*, 46 Agric. Dec. at 715. Complainant's case is distinguishable.

David Hicks testified that Respondent wanted to change the contract in the fall of 2005, and that he entered into contract negotiations with Respondent's owners. (TR 53, 58.) David Hicks testified that, unlike past years, he did not negotiate onion sales in October because he was negotiating with Respondent "what we were going to do for the next year." (TR 53.) He also testified that he had refused Respondent's initial contract offer because that contract would have ended Complainant's existence as an entity separate from Respondent. (TR 54.) David Hicks further testified that contract negotiations continued until January. (TR 102-103.) Respondent has presented more than sufficient evidence that it proposed a new written contract to Complainant in the fall of 2005 that David Hicks refused. (RX 1, TR 307-308, 341-42, 388-89.) Whatever course of dealing the parties maintained before October 2005, that course of dealing ended when the negotiations began.[6] Because the parties began negotiating a new contract, the terms of a contract for 2006 cannot be implied from the prior course of dealing between the parties before October 2005.

Second, Complainant introduced evidence that the Redbook and Bluebook listings in 2006 showed that Respondent held Complainant out to the produce industry as its agent. For instance, the October 2006 Bluebook lists Complainant's cell phone number under Respondent's entry, and the March 2006 Redbook listing for Respondent lists "Dave

[6] Complainant argued in its brief: "[Respondent] did nothing to officially terminate the relationship with Pearl until approximately April of 2006." (Complainant's Opening Brief at 23.) Complainant also argues: "The evidence showed that [Respondent] did nothing to terminate the relationship with [Complainant] until April of 2006." (Complainant's Opening Brief at 4.) There are two errors in this argument. First, this argument is inconsistent with Complainant's burden to show that a contract existed between Respondent and Complainant. It is not Respondent's responsibility to demonstrate that it cancelled the contract with Complainant. Instead, Complainant must demonstrate it entered into a contract with Respondent. Second, the beginning of negotiations is a clear indicator of the termination of the prior course of dealing. Accordingly, it is Complainant's burden to show that the contract negotiations resulted in a contract, rather than Respondent's burden to show that the contract negotiations ended the prior course of dealing

Hicks" as Respondent's sales contact. (CX 14, CX 15.)

Complainant supports its arguments by citing *George Arakelain Farms, Inc. v. O'Day*, 31 Agric. Dec. 1395 (1972). (Complainant's Opening Brief at 23-24.) In that case, a lettuce seller sued the purchaser of the lettuce for the acts of the purchaser's agent. The purchaser denied an agency relationship. We held, however, that the purchaser created an apparent agency because the purchaser had not notified the seller that it had terminated the relationship with its agent. We decided *George Arakelain Farms* on the basis of apparent agency. Apparent agency is intended to remedy injury caused to third parties when the principal has held out someone as an agent by words or conduct. *See Jacobson Produce, Inc. v. Best Potato Products Company*, 37 Agric. Dec. 1743, 1746 (1978).

Complainant has cited other cases that discuss apparent authority, as described in the Restatement (Third) of Agency § 2.03 (2006), where agents have apparent authority when third-parties reasonably believe that the agents have authority to act on behalf of the principals and that belief is traceable to the principals' manifestations. (Complainant's Brief at 25-26; Complainant's Reply Brief at 9.) Also, Complainant has cited cases that estopped principals from denying the existence of an agency relationship, as described in Restatement (Third) of Agency § 2.05, where principals are held liable for intentionally or carelessly causing the third-parties to rely on individuals to their detriment, because the third-parties justifiably believe the transaction was on the principals' account. (Complainant's Brief at 26; Complainant's Reply Brief at 10.) In both instances, the focus is on the harm done to third-parties because of the principals' actions. In this case, the issue is not whether a third-party was injured, but whether the agent had a contract with the principal.

For this reason, Complainant may not rely on the Bluebook and the Redbook listings as proof of an "apparent agency" between Complainant and Respondent. Apparent agency doctrines do not apply. At best, the listings show Respondent was advertising a relationship. One might draw an inference that Respondent had a relationship with Complainant because Respondent chose to advertise it. In this instance, however, we

decline to imply an agency contract based on the advertisements in the Bluebook and the Redbook. Communications to the produce industry do not form contracts between principals and agents.

Third, Complainant introduced evidence that Dave Hicks negotiated contracts for Respondent. (CX 2 at 3-7, 9; TR 105-20, 185-86, 188.) One of these contracts, with C. H. Robinson, was allegedly an oral agreement. (TR 185-86, 188.) Two contracts with Hillcrest Produce Co., list Complainant as the seller. (CX 2 at 3-4.) And the fourth contract with Michael Cutler Co. and signed by Dale Gillis of Respondent, has neither price terms nor quantity terms. (CX 2 at 5-7. [7]) No shipments were made under any of these four contracts. (TR 185-86.)

Complainant asserts that because it negotiated these contracts, Respondent owes it compensation. (See Complainant's Opening Brief at 34.) Complainant suggests, under the general rule in *D. L. Piazza Co. v. Cook Produce Co.*, 16 Agric. Dec. 360, 362-63 (1957), its right to compensation accrued when it completed negotiations and there was a meeting of the minds of the principals whom it brought together. (See Complainant's Opening Brief at 34.) Complainant further asserts that the failure to honor the agreements is irrelevant. (*Id.*) *D. L. Piazza Co.* is a case where, after the broker had negotiated the sale of lettuce, the parties to the contract had difficulty in reaching a final settlement on the value of the delivered lettuce. *D. L. Piazza Co.* at 362. There were written communications from the principal to the broker that demonstrated the principal authorized the broker to act as agent. *Id.* Those communications showed that the principal refused to pay the broker until the principal reached a final settlement on the delivered lettuce. *Id.*

Merely negotiating contracts is not enough. Complainant must demonstrate that Respondent authorized Complainant to negotiate these contracts. Unlike the communications in *D. L. Piazza Co.*, the contracts at issue here fail to demonstrate that Complainant was Respondent's

[7] There were also some e-mails showing that Complainant assisted Respondent with lost reusable pallets in January of 2006. (CX 6-10.) It is readily apparent from the context of the e-mails, the pallets were from onion shipments made in 2005. The e-mails do not show that Complainant contracted with Respondent to be its agent in 2006.

agent when Complainant negotiated them. Complainant produced no contract that identified Complainant as Respondent's agent. Moreover, there is no evidence that Respondent and the purported contracting buyers had a meeting of the minds. No onions were delivered under the contracts, and the purported contract with Michael Cutler Co., which only Dale Gillis signed, did not include price or quantity terms. (CX 2, 5-7.)

Taking all of the evidence in the aggregate, Complainant has failed in its burden to show by a preponderance of the evidence that it had a contract with Respondent. David Hicks's testimony fails to convince us that Complainant and Respondent assented to a grower's agent contract for the 2006 growing season. No other witness corroborated a contract and the available written evidence does not establish a contract. [8]

Besides Complainant's contract claims, Complainant also asserts that it should be compensated under many different equitable theories: "equitable estoppel, implied agency, unjust enrichment, detrimental reliance, and plain equity." (Complainant's Opening Brief at 33.) Complainant cites no authorities for the applicability of these equitable doctrines.

Equity is not automatically available whenever plaintiffs perceive a subjective unfairness in the legal outcome; equity grants relief when the law will not make plaintiffs whole. *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 511 F.Supp. 2d 1, 12 (D.D.C. 2007). Complainant's request for equitable relief is a hodgepodge of doctrines that Complainant failed to support with evidence. David Hicks's mere assertion that Respondent purportedly promised to give Complainant compensation for Respondent's decision to contract with Duda Farms (see TR 85; 227) is inadequate to support equitable relief. Complainant presented no evidence that it lost customers, lost opportunities, or incurred costs because of Respondent's purported promises. Equity disfavors Complainant.

Complainant has failed to prove by a preponderance of the evidence that it had a contract to act as Respondent's agent in 2006 for which it was not compensated or that it is entitled to equitable relief under any

theory of recovery. Therefore, Complainant does not prevail on its claim. The Complaint should be dismissed.

Under section 7 of the PACA (7 U.S.C. 499f), "The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any [reparation] hearing." Respondent filed a proper request for fees and expenses, and Complainant was given an opportunity to object to that request. Complainant did not file an objection. Fees and expenses will be awarded to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 864 (2000). The Secretary determines the reasonableness of the requested fees and expenses. *Id.* Expenses which would have been incurred under the documentary (shortened) procedure are not recoverable under section 7(a) of the Act; this includes the preparation of findings of fact, conclusions of law and post hearing briefs. *Id.*

As the prevailing party, Respondent is due its reasonable fees and expenses. Respondent has requested $10,763.92 in attorney's fees and associated expenses as costs associated with the hearing. Reasonable attorney's fees in the total amount of $6,256.00 appear to have been incurred in connection with the hearing. Those charges include witness interviews, a motion to quash a subpoena, hearing preparation, and counsel's review of the transcript. Also, $95.82 in miscellaneous costs for copying, receiving and sending faxes, and Federal Express packages appear to be associated with preparation for the hearing, and will be allowed as reasonable costs associated with the hearing. Respondent's claimed costs and attorney's fees that appear associated with the preparation of exhibits, post hearing briefs and Fed Ex delivery of those briefs, all of which would be ordinarily part of the documentary procedure, are specifically disallowed. The cost of the hearing transcript, $116.80 is reimbursed. In total, Respondent will be allowed to recover $6,468.62 as reasonable fees and expenses incurred in connection with the oral hearing.

Order

Complainant's Complaint in this matter is hereby dismissed. Within 30 days from the date of this Order, Complainant shall pay Respondent, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $6,468.62.
Copies of this Order shall be served upon the parties.
Done at Washington, DC.

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FRESH KIST PRODUCE, LLC. v. SUPERIOR SALES, INC.
PACA Docket No. R-08-070.
Decision and Order.
Filed December 11, 2008.

F.O.B. – Acceptance Final – Warranty of Merchantability.

Where the parties agree to f.o.b. acceptance final terms, the buyer's only recourse is to prove a material breach of contract by the seller. For the buyer to establish a breach by the seller of the implied warranty of merchantability in such a case, the buyer must establish that the produce was not merchantable at the time of shipment. While the destination inspection of the romaine in question disclosed significant defects (73 percent average condition defects, including 42 percent average decay), the inspection was performed seven days from the date of shipment and was found, on that basis, to be too remote from the time of shipment to establish that the romaine was not merchantable when shipped. It was also noted that the tape from the temperature recorder placed on the truck was not submitted in evidence by Respondent to establish that the romaine was held at proper temperatures between the time of shipment and the time of inspection. Without proof of proper temperatures during transit, it is possible that the defects found upon inspection were caused by high transit temperatures and not unmerchantability at the time of shipment.

Patrice H. Harps, Presiding Officer
Leslie Wowk, Examiner
Western Growers' Association, Complainant's Representative
Respondent, Pro Se
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $15,153.90 in connection with one truckload of romaine 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 Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the 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 ("ROI"). 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. Neither party submitted a Brief.

Findings of Fact

1. Complainant, Fresh Kist Produce, LLC, is a limited liability company whose post office address is P.O. Box 3617, Salinas, California, 93908. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Superior Sales, Inc., is a corporation whose post office address is P.O. Box 159, Hudsonville, Michigan, 49426. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about January 9, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of California, to a receiver located in Jersey City, New Jersey, 1,040 cartons of 24-count naked romaine. On the same date, Complainant

issued invoice number 428623, billing Respondent for 165 cartons of 24-count "outside purchase" naked romaine at $14.56 per carton, or $2,402.40, and 875 cartons of 24-count Pacific Coast naked romaine at $14.56 per carton, or $12,740.00, plus $11.50 for a temperature recorder, for a total f.o.b. acceptance final contract price of $15,153.90.

4. On January 16, 2007, at 9:53 a.m., a U.S.D.A. inspection was performed on the 1,040 cartons of romaine mentioned in Finding of Fact 3 at the place of business of Ambrogi Food Dist., in Thorofare, New Jersey, the report of which disclosed, in pertinent part, as follows:

LOT A (CON) – ROMAINE					
Temperatures: 35 to 37ºF		**NUMBER OF CONTAINERS:** 1040 CARTON(S)			**ORIGIN:** OT
Markings: BRAND: PACIFIC COAST PRODUCE MARKINGS: PACIFIC COAST PRODUCE, ROMAINE LETTUCE, PACKED & SHIPPED BY: PACIFIC COAST PRODUCE, SANTA MARIA, CA, 2 DOZEN HEADS, PRODUCE OF U.S.A.					
PLI: NONE					**OTHER ID:** XXXXXXXXXXXXXXX
INJURY	**DAM**	**SER. DAM**	**V.S.DAM**	**OFFSIZE/DEFECTS**	
NA	28	11	NA	MARGINAL BROWNING (17 to 42%)	
NA	3	0	NA	DOWNY MILDEW (0 to 6%)	
NA	42	42	NA	DECAY (21 to 83%)	
NA	73	53	NA	CHECKSUM	
GRADE:					
LOT DESC:	INSPECTION: RESTRICTED TO CONDITION ONLY AT APPLICANT'S REQUEST STAGES OF DECAY: GENERALLY EARLY, FEW MODERATE				

5. On March 2, 2007, Respondent's Rich Kim sent a letter to Complainant's Denny Donovan stating:

This letter is in reference to Fresh Kist# 428623 / Superior Sales# 07361063.

The return was $4.00 delivered to Superior Sales, Inc. The charges incurred are as follows:

Freight $4,450.00
Re-Delivery $150.00
Inspection $109.00
Unloading $277.5

$4986.50 total charges incurred / $4.79 per case freight incurred

We are requesting Fresh Kist to remit payment of $821.60 for losses and damages caused by the excessive decay in the romaine.

If you have any questions, please feel free to contact me.

6. Respondent has not paid Complainant for the subject load of romaine.
7. The informal complaint was filed on May 25, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the agreed purchase price for one truckload of romaine sold to Respondent. Complainant states Respondent accepted the romaine in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of $15,153.90. Respondent asserts, to the contrary, that the romaine shipped by Complainant did not meet the contract requirements, as a result of which Respondent states it incurred damages that exceeded the contract price by $821.60. Respondent did not, however, submit a counterclaim seeking to recover this amount.

There is no dispute that the subject load of romaine was sold under f.o.b. acceptance final terms.[1] The Regulations (7 C.F.R. § 46.43(m)) define this term as meaning:

… that the buyer accepts the produce at shipping point and has

[1] See Complaint ¶4 and Answer ¶4.

> no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

Since under the f.o.b. acceptance final terms of the contract there is no right of rejection, Respondent is liable to Complainant for the romaine it accepted at the agreed purchase price thereof, less any damages resulting from any material breach of contract by Complainant. The burden to prove both a breach and damages rests with Respondent. *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).

While the f.o.b. acceptance final term negates the suitable shipping condition that normally applies when goods are sold f.o.b., the implied warranty of merchantability nevertheless remains intact.[2] See U.C.C. § 2-314(1). For goods to be merchantable they must pass without objection in the trade under the contract description. U.C.C. § 2-314(2)(a). Respondent maintains that the U.S.D.A. inspection of the romaine, which disclosed 73 percent average defects, including 28 percent marginal browning, 3 percent downy mildew and 42 percent

[2] The merchantability warranty can be excluded by specific agreement between the parties through the use of such terms as "as is" or "with all faults;" however, there is no indication that it was the intent of the parties to exclude the warranty of merchantability here. While Complainant's passing includes a statement that reads, in pertinent part, "THIS CONTRACT ALSO EXCLUDES THE IMPLIED WARRANTY OF MERCHANTABILITY AND SUITABLE SHIPPING CONDITION ASSOCIATED WITH FIELD FREEZE SUCH AS BUT NOT LIMITED TO BLISTERING, PEELING, FEATHERING, AND DISCOLORATION" (see ROI Exhibit 3D) this is an exclusion that is commonly included in contracts for the sale of lettuce and other leafy greens that pertains to the defects listed only, and does not otherwise relieve the shipper of the responsibility to ship goods that are merchantable.

decay, establishes that the romaine was not merchantable.[3]

The common law warranty of merchantability is applicable only at shipping point. *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); and *J. D. Bearden Produce Company v. Pat's Produce Company,* 12 Agric. Dec. 682 (1953). Therefore, when we look at a destination inspection to establish a breach of the warranty of merchantability, the defects disclosed by the inspection must be sufficiently severe so as to allow us to conclude with reasonable certainty that the produce was non-conforming at shipping point. See *Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331 (1996).

In *Garren-teed Co., Inc. v. Mo-Bo Enterprises, Inc*., 51 Agric. Dec. 811 (1992), a destination inspection performed two days after shipment that disclosed an average of 76 percent wilted and flabby in wax beans was considered sufficient evidence to establish that the beans were not merchantable at shipping point. However, in the *Martori* decision cited above, an inspection performed the day after shipment that disclosed 32 percent average condition defects (including 11 percent black mold and 9 percent decay) was found not to furnish sufficient proof to establish that the cantaloupes in question were not merchantable at the time of shipment.[4] Notably, both of these decisions involve inspections that were performed not more than two days after the goods were shipped. In the instant case, however, a full seven days elapsed between the time of shipment and the time of inspection.

Moreover, while the record shows that a temperature recording device was loaded with the romaine,[5] Respondent did not submit a copy of the recorder tape to establish that proper temperatures were maintained from the time of shipment to the time of inspection. Although the pulp temperatures noted on the inspection certificate are in accordance with the temperature instructions noted on the bill of

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[3] See Answering Statement ¶4.

[4] While it was stated that such defects made it improbable that the cantaloupes were merchantable at shipping point, it was held that the standard that must be met is reasonable certainty, not probability. See 55 Agric. Dec. 1331, at 1339.

[5] See Complaint Exhibit Nos. 1 and 2.

lading,[6] the record shows that the romaine was stored in the consignee's warehouse overnight pending inspection.[7] It is therefore possible that the product arrived showing temperatures indicative of abnormal transit, but that the consignee was able to bring the temperatures back to the desired range between the time of arrival and the time of inspection. Our purpose in mentioning this is to determine whether the standard of reasonable certainty has been met.

As we look at the destination inspection results to determine whether the warranty of merchantability has been breached, it is also important to note that for a coast to coast shipment of romaine, 15 percent average defects, including 4 percent decay, are allowable under the warranty of suitable shipping condition. Therefore, 15 percent average defects, including 4 percent decay, would not indicate a breach of the warranty of merchantability. In other words, the romaine in question could have up to 15 percent average defects, including 4 percent decay, at shipping point and still be considered merchantable. Any number of circumstances could have occurred in the seven days that elapsed between the time of shipment and the time of inspection that would have allowed defects averaging only 15 percent, including 4 percent decay, to progress to the 73 percent average defects, including 42 percent decay, disclosed by the U.S.D.A. inspection of the romaine in question.[8] Moreover, we should also note that the decay disclosed by the inspection is described as being in "mostly early, few moderate" stages, which further supports the possibility that the decay developed during the

[6] See ROI Exhibits 1B and 1C.

[7] See ROI Exhibit 3P, a copy of an e-mail message from Respondent's Richard Kim to Complainant's Denny Donovan advising that the inspection would be delayed due to the Martin Luther King, Jr. holiday. See, also, ROI Exhibit 3C, a copy of the U.S.D.A. inspection certificate showing that the romaine was unloaded at the consignee's warehouse at the time of the inspection

[8] Aside from the decay, the other defect most prevalent in the romaine at the time of arrival was marginal browning, and while the conditions leading to marginal browning have not been clearly identified, it is known that this defect can be aggravated by long transit periods or undesirably high transit temperatures. Source: Canadian Food Inspection Agency, Vegetable Inspection Manuals, accessed on the Internet on July 8, 2008, at http://www.inspection.gc.ca/english/fssa/frefra/vegman/lettue/lettue.shtml

seven days that the romaine was in transit. Therefore, under the circumstances, we are unable to conclude with reasonable certainty that the romaine was not merchantable at the time of shipment. Since Respondent accepted the romaine under the f.o.b. acceptance final terms of the contract, it was entitled to attempt to show a material breach of contract. Based on the evidence submitted, we find that Respondent has failed to establish the existence of a material breach.

While we note that Respondent asserts in its sworn Answer that the f.o.b. acceptance final terms agreed upon excluded epidermal peel and blistering but did not exclude decay,[9] we hasten to point out that Respondent was free to fashion whatever agreement it desired at the time of contracting, *i.e.*, if Respondent intended to exclude only epidermal peel and blistering from Complainant's warranty, then Respondent should have negotiated a contract that contained only this exclusion.[10] Instead, Respondent agreed to purchase the romaine under f.o.b. acceptance final terms, which meant that the product could contain any number of defects, including decay, as long as the defects were not present to a sufficient degree to render the product unmerchantable at the time of shipment, thereby constituting a material breach of contract. Respondent accepted the romaine and has not sustained its burden to prove a material breach. Respondent is therefore liable to Complainant for the romaine it accepted at the full purchase price of $15,153.90.
Respondent's failure to pay Complainant $15,153.90 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.*

[9] See Answer ¶4.

[10] It appears, in fact, that this exclusion was included in the contract. See Note 2.

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.,* 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 $15,153.90, with interest thereon at the rate of 0.69% per annum from February 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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MISCELLANEOUS ORDERS

In re: THE MILES SMITH FAMILY CORP. d/b/a CAL FRESH PRODUCE.
PACA Docket No. D-03-0005.
Miscellaneous Order.
Filed October 28, 2008.

PACA.

Christopher Young-Morales for AMS.
Respondent, Pro se.
Miscellaneous Order by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case

The Complaint was filed on October 30, 2002, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (herein frequently, "the PACA" or "the Act"). The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, "AMS" or "Complainant"), is represented both here and in the two responsibly connected cases,[1] by Christopher P. Young-Morales, Esq. (and was previously represented by Andrew Y. Stanton, Esq.), with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

AMS's Motion for Withdrawal of Disciplinary Complaint, filed October 27, 2008, is before me. I conclude that the Complaint never was served as required by 7 C.F.R. § 1.147(c) upon the Respondent The Miles Smith Family Corp., d/b/a Cal Fresh Produce, and that AMS's Motion for Withdrawal should be and hereby is GRANTED. Accordingly, this case is **DISMISSED**.

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[1] The two responsibly connected cases are PACA-APP Docket No. 03-0019, regarding Brian O'D. White, also known as Brian O White; and PACA-APP Docket No. 04-0002, regarding Mark R. Laramie. Petitioners in both cases are represented by Luis A. Toro, Esq.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties, and Respondent shall be served (by regular mail), at all three addresses:

Cal Fresh Produce
2705 5th Street, Ste 5
Sacramento, California 95818

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
385 Inverness Drive South, Suite 380
Englewood, Colorado 80112

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
c/o CrossPoint Foods Corporation
1050 17th Street, Suite 195
Denver, Colorado 80265

The dismissal of this case, PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce, Respondent, impacts the two responsibly connected cases, PACA APP 03-0019 White, and PACA APP 04-0002 Laramie, so the Hearing Clerk is requested also to send a courtesy copy (by regular mail) to counsel for Mssrs. White and Laramie.

Luis A. Toro, Esq.
1801 California St 4300
Denver Colorado 80202-2604

Done at Washington, D.C.

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In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Order Lifting Stay Order.
Filed November 24, 2008.

PACA.

Christopher Young-Morales, for the Acting Associate Administrator, AMS
Paul T. Gentile, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

Order

On June 2, 2006, I issued a Decision and Order concluding KOAM Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and ordering publication of the facts and circumstances of KOAM Produce, Inc.'s violations.[1] On July 17, 2006, KOAM Produce, Inc., filed a "Petition to Reconsider," which I denied.[2]

On October 19, 2006, KOAM Produce, Inc., filed a petition for review of *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), 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.," requesting a stay of *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM*

[1] *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006).

[2] *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006).

Produce, Inc. (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), pending the outcome of proceedings for judicial review, which I granted.[3]

On March 12, 2008, the United States Court of Appeals for the Second Circuit issued a summary order affirming the Secretary of Agriculture's decision,[4] and on May 8, 2008, the Court entered final judgment of its summary order. KOAM Produce, Inc., did not file a petition for a writ of certiorari.

On October 27, 2008, Complainant filed a "Motion to Lift Stay Order as to Respondent KOAM Produce, Inc." KOAM Produce, Inc., failed to file a timely response to the Complainant's motion to lift stay, and on November 21, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's motion to lift stay.

Proceedings for judicial review are concluded. Therefore, the November 14, 2006, Stay Order is lifted; and the orders issued in *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), are effective, as follows.

ORDER

KOAM Produce, 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 KOAM Produce, Inc.'s violations shall be published. The publication of the facts and circumstances of KOAM Produce, Inc.'s violations shall be effective 60 days after service of this Order on KOAM Produce, Inc.

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[3] *In re: KOAM Produce, Inc.* (Stay Order), 66 Agric. Dec.930 (2006).

[4] *KOAM Produce, Inc. v. United States*, 269 F. App'x 35 (2d Cir. 2008).

PEARL RANCH PRODUCE, LLC. v. DESERT SPRINGS PRODUCE, LLC.
PACA Docket No. R-07-051.
Order on Reconsideration.
Filed December 4, 2008.

PACA.

Jonathan Gordy Hearing Officer for AMS.
Barrt M. Botta for Petitioner.
Donald P. Lutz for Respondent.
Order issued by William G. Jenson, Judicial Officer.

Order

On July 10, 2007 a Decision and Order was issued dismissing the Complaint and awarding the Respondent in this reparation proceeding $6,468.62 as reasonable fees and expenses incurred in connection with the oral hearing in this matter. Complainant filed a timely Motion for Reconsideration on August 4, 2008, before the Decision and Order became final. For the reasons stated below, we find that Complainant's arguments are without merit, and conclude that the Motion for Reconsideration should be denied.

In the Motion for Reconsideration, Complainant has argued that there are three errors in the Decision and Order. Complainant first asserts that we erred by concluding that "since there was no written agreement, Complainant has not proved its case." (Motion for Reconsideration at 2.) Complainant's second alleged error is that we erroneously ignored or minimized the importance of the bulk of the evidence. (Motion for Reconsideration at 4.) Finally, Complainant has argued that it was error to deny equitable relief in this case. (Motion for Reconsideration at 11.) Complainant's first and second assignments of error are without merit. The proper weight was given to the absence of a written agreement in the original Decision and Order, and the failure to enter into a written contract was not dispositive. In the Decision and Order, we were careful to examine all the available evidence of contract including the circumstantial evidence of a written contract, the course of dealing,

Respondent's listings in trade publications, and the contracts that Complainant negotiated with third parties. The prior course of dealing was inapposite, because the evidence clearly showed that the prior course of dealing was terminated. Four witnesses testified that contract negotiations in October of 2005 failed to result in an agreement. (TR 53-54 (Hicks), 307-308 (Culpepper), 341-42 (Dale Gillis), 388-89 (Mary Gillis).) Only Mr. Hicks testified that he had reached an agreement with Respondent after October 2005. As the Decision and Order explained, Complainant's remaining evidence failed to show that Respondent had agreed that Complainant would represent Respondent in 2006. (Decision and Order at 6-11.)

However, some additional clarification is warranted. Complainant claims that we contradictorily concluded that there was no contract, and yet also concluded that the parties remained in contact concerning their relationship. Complainant argues that Finding of Fact 8,[1] and the contacts between the parties after January 2006 until the informal complaint was filed, show that a contract did exist. (Motion for Reconsideration at 3.) We will clarify our reasoning for Finding of Fact 8: Complainant stayed in contact with Respondent based on Complainant's unreasonable expectation of compensation without an agency agreement. In the prior years, Complainant had managed to obtain an unwritten agreement to act as Respondent's agent, (see TR 228-29; 297) which was a violation of the regulations and the source of unhappiness for Respondent's owners and employees during the 2005 growing season (see TR 249; 259-60). Complainant apparently hoped for a similar unwritten agreement in 2006. This hope was misplaced given the failed negotiation in the fall of 2005 was based on a written offer that Complainant cease operations and Mr. Hicks work for Respondent as an employee.

Moreover, Complainant has misunderstood the evidentiary value of the contracts that Complainant presented at the hearing and our

[1] Finding of Fact 8 states: "In the following months Complainant and Respondent remained in contact concerning their relationship. By August 2006, however, Complainant and Respondent failed to settle their differences concerning the 2006 onion crop."

discussion of those contracts in the Decision and Order. (Decision and Order at 10-11). Complainant states that "[i]t is the lining up of the contracts that is compensable." (Motion for Reconsideration at 7.) Complainant cites to *Victor D. Bendel Co. v. A Peltz & Sons, Inc.*, 39 Agric. Dec. 311 (1980) and *Clement Jones Co.* v. *Cherry Foods, Inc.*, 34 Agric. Dec. 677 (1975) as support for this position. (Motion for Reconsideration at 10.) However, Complainant has greatly confused the factual findings and legal holdings of those cases. In fact, those cases stand for the general legal proposition that a broker is entitled to his fee when negotiations are completed and thereby a valid and binding contract is created. *See Victor D. Bendel*, 39 Agric. Dec. at 313; *Clement Jones Co.*, 34 Agric. Dec. at 679-80, *citing D. L. Piazza Co. v. Cook Produce Co.*, 16 Agric. Dec. 360, 362-63 (1957).

Those brokerage cases are factually distinguishable from the agency agreement at issue here for two reasons. First, in those cases the broker was unquestionably an agent of the principal. In this case, the principal has denied an agency relationship. Second, in those cases, the principals had ratified the contracts negotiated by the broker for the purchase and sale of produce. In this case, there is considerable doubt that Respondent and the purchasers ever agreed to the written contracts that Complainant has presented in CX 2. Neither the purchasers nor Respondent ever attempted to enforce these contracts. Two of the three purported contracts make no mention of Respondent (CX 2, pg. 3-4), and the remaining contract, with Michael Cutler Company, makes no mention of Complainant (CX 2, pg. 7). The Michael Cutler Company contract has no price or quantity terms. (Id.)

Complainant's argument that the contracts show "actual performance" evidence misses the point (see Motion on Reconsideration at 9-10) – Complainant must show that it had authority to act as Respondent's agent. Those contracts did not show Respondent had granted Complainant that authority. The contracts were considered and rejected in the Decision and Order for this reason. (Decision and Order at 10-11.)

Complainant's third assignment of error is that we failed to invoke equity when "this is an ideal case to do so." In its post-hearing brief in this matter, Complainant asserted that it should be compensated under

many different equitable theories: "equitable estoppel, implied agency, unjust enrichment, detrimental reliance, and plain equity." (Complainant's Opening Brief at 33.) Complainant cited no authorities on these equitable doctrines. Complaint's assertion that equity should be done in this case was soundly rejected. (Decision and Order at 12.) Now, in Complainant's Motion for Reconsideration, Complainant asserts that "the overwhelming facts showing how Respondent led Complainant on . . . demands equity." (Motion for Reconsideration at 13.) For a second time, Complainant has failed to cite any authority for this proposition. We will respond more specifically to Complainant's arguments.

Implied agency, to the extent that Complainant intends this to mean apparent agency or agency by estoppel, is inapposite; Complainant is not an aggrieved third party who is seeking recourse from a principal based on the actions of the principal's purported agent.[2]

Moreover, unjust enrichment occurs when the law implies a quasi-contract that requires a party who is unjustly enriched to make restitution *in quantum merit*. *See In re: Foreman Enterprises, Inc.*, 281 B.R. 600, 608 (W.D. Penn. 2002). Respondent did not benefit from Complainant's purported contract negotiations; Respondent never honored the contracts, never delivered onions, and never received payment under any of the contracts in evidence. Unjust enrichment is not applicable, because there was no enrichment.

Under the doctrine of equitable estoppel, when an individual makes factual statements to a person who reasonably relies on those statements, that individual may not deny the statement when the person who relied upon it is damaged. See Williston, *Contracts* § 8:3 (4th ed. supp. 2007). Similarly, promissory estoppel incorporates elements of equitable estoppel. In promissory estoppel, a promisor makes a gratuitous promise upon which the promisee reasonably relied upon by acting (or not acting) based on the promise. The promisee's action must be of a definite and substantial character in reliance, which the promisor should

[2] Complainant has rehashed its earlier arguments concerning apparent agency in the Motion for Reconsideration on pages 5-6. Those arguments are rejected for the reasons stated in the Decision and Order at pages 8-10.

have been able to foresee,[3] and the enforcement of the promise is necessary to avoid injustice. *See* Williston, *Contracts* § 8:5 (4th ed. supp. 2007); Calamari and Perillo, *Contracts* § 6.1 (4th ed. 1998).

Complainant's estoppel claims fail first because they lack factual support for the main element of promissory estoppel: a promise. "[O]ne of the elements of the promise is that it be communicated in such a manner to a promisee that he [or she] may justly expect performance and may reasonably rely thereon." *Granfield v. Catholic University of America*, 530F.2d 1035, 1040 (DC Cir. 1976). There was no corroborated evidence presented at the hearing that Respondent made a statement of fact or a definite promise to David Hicks upon which David Hicks reasonably relied. In his testimony, David Hicks fails to identify any specific statements or definite promises from Respondent that Complainant would be Respondent's agent for the 2006 season. In January 2006, David Hicks believed that there was an agreement (TR 104; 232), but his testimony never indicated with precision when an agreement was reached or who lead him to believe that an agreement was reached. In fact, the testimony of other witnesses (See Tr. 172; 324; 364-65) and the rejected written offer for David Hicks' employment (RX 1)[4] showed that Respondent did not intend to utilize Complainant as an agent after October 19, 2005.

Mr. Hicks did testify that Mr. Gillis promised to buy Complainant out of its "agreement" with Respondent in April 2006. (TR 85-86.) This testimony was specifically discounted in the Decision and Order at page 12. Moreover, Mr. Gillis failed to corroborate Mr. Hicks testimony concerning the purported promise. (See TR 351.) Complainant alleges that Respondent "strung him along" and that Respondent "never compensated Complainant one cent for the services he performed in the

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[3] The authorities are not all in agreement on the precise requirements of the foreseeability doctrine. Calamari and Perillo, *Contracts* § 6.1 (4th ed. 1998) (contrasting Corbin's and Williston's views on foreseeability). However, we do not need to discuss this issue in detail because Complainant has failed to demonstrate promissory estoppel on other grounds.

[4] RX 1 states: "Contract agreement must be signed and returned by Wednesday, October 19, 2005, in order to be secured for the October 2005 through October 2006 season."

year at issue" and that those actions should cause Respondent to be liable. (Motion for Reconsideration at 12-13.) Those vague allegations are not a substitute for evidence of a definite promise upon which Complainant reasonably relied. Without a promise, there can be no promissory estoppel.

As the Decision and Order noted at page 12, Complainant's equity claims also fail for lack of evidence of equitable losses. There is no evidence Complainant lost opportunities. The evidence fails to show that Complainant took a different course of action based on a purported promise in April of 2006, and it is not clear that Mr. Hicks would have been unable to seek employment as a grower's agent for others prior to April 2006.[5]

Ultimately, Complainant has not shown he lost money, except in the sense that he didn't have income from his failed legal claim that he had an agency agreement. His work with Michael Cutler Company, on which the Motion for Reconsideration relies for an estimate of his losses, was arranged prior to April 2006. (See TR 210.) His testimony implies that he received considerable income in 2005, but that testimony is inadequate evidence to support equitable damages because Mr. Hicks himself was uncertain:

> Q: Let me ask you this, do you know what your gross income was for the 2005 growing season? In other words on the eight per --
> A: It was probably -- gosh, I – I haven't looked -- these are not numbers I was -- I've -- I've gone over recently. I don't know. I would say maybe $160 to $180,000. I don't know.
> (TR 193.)

Complainant asserts that we should estimate damages, like we did in *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773

[5] There was testimony that in prior years Complainant had worked as an agent for other onion growers. (TR 92-93; 217; 357.) Complainant was not restricted in his employment to only Respondent. In addition, Complainant failed to show that he could reasonably have considered himself Respondent's agent after the failed negotiations in September and October 2005. At minimum, he could have pursued additional employment in October, November and December. There was no evidence that he attempted to find other work.

(1981). (Motion for Reconsideration at 12.) This case is completely different from *Arkansas Tomato, Co.*, in which we reluctantly estimated damages to do equity. In that case, the buyer had accepted and resold the tomatoes in question; an equitable estimation of damages was required because the buyer had misrepresented the value of the resold tomatoes. In contrast, Complainant seeks thousands of dollars in equitable damages for arranging "contracts" that did not result in the sale of any of Respondent's onions.

Complainant insists that Respondent relied on Complainant's services, and this should be compensable at equity. (Motion to Reconsider at 12-13.) The evidence does not support the allegation that Respondent relied on Complainant. Respondent was actively searching for a replacement after Mr. Hicks refused Respondent's offer in October 2006. (TR 324; 343.) Mr. Gillis testified that when he signed the contract with Michael Cutler Company, he believed he was eliminating Complainant from Respondent's sales to Michael Cutler. (TR 344.)

Far from being the perfect case to invoke principals of equity, Complainant failed to meet its burden of coming forward with evidence that would support an equitable award. To the extent that Complainant's other arguments on the law and the evidence have not been discussed in this opinion, those arguments have been considered and rejected.

For the foregoing reasons, Complainant's Petition for Reconsideration is denied. Therefore the stay of the original order in this proceeding is lifted and the following order is issued.

There shall be no further stays of this Order based on a new petition for reconsideration filed by Complainant. Complainant's right to appeal to federal district court is found in section 7 of the Act (7 U.S.C. §499g).

Order

The Complaint in this matter is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $6,468.62.

Copies of this Order shall be served upon the parties.

Done at Washington D.C.

EVANS SALES INC., D/B/A HORIZON MARKETING, INC. v. WEST COAST DISTRIBUTING, INC.
PACA Docket No. R-04-070.
Order Denying Complainant's Respondent Petition for Reconsideration.
Filed December 12, 2008.

PACA.

Christopher Young-Morales - Hearing Officer - AMS.
Tom Oliveri for Petitioner.
Mark Mandel for Respondent.
Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.§ 499a *et seq*.) (hereinafter, "PACA"). On June 3, 2008, a Decision and Order (D&O) was issued wherein the complaint was dismissed because the Presiding Officer found that Complainant failed to prove its case by a preponderance of the evidence, and that Complainant was not entitled to fees and expenses. On June 25, 2008, Complainant filed a Petition for Reconsideration, wherein Complainant requested that we reconsider the "important" evidence. (Petition, at 4). On July 22, 2008, Respondent filed an Objection To Petition For Reconsideration. We find that all relevant evidence has been considered exhaustively in this case, and therefore, the Petition For Reconsideration is denied.

Discussion

Complainant made a claim against Respondent in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments of grapes sold to Respondent in the course of

interstate commerce. Respondent argued, *inter alia*, that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent has already paid the grower and rightful owner of the grapes identified in each transaction, Amanda Marroquin/AMC Produce Sales, in full.

Complainant argued at hearing, in its brief, and again in its Petition for Reconsideration that the invoices from Complainant to Respondent were sent to Respondent, and that Respondent did not object to the invoices. Complainant claims that the invoices, particularly because they were not objected to by Respondent when first sent to Respondent, are evidence of a sale, for which Respondent owes Complainant. We concluded in the D&O that no contract existed between Complainant and Respondent. It is this conclusion, and the facts supporting that conclusion, that Complainant requests be reconsidered.

At the hearing held in this case, in response to Complainant's claims, Respondent's witnesses provided the explanation, which we found to be credible, that it was known that Complainant was "running" the "Marroking" cooler, through which the AMC Sales grapes came, and that it was therefore unremarkable that Complainant was sending copies of invoices and bills of lading for AMC grapes (which Complainant did not own and had no right to sell) to Respondent's office in Bakersfield (Respondent in Massachusetts did not see the invoices until sometime in 2003). Witnesses stated all AMC grapes went through the Marroking cooler, and that because Complainant was involved in running the Marroking cooler, Complainant's "number" was assigned to every file that went through the Marroking cooler, including those sent to Respondent in Bakersfield. Therefore, Respondent had no reason to take issue with, or object to, the invoices. At hearing, Complainant did not produce any witnesses or evidence to rebut the testimony of Respondent's witnesses.

The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co., Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988). As stated in the Decision and Order, the 30 invoices at issue in this case do not prove the existence of a contract between Complainant and Respondent as claimed by Complainant, and

Respondent provided an explanation for the lack of objection to the invoices and bills of lading sent to Respondent's office in Bakersfield. Therefore, the invoices and bills of lading are not conclusive evidence of a contract in this case, particularly in light of other evidence produced by Respondent, which Complainant failed to rebut. (D&O at 21- 23). Accordingly, based on the evidence adduced by Respondent at hearing, Complainant did not meet its burden to prove its case, while Respondent did meet its burden to prove its own assertion and defense.

All relevant evidence was considered in this case, and from that evidence, we concluded that Complainant did not meet its burden of proving by a preponderance of the evidence all of the material allegations of its Complaint. Upon reconsideration of the evidence and for the reasons cited above, Complainant's Petition for Reconsideration should be denied.

This forum will entertain no further petitions for reconsideration. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. 499g).

Order

The Complainant's Petition for Reconsideration is denied.

The Complaint in this case is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $22,401.39 in attorney's fees and expenses.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

PERISHABLE AGRICULTURE COMMODITIES ACT

DEFAULT DECISIONS

In re: WU CHU TRADING CORPORATION d/b/a TROPICAL WHOLESALE PRODUCE.
PACA Docket No. D-07-0194.
Default Decision.
Filed October 7, 2008.

PACA – Default.

Gary F. Ball for AMS.
Respondent, Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

The Complaint, filed on September 13, 2007, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (the "Act" or the "PACA"), alleged that during November 27, 2005 through November 24, 2006, Respondent Wu Chu Trading Corporation, d/b/a Tropical Wholesale Produce ("Respondent Wu Chu" or "Respondent"), failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $376,711.50 for 142 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce.

Parties and Counsel

Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Complainant"), is represented by Gary F. Ball, Esq., and was previously represented by Tonya Keusseyan, Esq., both with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue SW, Washington

D.C. 20250-1413.

Respondent Wu Chu is a corporation organized and existing under the laws of the state of Illinois. Respondent has not answered the Complaint.

Respondent's Failure to Answer

The time for filing an answer expired in mid-January 2008. Complainant's Motion for Decision Without Hearing by Reason of Default, filed May 23, 2008, is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Wu Chu Trading Corporation, doing business as Tropical Wholesale Produce, is a corporation organized and existing under the laws of the state of Illinois. Respondent Wu Chu's business and mailing address at all times material herein was 2404 S. Wolcott Avenue, Unit 13, Chicago, Illinois 60608.

2. Respondent Wu Chu was licensed under the PACA at all times material herein. License number 1984-0953 was issued to Respondent on March 26, 1984. This license was suspended on December 21, 2006, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) when Respondent failed to pay a reparation award. Subsequently, this license terminated on March 26, 2007, 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 November 27, 2005, through November 24, 2006,

Respondent Wu Chu failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $376,711.50 for 142 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce.

Conclusions

Respondent Wu Chu's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the following Order is issued.

Order

Respondent Wu Chu Trading Corporation, doing business as Tropical Wholesale Produce, is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

Finality

This Decision will become final and effective without further proceedings 35 days after it is served unless a party to the proceeding files with the Hearing Clerk an appeal to the Judicial Officer 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). See attached Appendix A, containing 7 C.F.R. § 1.145).

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

Done at Washington, D.C.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

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

(b) Response to appeal petition. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by

a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

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

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

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

(f) Notice of argument; postponement. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be

heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

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

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

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

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

7 C.F.R. § 1.145

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In re: RLB GROWERS AND SHIPPERS, LLC.
PACA Docket No. D-08-0161.
Default Decision.
Filed December 1, 2008.

PACA – Default.

Leah C. Battagioli 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 "PACA"), instituted by a Complaint filed on August 1, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Complainant"). The Complaint alleges that during the period July 5, 2006, through September 29, 2007, Respondent RLB Growers and Shippers, LLC, failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

A copy of the Complaint was sent to Respondent's principal, Roger L. Burden, by certified mail on August 1, 2008, and it was returned to the Hearing Clerk on September 2, 2008, as "unclaimed." Accordingly, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151; hereinafter "Rules of Practice"), on September 3, 2008, the Hearing Clerk re-mailed the Complaint using regular mail. That mailing by regular mail is deemed to constitute service on Respondent pursuant to section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)). 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 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. RLB Growers and Shippers, LLC (hereinafter "Respondent"), is a limited liability company organized and existing under the laws of the State of Indiana. Its business and mailing address was 9951 Hedden Road, Evansville, Indiana 47725. Respondent ceased business operations in August 2007. Respondent's current mailing address is c/o Roger L. Burden, 2736 Sugar Cane Lane, Evansville, Indiana 47715.
2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 2007-0201 was issued to Respondent on November 24, 2006. This license was suspended on November 1, 2007, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), when Respondent failed to pay a reparation award. The license terminated on November 24, 2007, 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. Respondent, during the period July 5, 2006, through September 29, 2007, failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.
4. On August 20, 2007, a civil complaint was filed against Respondent in the United States District Court, Southern District of Indiana to enforce the trust provisions of the PACA (7 U.S.C. § 499e(c)). The civil complaint was designated case number 3:07-cv-00110-RLY-WGH. On January 15, 2008, an Order and Judgment was issued as to the validity and amount of the PACA claims. The Order and Judgment deemed as valid all the PACA claims of the sellers listed in paragraph III of the Complaint and found that the amounts owed to the sellers were greater than or equal to the amounts alleged in this complaint.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly to 23 sellers in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the PACA, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 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.

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In re: FJB, INC., d/b/a EMPIRE PRODUCE.
PACA Docket No. D-08-0189.
Default Decision.
Filed December 16, 2008.

PACA – Default.

Leah C. Battagioli 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 "PACA"), instituted by a Complaint filed on September 25, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Complainant"). The Complaint alleges that during the period May 1, 2006, through March 30, 2007, Respondent FJB, Inc., d/b/a Empire Produce (hereinafter "Respondent"), failed to make full payment promptly to 63 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

A copy of the Complaint was served on Respondent's principal, Robert Garsha, by certified mail on October 4, 2008. A copy of the Complaint was also served on Respondent's attorney, Mark Mandell, Esq., by certified mail on September 27, 2008. Respondent failed to file an answer as prescribed by section 1.136 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136; hereinafter "Rules of Practice"). Pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent's failure to file an answer constitutes an admission of the allegations in 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 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. FJB, Inc., d/b/a Empire Produce, is a corporation organized and existing under the laws of the State of New York. Its business and mailing address was 337 Row C, New York City Terminal Market,

Bronx, New York 10474. Respondent ceased business operations on March 2, 2007. Respondent's current mailing addresses are through its attorney, Mark Mandell, Esq., 42 Herman Thau Road, Annandale, New Jersey, 08801, and through its principal, Robert Garsha, in the State of California.

2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 2007-0742 was issued to Respondent on April 30, 2004. The license terminated on April 30, 2007, 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. Respondent, during the period May 1, 2006, through March 30, 2007, failed to make full payment promptly to 63 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

4. On February 6, 2007, a civil complaint was filed against Respondent, and Respondent's principal, Robert Garsha, in the United States District Court, Southern District of New York to enforce the trust provisions of the PACA (7 U.S.C. § 499e(c)). The civil complaint was designated case number 1:07-cv-00898-CM-DFE. Final judgments have been entered as to the PACA claims of 25 of the 63 sellers listed in paragraph III of the Complaint. In all instances, the court found that Respondent was liable to the 25 sellers to the extent of their PACA claims. The amounts found to be due and owing to 23 of the 25 sellers in the PACA trust case were greater than or equal to the amounts in the Complaint. The chart below compares the amounts due per the Complaint to the amounts found to be due and owing in the PACA trust case by the New York district court.

Seller Name	**Complaint**	**PACA Trust Case**
Hintz Reiman, Inc., d/b/a River City Produce	$27,890.50	$27,913.00
Team Produce International, Inc.	$12,025.50	$12,025.50
Natural Selection Foods, LLC, d/b/a Earthbound Farms	$26,867.45	$28,143.45

William Consalo & Sons Farms, Inc.	$24,262.55	$24,332.55
Classic Salads, LLC	$55,548.25	$58,136.62
Eco Farms Sales, Inc.	$14,824.00	$14,824.00
Stellar Distributing, Inc.	$18,316.80	$18,316.80
John Vena Specialties, LLC	$3,709.50	$3,836.50
Ger-Nis International, LLC	$89,733.65	$85,910.65
Church Brothers, LLC	$75,519.85	$79,562.40
Calavo Growers, Inc.	$153,841.60	$153,841.60
J. Marchini & Son, Inc.	$18,156.50	$18,396.50
Fresh Directions International, Inc.	$58,957.50	$59,514.00
Nasiff International, Inc.	$6,416.00	$6,416.00
Gourmet Veg-Paq, Inc.	$56,639.00	$56,639.00
Robert Masha Sales, Inc.	$84,953.75	$81,332.15
Consolidated Farms, Inc., d/b/a Crystal Valley Foods	$79,365.75	$90,683.50
Top Banana, LLC	$10,236.25	$10,236.25
Nathel & Nathel, Inc.	$11,782.00	$12,745.50
Pio Enterprises, Inc.	$13,593.50	$13,593.50
Maurice A. Auerbach, Inc.	$9,673.50	$9,673.50
A.J. Trucco, Inc.	$980.00	$980.00
G&V Farms, LLC	$82,507.50	$82,607.50
Del Monte Fresh Produce N.A., Inc.	$58,699.00	$58,699.00
Moog Marketing, Inc.	$11,173.00	$11,173.00

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly to 63 sellers in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the PACA, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 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.

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Consent Decisions
Date Format [YY/MM/DD]

Perishable Agricultural Commodities Act

David W. Theodore d/b/a Consolidated Farms PACA-D-0195
08/07/08.