

# AGRICULTURE DECISIONS

**Volume 68**

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Part Three (PACA)  
Pages 477 - 611



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

## AGRICULTURE DECISIONS

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**COURT DECISION**

**TUSCANY FARMS, INC.; et al. v. USDA.**  
**No. 08-75040.**  
**Filed March 17, 2009.**

[Cite as: ]

**United States Court of Appeals  
for the Ninth Circuit**

By: Lisa J. Evans, Circuit Mediator.

**ORDER**

The court is in receipt of petitioner's correspondence dated March 16, 2009, requesting voluntary dismissal of this appeal. The court construes petitioner's letter as a motion to dismiss. So construed, the motion is granted and this appeal is dismissed. Fed. R. App. P. 42(b). The parties shall bear their own costs on appeal.

This order served on the district court shall act as and for the mandate of this court.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

**In re: CHERYL A. TAYLOR.**  
**PACA-APP Docket No. 06-0008.**  
**Decision & Order.**  
**March 19, 2009.**

**AND**

**In re: STEVEN C. FINBERG.**  
**PACA-APP Docket No. 06-0009.**  
**Decision and Order.**  
**March 19, 2009.**

**PACA – Active involvement – Prompt payment, failure to make full – Responsibly connected.**

Charles Spicknall for AMS.  
Stephen McCarron for Respondents..  
*Decision and Order by Administrative Law Judge Jill S. Clifton.*

**Decision & Order**

**Decision Summary**

1. When produce buyer Fresh America Corp. violated the Perishable Agricultural Commodities Act (“the PACA”), by failing to make **full payment promptly** to Fresh America Corp.’s produce sellers,<sup>1</sup> the Chief Financial Officer of Fresh America Corp., together with others, became vulnerable to the consequences under the PACA.
2. **Decision Summary Specifically as to Cheryl A. Taylor:** I decide that the Petitioner, Cheryl A. Taylor (herein frequently “Cheryl Taylor”), under the circumstances here, was **actively involved** in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more than \$1.2 million in produce purchases. Cheryl Taylor’s **active involvement** in such activities stems from her failure as Fresh America Corp.’s Chief Financial Officer (which she became in May 2001), to see that **full payment promptly** was made to Fresh America Corp.’s produce sellers. Because she was actively involved,

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<sup>1</sup> in violation of section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

Cheryl Taylor was *responsibly connected* with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9). I decide further that Cheryl Taylor was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary) who was **NOT** "*only a nominal*" officer. Consequently, whether she was *actively involved* or not, Cheryl Taylor was *responsibly connected* with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

3. **Decision Summary Specifically as to Steven C. Finberg:** I decide that the Petitioner, Steven C. Finberg (herein frequently "Steven Finberg"), under the circumstances here, was **NOT** *actively involved* in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more than \$1.2 million in produce purchases. Steven Finberg had no involvement in seeing that *full payment promptly* was made to Fresh America Corp.'s produce sellers; Steven Finberg's responsibilities were primarily sales and management of sales. I decide, however, that Steven Finberg was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development)<sup>2</sup> who was **NOT** "*only a nominal*" officer. Consequently, even though he was **NOT** *actively involved*, Steven Finberg was *responsibly connected* with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

#### Parties and Counsel

4. Cheryl Taylor and Steven Finberg are both represented by Stephen P. McCarron, Esq., McCarron & Diess, Suite 310, 4900 Massachusetts Ave. NW, Washington, D.C. 20016.

5. The Respondent, the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS"), is represented by Charles E. Spicknall, Esq., with the Trade Practices Division, Office of the General

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<sup>2</sup> Steven Finberg's title, beginning in October 1999, had been "Vice President of Sales and Marketing." RX 6; RX 31 at 25, 30. The corporate minutes for the October 17, 2001 meeting show Steven Finberg as "Vice President of Sales and Marketing." The SEC (Securities and Exchange Commission) annual report as of March 22, 2002, shows Steven Finberg's agreement for employment for three years commencing on October 5, 2001, "as Vice President of Sales and Marketing." RX 21 at 29. Mr. Finberg testified that the "Executive Vice President" title began in September 2001 (Tr. 791-92), and that his job responsibilities and salary remained the same.

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Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

### Introduction

6. The within cases are known as “*responsibly connected*” cases under the PACA, and the underlying disciplinary action is *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007). The Default Decision and Order in *In re Fresh America Corp.* was issued by U.S. Administrative Law Judge Peter M. Davenport<sup>3</sup> and established that during February 2002 through February 2003, Fresh America Corp., a Texas corporation, left produce sellers unpaid for more than \$1.2 million in produce purchases.

7. Both Cheryl Taylor and Steven Finberg had urged the Fresh America Corp. Board and specifically Chairman of the Board Arthur Hollingsworth, to pay payables more quickly for business reasons, including improving ratings in the Blue Book (Tr. 861-62) and the Red Book (Tr. 811) (two competing credit services, heavily relied on by produce companies), and including inspiring the confidence of customers and suppliers and potential creditors and investors. Mr. William Hasson of John Hancock (a creditor/investor) testified that, at one of the 10 to 12 Fresh America Corp. board meetings he attended, he had been asked “to talk a little bit about PACA one time.” Tr. 88. Mr. Hasson testified he had said the following in response:

You can't - - I said, You've got to adhere to PACA, or you're pretty much out of business, is what I told them. I said, You guys just need to follow the guidelines, do it, and that's my recommendation. And the board did not take the PACA issue seriously, which really shocked me. I communicated to them that I thought it was a mistake to be so cavalier with that issue, which I thought they were definitely being cavalier with the issue, and I also believed that over a period of time if that continued, that would be the downfall of the company.

Tr. 88-89.

Mr. McCarron: And when you say, that issue, what issue under PACA were you talking about?

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<sup>3</sup> The Default Decision and Order, issued on January 19, 2007 in PACA Docket No. D-06-0002, concluded that Fresh America Corp. violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

Mr. Hasson: Well, simply delaying payment to suppliers. It's just not something that obviously - - that is the reason PACA's issued - - or written - - excuse me. And I just explained to them that, you know, if you want to be a successful company in this industry, you have to adhere to the rules of PACA.

Tr. 88-89.

8. Cheryl Taylor and Steven Finberg were NOT directors of the corporation, or members of the board, that Mr. Hasson was referring to. But they were officers of the corporation that violated 7 U.S.C. § 499b(4), and every such officer is held to be **responsibly connected** (which has licensing and employment restrictions ramifications under the PACA), unless he or she can prove that he or she should be excepted (by proving both prongs of the *Norinsberg*<sup>4</sup> two-prong test).

9. Cheryl Taylor and Steven Finberg had worked heroically to save Fresh America Corp. - - to keep the business operating. Even though Fresh America Corp. was in severe financial trouble, Cheryl Taylor and Steven Finberg did not "abandon ship" - - they continued to work for Fresh America Corp. Nevertheless, neither of them was effective in getting the produce sellers ("suppliers") paid promptly.

10. All efforts to keep Fresh America Corp. afloat failed, and Fresh America Corp. ceased operations on January 22, 2003. RX 41 at 2. Cheryl Taylor and Steven Finberg saw their work through, essentially to the end (through January 2003 for Steven Finberg, Tr. 810; longer for Cheryl Taylor who continued to respond to inquiries regarding Fresh America Corp. Tr. 622-24). The steadfast dedication of each of them was laudable (for example, *see* Tr. 648-53, 874-75) but can be hazardous under the PACA to one's career in PACA licensed ventures, if one worked as an officer, as they did, for a produce buyer such as Fresh America Corp. that left produce sellers unpaid.

11. Cheryl Taylor and Steven Finberg took nothing more from Fresh America Corp. than the compensation for their work to which they were entitled (\$175,000 per year salary for Ms. Taylor; \$145,000 per year salary for Mr. Finberg). Tr. 856. Each had a three-year employment agreement that began October 5, 2001. RX 31 at 30. Their compensation was, in my opinion, reasonable in amount, considering their responsibilities and the risks they undertook staying with a company that was so distressed.

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<sup>4</sup> 58 Agric. Dec. 604, 610-611 (1999).

### Procedural History

12. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on June 23, 2006, that Cheryl A. Taylor was *responsibly connected* with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Cheryl Taylor filed her Petition for Review on July 27, 2006. The agency record was filed on August 8, 2006. 13. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on August 11, 2006, that Steve C. Finberg was *responsibly connected* with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Steven C. Finberg, also known as Steve C. Finberg, filed his Petition for Review on September 13, 2006. The agency record was filed on September 21, 2006.

14. The within cases, that is, *In re Cheryl A. Taylor*, PACA APP Docket No. 06-0008, and *In re Steven C. Finberg*, PACA APP Docket No. 06-0009, were joined for hearing by Order of Judge Davenport dated March 27, 2007. The hearing was held on January 29-30, 2008, in Dallas, Texas, before me, Jill S. Clifton, U.S. Administrative Law Judge. Witnesses testified and exhibits were admitted into evidence. The transcript, in two volumes, is referred to as “Tr.”

15. Cheryl Taylor and Steven Finberg called eight witnesses: (1) William H. Hasson, Tr. 60-133; (2) Colon Otho Washburn, Tr. 137-193; (3) Mark Prowell, Tr. 196-244; (4) Jerry Campbell, Tr. 247-263; (5) Nancy Blakney, Tr. 265-289; (6) Julie Ann Anderson, Tr. 291-325; (7) Cheryl Ann Taylor, Tr. 329-412, 465-750; and (8) Steven Craig Finberg, Tr. 752-884.

16. Petitioners’ exhibits are designated by “PX”. Cheryl Taylor and Steven Finberg submitted exhibits PX 1 through PX 14 [note, PX 11 has 15 tabs], each of which was admitted into evidence.

17. AMS called one witness: Josephine E. Jenkins, Tr. 885-900.

18. Respondent AMS submitted the following exhibits, each of which was admitted into evidence, each marked as “RX”, found in 5 rust-colored binders. I refer to them this way:

TRX 1 through TRX 26 (“T” for Taylor), labeled: “In re: Cheryl A. Taylor” with “PACA copy” written on label.

TRX 27 through TRX 40 (“T” for Taylor), labeled: “In re: Cheryl A. Taylor,” Respondent’s Supplemental Exhibits.

FRX 1 through FRX 17 (“F” for Finberg), labeled: “In re: Steven C. Finberg” with “PACA copy” written on label.

FRX 18 through FRX 25 (“F” for Finberg), labeled: “In re: Steven C. Finberg,” Respondent’s Supplemental Exhibits.

JRX 41 through JRX 45 (“J” for Joint), labeled: “In re: Cheryl A. Taylor and Steven C. Finberg,” Respondent’s Supplemental Exhibits.

19. I took official notice of the Default Decision and Order issued on January 19, 2007 in PACA Docket No. D-06-0002, *In re Fresh America Corp.*, together with the Hearing Clerk’s cover letter and subsequent Notice of Effective Date.

20. Neal R. Gross and Co., Inc. did excellent work preparing the hearing transcript, and few corrections were requested. AMS filed no request for transcript corrections. Cheryl Taylor’s and Steven Finberg’s (Petitioners’) Corrections to Transcript, filed April 23, 2008, are accepted, and I have made the changes accordingly, EXCEPT that, regarding Tr. 195:4, ~~malleable~~ is corrected to “valuable” on my own motion; and regarding Tr. 483:1, I made no change (“Hasson” was already there). Also, on my own motion, on page 2 of the first volume of transcript, and on pages 460 & 462 of the second volume, I hereby correct the references to counsel’s clients as follows: On behalf of the ~~Complainant~~ “Respondent” is Mr. Spicknall; On behalf of the ~~Respondent~~ “Petitioners” is Mr. McCarron. Lastly, on my own motion, regarding Tr. 149:10, ~~mean~~ is corrected to “meant”; and regarding Tr. 101:6, ~~lat~~ is corrected to “late”.

21. Cheryl Taylor’s and Steven Finberg’s Brief of Petitioners was timely filed on April 23, 2008. Cheryl Taylor’s and Steven Finberg’s (Petitioners’) Reply Brief was timely filed on May 22, 2008.

22. AMS’s (Respondent’s) Proposed Findings of Fact, Conclusions of Law, and Order; and Post-Hearing Brief In Support, were timely filed on April 23, 2008. AMS’s Reply Brief was timely filed on May 22, 2008.

### Discussion

23. Mr. McCarron (counsel for Cheryl Taylor and Steven Finberg) in his opening statement refers to Cheryl Taylor and Steve Finberg as the “poster child” of the people that fit within the exception (the exception to being found to be *responsibly connected*, by proving both prongs of the *Norinsberg*<sup>5</sup> two-prong test). Tr. 41.

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<sup>5</sup> *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

24. Mr. McCarron stated that Cheryl Taylor and Steven Finberg were not actively involved, were officers only nominally, and that NTOF<sup>6</sup> was the alter ego of Fresh America (Tr. 38-41). After careful study of the evidence, I conclude otherwise. I concede that Cheryl Taylor and Steven Finberg may be “poster children” for “no good deed goes unpunished.”

25. The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. 7 U.S.C. § 499a(b)(9).

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

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

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

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<sup>6</sup> By “NTOF,” Mr. McCarron was referring to North Texas Opportunity Fund. Such reference could mean North Texas Opportunity Fund LP OR its general partner North Texas Opportunity Fund Capital Partners LP; OR its general partner NTOF Fund LLC; OR North Texas Investment Advisors LLC; or some combination thereof. RX 31 at 32-33; RX 29 at 63-64.

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

28. Mr. Colon Washburn had been a Director of Fresh America Corp. from 1993 to about September 2002 (Tr. 144, 184), and he was Fresh America Corp's Chief Executive Officer for nearly 2 years (October 1999 - August 2001). PX 14 at 3; Tr. 144, 154; TRX 31 at 25. Mr. Washburn's resumé shows the following Fresh America Corp. accomplishments during his time as CEO:

**Chief Executive Officer** 10/99 - 8/01  
Reduced debt from \$49 million to \$5.4 million.  
Divested 7 non-performing or non-strategic operating units.  
Retained all key personnel.  
Implemented supply chain and "value-add" strategy.  
Relocated HR, Accounting and IT to corporate.  
Reduced overhead from \$13 million (1999) to \$5 million (2001).

Identified and executed "seamless" transition to new owners.

PX 14 at 3.

29. AMS began its cross-examination of Mr. Washburn with Mr. Washburn's acknowledgment that Fresh America Corp. had financial problems during Mr. Washburn's time as CEO (Tr. 151-52):

Mr. Spicknall: Okay. As I understand it, there was - - Fresh America was experiencing some pretty significant financial problems in the late '90s and early 2000, 2001, prior to the NTOF transaction. Is that accurate?

Mr. Washburn: Yes, sir.

Mr. Spicknall: Okay. And during part of that time, at least, 1999 to 2001, you were the CEO, the chief executive officer. Right?

Mr. Washburn: Yes.

Mr. Spicknall: Okay. Now, tell me about - - there was a number of the older management who had been there for quite a period of time that were leaving the company during that late '90s, early 2000 time frame, for instance, John Gray. Why were people leaving?

Mr. Washburn: John actually didn't leave until May of 2001, and John left because he had an incredible opportunity with another company.

Mr. Spicknall: Okay. It didn't have anything -- --

Mr. Washburn: In fact --

Mr. Spicknall: Go ahead.

Mr. Washburn: John and I were personal friends, and he was very reluctant to leave, but he had a great opportunity. Prior to John leaving,

he promised the company and fulfilled it that he would find someone - - find his replacement. In fact, he was really instrumental in us finding Cheryl Taylor.

Tr. 151-52.

30. Again, AMS on cross-examination of Mr. Washburn, established that Fresh America Corp. was "in fairly significant financial trouble" (Tr. 156- 57) :

Mr. Spicknall: Right. Now, Fresh America, though was in fairly significant financial trouble by 2000, 2001. Is that accurate?

Mr. Washburn: That's accurate.

Mr. Spicknall: Okay. And, in fact, that's the reason that really it had to take the NTOF transaction. It had to have that cash. Is that accurate?

Mr. Washburn: That's accurate.

Mr. Spicknall: Okay. Or it would have shut down. Is that true?

Mr. Washburn: I don't know whether we would have shut down. I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all our vendors. And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.

Tr. 156-57.

31. NTOF invested substantial amounts of money in Fresh America Corp. (\$5 million). Tr. 103, 145. In the end, NTOF and Arthur Hollingsworth, who was placed by NTOF as Chairman of the Board, lost their investment. During their tenure, they kept a tight rein on Fresh America Corp.'s operation (Tr. 145-46):

Mr. McCarron: All right. Now I'd like to take you to the point when the North Texas Opportunity Fund, NTOF, became involved with Fresh America. Do you recall that?

Mr. Washburn: Yes.

Mr. McCarron: All right. And do you recall them becoming - - investing \$5 million and obtaining a number of shares of stock in Fresh America?

Mr. Washburn: Yes.

Mr. McCarron: All right. Now, do you recall as part of the deal how many board positions NTOF was allotted?

Mr. Washburn: I recall four positions.

Mr. McCarron: An then did you fill the fifth one?

Mr. Washburn: Yes.

Mr. McCarron: All right. Do you remember who was on the board there at NTOF?

Mr. Washburn: Yes.

Mr. McCarron: Can you tell us those names?

Mr. Washburn: Yes. Arthur Hollingsworth, Darren Miles, Luke Sweetser, Greg Campbell.

Mr. McCarron: All right. And can you tell us how the - - what changes were made in the operation of the company from the time that NTOF became involved in 2001.

Mr. Washburn: In effect, the board meetings became the management of the company. Steve and Cheryl and others had no operating authority with the company. We discussed - - everything was, the way I described it, is managed at board level.

Tr. 145-46.

32. Further (Tr. 146-47):

Mr. McCarron: All right. And what decisions were made by - - well, who actually made the decisions - - when you say, management by the board, who was actually making the decisions, the management decisions, at the board?

Mr. Washburn: Arthur Hollingsworth.

Tr. 146-47.

33. Further (Tr. 148-50):

Mr. McCarron: What about bills to pay? Who decided that?

Mr. Washburn: In essence, the board decided. There was a point during one meeting when we were getting - - burning through the \$5 million quicker than anyone had anticipated, and the comment was made, Well, what do we need to do. And Arthur Hollingsworth said, Well, we need to delay paying our vendors. And both Cheryl and Steve commented, well, was Arthur aware of PACA and what that meant.

And Arthur said initially that it didn't really make any difference, that he'd managed and run other companies, and he was able to extend payments without any problem. And we got into a rather lengthy discussion about what that meant on PACA. In essence, Arthur was going to decide who was going to get paid, when, and how, and what kind of terms those payment terms would be.

Mr. McCarron: What authority did either Cheryl Taylor or Steve Finberg have over any decisions - - what decision-making authority, if any, did they have at Fresh America after NTOF came in?

Mr. Washburn: Cheryl virtually had no authority. Steve had some authority. I think he could book trips and pretty much see the customers he wanted to, but beyond that, he had no authority.

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Tr. 148-50.

34. Finally (Tr. 179):

Mr. Washburn: During the NTOF, it was very obvious that it was difficult, if not impossible, to make any decisions on a day-to-day basis in Fresh America, that they needed to be handled by Arthur during the board, or if there was a decision that needed to be made before a board meeting, they would contact Arthur to get the decision made.

Tr. 179.

35. **Discussion Specifically as to Cheryl Taylor** (paragraphs 32 through 68): Cheryl Taylor was, among other things, the Chief Financial Officer. If it was not *her* job to see that *full payment promptly* was made to Fresh America Corp.'s produce sellers, then whose job was it?

36. The chief financial officer of a produce buyer is in a unique position to see that *full payment promptly* is made to produce sellers. The privilege of buying produce may be lost under the PACA (through license suspension or revocation) if produce buyers do not pay produce sellers *full payment promptly*.

37. Cheryl Taylor concluded that she, Cheryl Taylor, never had the authority to get the produce sellers paid. Cheryl Taylor compared her own authority with that of others in management of Fresh America Corp. that had greater authority. Cheryl Taylor described her helplessness to affect the agenda of (1) Arthur Hollingsworth (Chairman of the Board beginning October 2001, TRX 31 at 25); (2) Darren Miles (President and Chief Executive Officer beginning in August of 2001; also Director beginning October 2001, TRX 31 at 25), and (3) Cheryl Taylor's subordinate Helen Mihas (Vice President, Treasurer, Controller, and Assistant Secretary, beginning in May 2001 according to TRX 4; and in April 2001 according to TRX 31 at 25).

38. Cheryl Taylor worked for Fresh America Corp. to obtain financing, including filing required SEC (Securities and Exchange Commission) documents. She began as a consultant, April 23, 2001, having committed to working for a minimum of 30 hours per week, for three months. Tr. 364-65. PX 1. Cheryl Taylor's good work - - she tried valiantly to keep Fresh America Corp. from failing; she worked hard to find financing - - is irrelevant to whether she is found to have been *responsibly connected*.

39. Cheryl Taylor was to report to John Gray. Within the first month of her work as a consultant, during May 2001, John Gray resigned as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., and Cheryl Taylor was "elected to the offices of Executive Vice President, Chief Financial Officer and Secretary of the

Company” (Fresh America Corp.). TRX 4. Cheryl Taylor was no longer a consultant but an employee. Cheryl Taylor had become part of Fresh America Corp.’s management. The effective date shown on TRX 4 was May \_\_\_\_\_, 2001. Simultaneously, Cheryl Taylor picked up another of John H. Gray’s responsibilities, that of being the registered agent: “it is in the best interest of the Company to change the registered agent of the Company from John H. Gray to Cheryl Taylor.” TRX 4. There is nothing “nominal” about these responsibilities.

40. Had Cheryl Taylor remained a consultant on contract, one who was **not** an officer, director, or holder of more than 10 per centum of the outstanding stock, it is true that there would be no basis for finding her to be responsibly connected. Cheryl Taylor’s analysis is, that her job responsibilities did not change from those she was hired to do as a consultant. Tr. 635-38. I disagree. When Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., with respect to the Perishable Agricultural Commodities Act, everything changed.

41. Cheryl Taylor’s counsel, Mr. McCarron, is extremely capable in addressing the evidence and the law. Here, he attempted to “shoehorn” Cheryl Taylor’s role within Fresh America Corp. into *exceptions* that would allow her to escape a *responsibly connected* finding. Exceptions to being found to be *responsibly connected* are rare.

42. Before addressing counsel’s attempt to fit Cheryl Taylor’s work into an exception, I address the general rules that are pertinent here. Generally under the PACA, officers are *responsibly connected* with the corporation they serve. 7 U.S.C. § 499a(b)(9). Every officer of a corporation that violates 7 U.S.C. § 499b(4) is held to be *responsibly connected*, unless she can prove that she should be excepted (by proving both prongs of the *Norinsberg*<sup>7</sup> two-prong test).

43. **Was Cheryl Taylor Actively Involved?** (paragraphs 43 through 51). Fresh America Corp. did not pay its produce sellers *full payment promptly*, as required by the PACA. See 7 C.F.R. § 46.2(aa), which contains definitions of “Full payment promptly”. While I do not have the details of Fresh America Corp.’s arrangements with its produce sellers, produce sellers are entitled to be paid quickly, as quickly as *within 10 days* after the produce is accepted. Not only were produce sellers to Fresh America Corp. not paid quickly; they were not paid ever,

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<sup>7</sup> *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

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to the tune of \$1.2 million.<sup>8</sup> 44. Fresh America Corp. was disintegrating. Fresh America Corp. was losing half-a-million dollars a month. Tr. 742. Under the PACA, especially under such circumstances, financial management is required to see that the produce sellers are paid. Fresh America Corp. had taken the produce; Fresh America Corp. was required to pay for the produce. Under the PACA, other payments should have taken a lower priority than paying the produce sellers. Cheryl Taylor's failure to exercise authority over the payables, at least to see that the produce was paid for, constituted *active involvement* under the PACA under these circumstances.

45. Cheryl Taylor is found to have been *actively involved* in Fresh America Corp.'s activities that led to the PACA violations, even though she herself did not buy produce, and she herself did not pay for other items in preference to paying for the produce.

46. I am sympathetic to Cheryl Taylor in the predicament she was in. Cheryl Taylor testified that she was the chief financial officer in name only, so that she could be the "signer" of documents prepared by lawyers who understood why the documents were needed (Tr. 365-66), that her function as the signer was merely administrative. Tr. 362. The documents might be needed to dissolve or transfer entities that would no longer be connected to Fresh America Corp. Tr. 358-59. The documents might be related to obtaining financing, which was what she had been hired to do (Tr. 361-62). Cheryl Taylor had her hands full, with her efforts to obtain financing, including filing required SEC documents.<sup>9</sup> Her work also required her to be involved in severing or modifying connections with numerous entities. Cheryl Taylor worked also in preparation for taking the Fresh America Corp. private, to cut expenses.

47. Cheryl Taylor maintains that she was shut out of the bill-paying process. Cheryl Taylor disputes that she was able to "exercise judgment, discretion, or control" with regard to whether produce would be paid for promptly. Cheryl Taylor testified that Helen Mihas (her subordinate), was very protective over her (Helen Mihas's) work, walled Cheryl Taylor out, and controlled such decisions (Tr. 531-33); that Arthur

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<sup>8</sup> This could have been worse. When Fresh America Corp. ceased operations on or about January 22, 2003 (JRX 41 at 2), produce sellers to Fresh America Corp. were owed about \$13 million. Distributions reducing that amount were made from the PACA trust, United States District Court for the Northern District of Texas.

<sup>9</sup> Cheryl Taylor: I would say 90 to 95 percent of my time at any given week or time was devoted to trying to get the company refinanced and working on the SEC documents. Tr. 738. *See also* Tr. 349.

Hollingsworth (Chairman of the Board) controlled such decisions (Tr. 544-46); that Darren Miles (President and Chief Executive Officer) had more control over such decisions than she had.

48. Cheryl Taylor's name and title were used by Fresh America Corp. to pay bills. Cheryl Taylor signed signature cards of corporate checking accounts, and her signature was stamped on corporate checks by machine; after all, she was the Chief Financial Officer. Cheryl Taylor neither bought produce nor paid for it. Cheryl Taylor did not determine the preference or priority for paying for produce compared to other payables. Cheryl Taylor did not exercise authority over the payables.

49. Nevertheless, Cheryl Taylor was the "Executive Vice President, Chief Financial Officer, and Secretary," and regardless of why she had ascended to those responsibilities, they were hers. Where, as here, produce sellers were left unpaid for more than \$1.2 million in produce purchases, the chief financial officer of the produce buyer was **actively involved** in the produce buyer's activities that resulted in PACA violations, because the chief financial officer was uniquely positioned to see that **full payment promptly** was made to produce sellers.

50. Cheryl Taylor's failure to see that **full payment promptly** was made to Fresh America Corp.'s produce sellers, constituted **active involvement** in the activities resulting in the produce buyer's PACA violations (violations of section 2 of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4)). This is consistent with *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999), because the chief financial officer of a produce buyer is expected to "exercise judgment, discretion, or control" with regard to whether produce will be bought and whether produce will be paid for promptly.

51. Cheryl Taylor cannot prove the first prong of the exception, because she was **actively involved**, within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Fresh America Corp.'s PACA violations. Thus, Cheryl Taylor must be determined to be **responsibly connected** with Fresh America Corp. during its PACA violations.

52. **Was Cheryl Taylor "Only a Nominal" Officer?** (paragraphs 52 through 57). As indicated in paragraph 32, there was nothing "nominal" about Cheryl Taylor's responsibilities as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp. Whatever was said to Cheryl Taylor to induce her to accept the responsibilities, once she did, she became part of Fresh America Corp.'s management.

53. Cheryl Taylor testified that her responsibilities did not change from those she had undertaken when she was not an employee of Fresh America Corp. but a contractor. Tr. 362, 749. Her compensation also

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did not change. Tr. 362, 749. Cheryl Taylor was a certified public accountant who had worked her way up in Coopers & Lybrand, auditing, and had valuable public company experience and valuable bankruptcy experience as controller with the Great Train Store and valuable refinancing experience with Intellisys Group. Tr. 331-34. Cheryl Taylor's compensation, \$175,000 per year salary (RX 31 at 30, Tr. 663), was commensurate with her responsibilities. Tr. 740.

54. Cheryl Taylor testified that neither her reporting to the Board nor her signing of Board minutes (which were severely edited by Chairman Arthur W. Hollingsworth to exclude details she believed should be included) was more than administrative. Tr. 526. 55. Cheryl Taylor is an admirable and impressive professional, and I appreciate the courage she exhibited in taking on and in persisting in the work for Fresh America Corp. Her courage and her ethical nature were also exhibited in about October 2002, when she blocked \$868,000 from going out of Fresh America Corp. Had those funds gone out, she testified, that would have been in violation of Fresh America Corp.'s covenant with its senior lender, Bank of America, and would have had to be disclosed in SEC reports. PX 3 at 1, Tr. 407-11.

56. I appreciate the difficult situation Cheryl Taylor found herself in at Fresh America Corp. and would prefer that she not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. Nevertheless, it is obvious that when Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., in May 2001, she was from then on vital to Fresh America Corp. and an important and influential officer. There is no question that Cheryl Taylor had "an actual, significant nexus with the violating corporation during the violation period." Thus, she cannot demonstrate that she was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

57. By being the Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., who was **NOT** "*only a nominal*" officer, Cheryl Taylor was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

58. **Was Fresh America Corp. the "Alter Ego of Its Owners"?** (paragraphs 58 through 68). Cheryl Taylor was not an owner of Fresh America Corp. She had stock options, but she did not exercise them. During the time she held them, Cheryl Taylor's stock options were or became worthless. Tr. 705.

59. Mr. McCarron's opening statement asserted that **NTOF** (*see* footnote 6) was the dominating influence over Fresh America Corp.; Mr. McCarron's post-hearing briefs asserted that **Arthur Hollingsworth** was the dominating influence over Fresh America Corp.

60. Here, to prove the **alter ego** exception under 7 U.S.C. § 499a(b)(9), Cheryl Taylor must prove that NTOF, or Arthur Hollingsworth, or both, so dominated Fresh America Corp. as to negate its separate identity. *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000).

61. When NTOF arrived with its infusion of \$5 million (Tr. 376), NTOF did influence the way Fresh America Corp. did business. NTOF had influence in placing the Chairman of the Board (Arthur Hollingsworth), and 3 additional board members, including one who was also the President and Chief Operating Officer (Darren Miles). Tr. 145-46. (If John Hancock had placed a Board member of its choice, NTOF would have placed only three, instead of four, but John Hancock chose not to. Tr. 111.)

62. Mr. Washburn, as CEO of Fresh America Corp., was optimistic about bringing in NTOF (Tr. 157-58):

Mr. Washburn: \* \* \* I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all of our vendors. And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.

Mr. Spicknall: Okay. And when you say, you chose NTOF, you just talked about the fact that as a result of that transaction, they got 50,000 shares of that Series D preferred stock that was created, which gave them significant voting rights in the company, and that it - - is that accurate?

Mr. Washburn: I don't recall the specific number, sir.

Mr. Spicknall: Okay. But essentially you knew at the time of the NTOF transaction before it was signed that they were going to appoint - - they were going to replace you as the CEO. Is that accurate?

Mr. Washburn: Please restate that question.

Mr. Spicknall: You knew prior to the signing of the NTOF transaction that Darren Miles was going to be the new CEO of the company if the company went through with the NTOF transaction. Is that accurate?

Mr. Washburn: That's accurate.

Tr. 157-58.

63. Cheryl Taylor had helped bring NTOF in (Tr. 159):

Mr. Spicknall: Well, who was responsible for briefing the board on the details of the NTOF transaction? Would that be Cheryl Taylor?

Mr. Washburn: It would have been a combination of myself and Cheryl. Tr. 159.

64. Cheryl Taylor personally executed the agreement with NTOF on behalf of Fresh America as the company's Chief Financial Officer. TRX 29 at 63.

65. After NTOF's and Arthur Hollingsworth's arrivals at Fresh America Corp., other important influences on Fresh America Corp. remained. Fresh America Corp. had and needed creditors and/or investors beyond NTOF. For example, Bank of America was Fresh America Corp.'s senior debt holder; and John Hancock had invested a \$15 million subordinated debt tranche with Fresh America Corp. in about 1997 or 1998 (Tr. 61), with another \$5 million added later, which together added up to \$20 million. For its \$20 million, John Hancock got 27,000 shares of preferred Series D stock. RX 30, p. 2. Tr. 699. TRX 31 at 7. The John Hancock shares were owned by three distinct corporate entities: (1) the John Hancock Life Insurance Company, which held 24,840 shares; (2) the John Hancock Variable Life Insurance Company, which held 1,620 shares; and (3) the Investors Partner Life Insurance Company, which held 540 shares. TRX 29 at 65-66. Mr. William Hasson of John Hancock started attending (to observe, rather than participate in) Fresh America Corp. board meetings after NTOF made their investment in the company. He attended probably 10 to 12 such board meetings. Tr. 64-66, 70-71.

66. John Hancock lost the \$20 million (Tr. 93-94) it had loaned to Fresh America Corp., and the John Hancock Board was already prepared to write off its \$20 million loan, even when NTOF was bringing \$5 million (Tr. 103-05):

Mr. Hasson: Well, you know, the recommendation of John Hancock at the time (when NTOF came in) was to write off the loan and let it go, and I asked them if I could have permission to at least try to get something for our investment. But the board's (John Hancock's board) decision at that time was to write it off and forget about it, and I chose not to do that, tried to at least get something out of it. I ended up not doing - - getting anything out of it. They were right; I was wrong, but I just didn't want to give up.

Mr. Spicknall: What was the mood at Fresh America at the time? Was there real hope that the company could be turned around with the money from NTOF?

Mr. Hasson: There was. Yes.

Mr. Spicknall: Okay. And why was that hope alive, considering the state of the company at that time?

Mr. Hasson: Well, I think they felt with the liquidity, which obviously is the driver of these types of companies, they could rebuild the business at each location with the new management team they had and survive. That just didn't seem to work out for them.

Tr. 103-05.

67. Fresh America Corp.'s articles of incorporation permitted the company to issue 10,000,000 shares of common stock. TRX 31 at 7. Fresh America Corp. had 8,410,098 shares of common stock outstanding as of March 22, 2002. TRX 31 at 1, TRX 32 at 6. While NTOF owned no shares of common stock, the common stock was widely held as of March 15, 2002. Entities that owned 5% or less of the outstanding common stock owned roughly 45% of all the outstanding common stock; and the other 55% of all the outstanding common stock was owned by three entities, none of which was NTOF: an individual named Larry Martin owned 37.7% of the outstanding common stock; Gruber & McBaine Capital Management owned 10.6% of the outstanding common stock; and DiMare Homestead, Inc. owned 6.3% of the outstanding common stock. TRX 31 at 33-34.

68. Cheryl Taylor cannot prove that Fresh America Corp.'s owners were NTOF, or Arthur Hollingsworth, or both. Cheryl Taylor also cannot prove that Fresh America Corp. lost its separate identity as a result of the influence of NTOF, or Arthur Hollingsworth, or both. Fresh America Corp.'s distinct identity is evident, for example, to those who lost their investment in Fresh America Corp. (Bank of America presumably salvaged something by selling its receivable). The others described in paragraphs 65 and 67, plus others not specifically mentioned (Fresh America Corp.'s owners, shareholders and other investors, including lenders) lost their investment.

69. **Discussion Specifically as to Steven Finberg** (paragraphs 69 through 87): Fresh America Corp. had exciting roots. Its predecessor, Gourmet Packing Company (frequently herein, "Gourmet Packing"), had been created to supply Sam's Club with produce and to run those departments. Tr. 756, 752. Sam's Club was about 99.9% of Gourmet Packing's business. Tr. 756.

70. Gourmet Packing became Fresh America Corp. through an IPO (initial public offering), in about 1993. Tr. 758.

71. At its peak, Fresh America Corp. provided produce to 375 Sam's Club locations throughout the country. TRX 31 at 6.

72. Steven Finberg first worked for Gourmet Packing beginning when he was still in college, during summers when he was in Houston Texas. Tr. 752. Steven Finberg then "resigned" to return to college, but before his two weeks "notice" was effective, Gourmet Packing called to put him to work as general manager of two locations in Austin, Texas, while he was completing college. Tr. 753-54. Three days after that call, Gourmet Packing called again to make Steven Finberg district manager of three

additional locations, in San Antonio, Texas. I believe this was about August 1989. Tr. 753.

73. Sam's Club was growing, Gourmet Packing was growing, and Steven Finberg was growing. Steven Finberg's description is helpful. This excerpt of Steven Finberg's testimony begins about 1992 (Tr. 756-59):

To make a long story short, out of about 400-plus employees of Gourmet Packing at the time, I was selected and offered a position to go work in the Sam's Club home office in Bentonville, Arkansas, as the corporate liaison and to learn supply chain. Sam's Club wanted someone to understand the mentality and their culture and be able to convey that throughout our organization.

And at that time, again, Sam's Club was our business. I usually say 99.9 percent. We were created to supply Sam's Club with produce and run those departments. We may have had some outside business, but it would barely register a percentage point of the overall sales contribution.

I was in Bentonville, Arkansas, moved there July of 1992, less about two weeks prior to my getting married in Austin, and started my career, that phase of my career, as the customer service manager of Gourmet Packing.

In December of 1992, I was promoted to director of customer service. My role as director of customer service was to work closely and coordinate the different initiatives of the Sam's Club buyers within our own organization, and at that time, the one distribution center in Houston, Texas had expanded to also include locations in Dallas and Atlanta.

By 1995, when I departed Bentonville, Arkansas, to return to what was still our corporate office of Gourmet Packing in Houston, Texas, I was now, I believe, director of national programs. Sam's Club was still in the high 90s as far as the percent of our business. I was with - - at that time, the Sam's Club program - -

It's very important, if I could have a little latitude to explain this - - we mentioned the Sam's - - we mentioned Wal-Mart quite frequently throughout the last two days'

testimonials. There is a distinction. Gourmet Packing had and built distribution centers - - I'm sorry. And there was also an IPO [Initial Public Offering] where we became Fresh America in 1993.

Gourmet Packing, now Fresh America, built distribution centers to function as a perishable distribution center for the Wal-Mart Corporation, to supply Sam's Clubs with perishable commodities. These were large distribution centers that would do in excess of about \$50 million a sale. This is before Sam's Club and Wal-Mart got into the business of perishable distribution. They used to have dry and select freezer and refrigerated capabilities. Now they were starting to build perishable distribution centers.

We entered into an agreement in 1995, a five-year agreement, which was going to allow our company enough time to divest our business, knowing that the Sam's Club distribution piece of the business was going away, not because of any performance issues, but the parent company, Wal-Mart, was building distribution centers. So that's why I returned back in 1995 to our corporate office.

In December of 1995, I was hired and promoted to general manager of our Arlington, Texas, distribution center, right up the road. For two years, I was the general manager of that location, responsible for the entire P&L, under parameters set by corporate of that operation. At that time, all of my business was to supply the neighboring Sam's Clubs in this part of the state of Texas and Oklahoma and, I believe, Arkansas with product for the Sam's Club produce departments.

Tr. 756-59.

74. During 1995, Steven Finberg went from being Fresh America Corp.'s director of national programs (with Sam's Club still being in the "high 90s" percentage of Fresh America Corp.'s business), to being promoted to general manager of the Arlington, Texas distribution center. Tr. 757-59.

75. Fresh America Corp. was at a crossroads in 1995. When Wal-Mart / Sam's Club entered into a 5-year contract with Fresh America Corp. to

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cover 1995 through 2000, everyone understood that at the end of that 5 years, Fresh America Corp. would lose its Sam's Club business, because Sam's Club would be doing internally what Fresh America Corp. had been doing for Sam's Club. Tr. 758-59.

76. Gourmet Packing, and then Fresh America Corp., had built perishable distribution centers to serve the Wal-Mart corporation, to supply Sam's Club with perishable commodities. Tr. 758. Fresh America Corp. had about 8 such distribution facilities by the end of 2001. TRX 31 at 3.

77. The "Acquisitions/Divestitures" section of Fresh America Corp.'s SEC Annual Report for the year ending December 2001, includes the following:

Because the Company understood the Sam's Agreement would expire in 2000, in 1995 the Company began to implement a strategy to attract new customers over a wider geographical area and diversify its customer base into other areas of produce distribution. In executing its strategy, the Company completed 16 acquisitions from 1995 through 1998 and added various customer alliances involving fresh produce procurement, warehousing, distribution and/or marketing. Through these acquisitions and new customer relationships, the Company expanded its cold chain distribution network to become national in scope, diversified its customer and supplier relationships and expanded its value-added processing capabilities. Six of these acquisitions in the specialty food service business never achieved sufficient market presence and were closed or sold during the period from September 1999 to May 2001.

TRX 31 at 6.

78. Fresh America Corp. had to operate "full speed ahead" for the 5 years 1995-2000, to take good care of Sam's Club, its primary customer. At the end of that 5 years, Fresh America Corp. needed to have "divest"ed the business: closed down, scaled back, or otherwise changed proportions to match the loss of Sam's Club; or, Fresh America Corp. needed to have developed additional customers, to replace the Sam's Club business, and Fresh America Corp. tried. Losing the Sam's Club business was the beginning of the end, looking back at Fresh America Corp.'s boom-to-bust. 79. **Was Steven Finberg Actively Involved?** (paragraphs 79 through 81). Fresh America Corp. did not pay its produce sellers *full payment promptly*, as required by the PACA.

AMS argues that Steven Finberg was actively involved by virtue of his oversight responsibilities including his participation in Board meetings. I disagree. Steven Finberg was not a Director; he was not a Board member. He was invited to the meetings to report the state of sales. Steven Finberg did not purchase product; he did not issue purchase orders. Tr. 835. Steven Finberg had no authority to determine payment priorities. I am persuaded that Steven Finberg worked valiantly to increase sales, trying to replace the loss of most of the Wal Mart business. Mr. Finberg testified about some of the happenings that interfered with his attempts to improve the “top” line (Tr. 846), but I need not detail those here. Steven Finberg’s responsibilities, as Vice President of Sales and Marketing OR Executive Vice President of Business Development, did not *actively involve* him in the activities that resulted in the PACA violations.

80. I am reminded of *Philip J. Margiotta*, who, even though he was the manager of the business (who was also a corporate officer), was not *actively involved* when, unbeknownst to Mr. Margiotta, another employee paid unlawful bribes and gratuities to a USDA produce inspector:

... Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner’s management of M. Trombetta & Sons, Inc.’s Hunts Point Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.’s violations of the PACA.

65 Agric. Dec. 622, 638 (2006).

81. Steven Finberg’s circumstances can of course be distinguished from those of *Philip J. Margiotta*, in part regarding awareness. Steven Finberg was aware that Fresh America Corp. was not timely paying its produce sellers (“suppliers”); *Philip J. Margiotta* was unaware that M. Trombetta & Sons, Inc., through an employee, was paying unlawful bribes and gratuities. Nevertheless, I cite *Philip J. Margiotta* to show that being a highly responsible, highly placed corporate officer does not automatically make one “*actively involved*.”

82. **Was Steven Finberg “Only a Nominal” Officer?** (paragraphs 82 through 85): During produce buyer Fresh America Corp.’s PACA violations, that is, from February 2002 through February 2003, Steven Finberg was Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2). There was nothing “nominal” about Steven Finberg’s responsibilities. There is no question

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whether he had “an actual, significant nexus with the violating corporation” - - clearly, he did. He was a valuable member of the team that tried to keep Fresh America Corp. in business (*see* paragraphs 8 through 11). Steven Finberg cannot prove the second prong of the two-prong exception; he cannot demonstrate that he was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep’t of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

83.I would prefer that Steven Finberg not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. I agree with Mr. Spicknall, though, that the PACA Act and regulations are “tough” for good reason (AMS’s initial Brief at 10):

The PACA “is admittedly and intentionally a ‘tough’ law,” that was “designed primarily for the protection of the producers of perishable agricultural products -- most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing. . . .” *See* S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956). Any person who is or has been responsibly connected with a business entity that has been found to have committed any flagrant or repeated violations of Section 2 of the PACA may not be employed by any PACA licensee for at least one year. *See* 7 U.S.C. § 499h(b).<sup>10</sup> After one year, if the prospective employer furnishes and maintains a surety bond in an amount set by the Secretary, the responsibly connected person may be employed by a PACA licensee. *See id.*<sup>11</sup> The Secretary

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<sup>10</sup> The Secretary’s power to refuse to issue a PACA license to individuals responsible for PACA violations was initially limited to situations in which the applicant or one closely connected with the applicant was responsible for any violation that had led to the prior revocation of a PACA license. *See* H.R. Rep. No. 1041, 71st Cong., 2d Sess. at 3-4. Over time, the PACA was amended to increase the Secretary’s power in order to prevent individuals who were responsible for violations of the PACA from evading the statute’s penalties. *See* H.R. Rep. No. 489, 73rd Cong., 2d Sess. at 2-3 (1934); H.R. Rep. No. 2116, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 2233, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 956, 75th Cong., 1st Sess. at 1-3 (1937); S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956).

<sup>11</sup> “Employment” is defined by the PACA as “any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.” *See* 7 U.S.C. § 499a(b)(10).

may approve employment of the responsibly connected person without a bond after two years. *See id.*

AMS's initial Brief at 10.

84. The PACA, by "casting a wide net," deters people in responsible positions from allowing produce sellers to go unpaid - - nay, from allowing produce sellers even to wait for the prompt payments to which they are entitled. These people in responsible positions include all partners, officers, directors, and holders of more than 10 percent of the outstanding stock of a corporation.

85. By being the Vice President of Sales and Marketing OR Executive Vice President of Business Development of Fresh America Corp., who was **NOT** "*only a nominal*" officer, Steven Finberg was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

86. **Was Fresh America Corp. the "Alter Ego of Its Owners"?** (paragraphs 86 through 87). Steven Finberg was an owner of Fresh America Corp., but the parties stipulated that he owned less than 10% per cent of the outstanding common stock; in fact, Steven Finberg owned far less than 5% of the outstanding common stock. Steven Finberg also had stock options that he did not exercise, which, during the time he held them, were or became worthless. Nevertheless, for the "**alter ego**" analysis, Steven Finberg was an owner.

87. The remainder of the "**alter ego**" analysis with regard to Steven Finberg is identical to that for Cheryl Taylor, and I incorporate paragraphs 59 through 68, applying them to Steven Finberg rather than Cheryl Taylor.

### **Findings of Fact and Conclusions**

88. Paragraphs 88 through 108 contain intertwined Findings of Fact and Conclusions.

89. The Secretary of Agriculture has jurisdiction over Cheryl A. Taylor, over Steven C. Finberg, also known as Steve C. Finberg, and over the subject matter involved herein.

90. Fresh America Corp., a Texas corporation, "ceased operations January 22, 2003," according to the PACA License Renewal Application form marked "NOT RENEWING," received by AMS December 2, 2003. JRX 41.

91. During February 2002 through February 2003, Fresh America Corp. failed to make full payment promptly in the amount of \$1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that it received and accepted in interstate and

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foreign commerce, in willful, repeated and flagrant violation of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). *See* Default Decision and Order issued on January 19, 2007 against Fresh America Corp. by U.S. Administrative Law Judge Peter M. Davenport. *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007).

92. Fresh America Corp. was not the alter ego of Arthur Hollingsworth. Paragraphs 58 through 68.

93. Fresh America Corp. was not the alter ego of North Texas Opportunity Fund LP. Paragraphs 58 through 68.

94. An officer need not control a company to be found ***responsibly connected***.

95. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Cheryl Taylor was an officer of Fresh America Corp., to-wit: Executive Vice President, Chief Financial Officer, and Secretary of Fresh America Corp. TRX 4.

96. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Steven Finberg was an officer of Fresh America Corp., to-wit: Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2).

97. Cheryl Taylor was not a director of Fresh America Corp.

98. Steven Finberg was not a director of Fresh America Corp.

99. Cheryl Taylor did not own Fresh America Corp. stock. [Cheryl Taylor had stock options, never exercised.]

100. Steven Finberg owned Fresh America Corp. stock, but the parties stipulated that he owned less than 10% per cent of the outstanding common stock (Tr. 851-52); in fact, Steven Finberg owned far less than 5% of the outstanding common stock (TRX 31 at 33-34). Steven Finberg also had stock options that he never exercised.

101. The burden is on each Petitioner to demonstrate by a preponderance of the evidence that he or she was not responsibly connected with Fresh America Corp., despite being an officer of Fresh America Corp.

102. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary), **she was not actively involved** in Fresh America Corp.'s activities that resulted in Fresh America Corp.'s PACA violations. Paragraphs 43 through 51.

103. Steven Finberg carried his burden of proof and proved that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was not actively involved** in Fresh America Corp.'s activities that

resulted in Fresh America Corp.'s PACA violations. Paragraphs 79 through 81.

104. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

105. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer and Secretary), **she was only a nominal** officer of Fresh America Corp. Paragraphs 52 through 57.

106. Steven Finberg failed to prove that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was only a nominal** officer of Fresh America Corp. Paragraphs 82 through 85.

107. Cheryl Taylor was **responsibly connected** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 43 through 57.

108. Steven Finberg was **responsibly connected** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9)), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 79 through 85.

### Order

109. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated June 23, 2006, that Cheryl A. Taylor

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was *responsibly connected* with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA<sup>12</sup> violations.

110. Accordingly, Cheryl A. Taylor 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 35 days after service of this Order on Cheryl A. Taylor.

111. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated August 11, 2006, that Steven C. Finberg, also known as Steve C. Finberg, was *responsibly connected* with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA<sup>13</sup> violations.

112. Accordingly, Steven C. Finberg, also known as Steve C. Finberg, 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 35 days after service of this Order on Steven C. Finberg.

113. This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

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<sup>12</sup> when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

<sup>13</sup> when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

**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.

## 506 PERISHABLE AGRICULTURAL COMMODITIES ACT

(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: PERFECTLY FRESH FARMS, INC.  
PACA Docket No. D-05-0001  
In re: PERFECTLY FRESH CONSOLIDATION, INC.  
PACA Docket No. D-05-0002 and  
In re: PERFECTLY FRESH SPECIALTIES, INC.  
PACA Docket No. D-05-0003  
In re: JAIME O. ROVELO  
In re: JEFFREY LON DUNCAN  
In re: THOMAS BENNETT  
PACA-APP Docket No. 05-0010  
PACA-APP Docket No. 05-0011  
PACA-APP Docket No. 05-0012  
PACA-APP Docket No. 05-0013  
PACA-APP Docket No. 05-0014  
PACA-APP Docket No. 05-0015  
Decision and Order as to Perfectly Fresh Farms, Inc.; Perfectly  
Fresh Consolidation, Inc.; Perfectly Fresh Specialities, Inc.; Jeffrey  
Lon Duncan; and Thomas Bennett.  
Filed June 12, 2009.**

**PACA – Responsibly connected – Willful, flagrant and repeated violations –  
Failure to pay full payment promptly – Facts and circumstances published –  
Licensing restrictions – Employment restrictions – Right to judicial review –  
Preponderance of the evidence – Nominal – Alter ego.**

## 508 PERISHABLE AGRICULTURAL COMMODITIES ACT

Christopher Young-Morales, for the Associate Deputy Administrator, AMS.  
Jonathan Barry Sexton, Orange, CA, for Petitioner Thomas Bennett.  
Christopher F. Bryan, Los Angeles, CA, for Respondents Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; and Petitioner Jeffrey Lon Duncan.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

### PROCEDURAL HISTORY

This proceeding originated as three disciplinary proceedings along with six responsibly connected proceedings, all brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. Because the companies were inter-related, the proceedings were consolidated for hearing. On October 28, 2008, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued a consolidated decision in which he found that Perfectly Fresh Consolidation, Inc. [hereinafter Consolidation]; Perfectly Fresh Farms, Inc. [hereinafter Farms]; and Perfectly Fresh Specialties, Inc. [hereinafter Specialties], each committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers for produce purchased in interstate and foreign commerce. The Chief ALJ further found: (1) Jaime Rovelo was responsibly connected with Consolidation, Farms, and Specialties; (2) Jeffrey Lon Duncan was responsibly connected with Consolidation, but was not responsibly connected with Specialties; and (3) Thomas Bennett was responsibly connected with Farms.

On January 8, 2009, Consolidation, Farms, Specialties, and Jeffrey Lon Duncan appealed the Chief ALJ's decision. On January 9, 2009, Thomas Bennett appealed the Chief ALJ's decision that he was responsibly connected with Farms when it committed willful, flagrant, and repeated violations of the PACA.<sup>1</sup> I have reviewed the record, filings, and arguments in this case. I have read the Chief ALJ's

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<sup>1</sup> Counsel for Mr. Bennett also appealed the Chief ALJ's findings regarding Farms. However, Farms was not represented by Mr. Bennett's counsel; therefore, the arguments raised by Mr. Bennett's counsel could be struck from the record. However, in an effort to ensure Mr. Bennett receives fair treatment, I reviewed his arguments regarding Farms. The arguments have no merit.

decision. I find the Chief ALJ's decision to be well-reasoned and complete. Therefore, I adopt with minor changes the Chief ALJ's decision as my own.

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], filed separate disciplinary Complaints against Consolidation, Farms, and Specialties. Each separate Complaint alleged that one of the respondent companies, Consolidation, Farms, and Specialties, had committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly to sellers of perishable agricultural commodities. Consolidation, Farms, and Specialties each had received a PACA license which had expired subsequent to the date of the alleged violations. Consolidation, Farms, and Specialties had each filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the Complaints in the instant consolidated proceeding.

In particular, the three separate Complaints alleged that Consolidation, during the period November 17, 2002, through February 15, 2003, failed to make full payment promptly of the agreed purchase prices 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 promptly of the agreed purchase prices 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 promptly of the agreed purchase prices 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 Consolidation, Farms, and Specialties on May 22, 2006.<sup>2</sup> Each company answered on June 8, 2006, denying the alleged violations.

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<sup>2</sup> Administrative Law Judge Peter M. Davenport granted AMS' motions for default decisions with respect to Consolidation and Specialties on March 31, 2005, and subsequently vacated his decision in 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, Consolidation, Farms, and Specialties were served/re-served with their respective Complaints.

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Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the PACA Branch Chief], issued six letters informing three individuals that he found that each individual was responsibly connected with one or more of the three respondent companies at the time the alleged violations, which are the subject of the disciplinary Complaints, were committed. The PACA Branch Chief found Jaime O. Rovelo to have been responsibly connected with Consolidation, Farms, and Specialties; found Thomas Bennett to have been responsibly connected with Farms; and found Jeffrey Lon Duncan to have been responsibly connected with Consolidation and Specialties. Mr. Rovelo, Mr. Bennett, and Mr. Duncan each filed a Petition for Review of the PACA Branch Chief's responsibly connected determinations. The three disciplinary proceedings and the six responsibly connected proceedings were consolidated for hearing pursuant to section 1.137 of the Rules of Practice (7 C.F.R. § 1.137). Following the deployment of Administrative Law Judge Peter M. Davenport to Iraq, the Chief ALJ re-assigned the matter to himself.

The Chief ALJ conducted a hearing in these consolidated proceedings in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales and Tonya Keuseyan represented AMS and the PACA Branch Chief. Christopher S. Bryan represented Consolidation, Farms, and Specialties in the disciplinary proceedings and Mr. Duncan in his responsibly connected proceeding. Douglas B. Kerr represented Mr. Bennett in his responsibly connected proceeding.<sup>3</sup> Jaime O. Rovelo did not respond to any motions or orders after filing his Petition for Review and did not appear at the hearing.

Eight witnesses, including Mr. Duncan and Mr. Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency records" in the responsibly connected proceedings, 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 PACA governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, the PACA defines, and provides a sanction for, "unfair conduct"

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<sup>3</sup> Subsequent to the hearing, Jonathan Barry Sexton entered his appearance on behalf of Mr. Bennett. Mr. Sexton replaced Mr. Kerr. Mr. Sexton is Mr. Bennett's counsel on appeal.

in transactions involving perishables agricultural commodities. Section 2(4) of the PACA provides:

**§ 499b. Unfair conduct**

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

. . . .

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

7 U.S.C. § 499b(4).

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

**§ 499h. Grounds for suspension or revocation of license**

**(a) Authority of Secretary**

. . . 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.

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7 U.S.C. § 499h(a).

The Regulations define “full payment promptly”:

**§ 46.2 Definitions.**

....

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

....

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

....

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

7 C.F.R. § 46.2(aa)(5), (11).

The PACA also imposes on every PACA 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 PACA also imposes severe sanctions against any person “responsibly connected” with an establishment that has had its PACA license revoked or suspended or has been found to have committed flagrant or repeated violations of section 2 of the PACA. (7 U.S.C. § 499h(b).) The PACA prohibits any PACA licensee from employing any person who was responsibly connected with any person whose license “has been revoked or is currently suspended” for as long as 2 two years, and then only upon approval of the Secretary. (*Id.*)

Section 1(a) of the PACA defines the term “responsibly connected,” as follows:

**§ 499a. Short title and definitions**

....  
**(b) Definitions**

For purposes of this chapter:

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

7 U.S.C. § 499a(b)(9).

## **BACKGROUND**

### **A. The Investigation**

Upon receiving notification that four related companies, Consolidation, Farms, Specialties, 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 many of the assets of the companies had been purchased by another company, Hidden Villa Ranches. In late April 2003, Ms. Kondora spoke to Phil Brundt, the chief financial officer of Hidden Villa Ranches, and he informed her that Hidden Villa Ranches was in possession of all documents of the four companies. (Tr. 33-35, 163.) Ms. Kondora faxed him a Notice of Investigation (CX-5) and, in early May 2003, traveled to Los Angeles to meet with Mr. Brundt. He directed her to 50 boxes of records (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 alleged violating companies.

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Gary Tice indicated to Ms. Kondora that the companies owed a total of about \$1.2 or \$1.3 million in produce debt. (Tr. 46-48.)

Ms. Kondora 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.<sup>4</sup> Ms. Kondora prepared a “no-pay” table for each of the three respondent companies.<sup>5</sup> According to her tables, Consolidation owed 24 produce sellers a total of \$373,944.19 for 286 lots of perishable agricultural commodities (CX-02-7<sup>6</sup>); Farms owed 14 produce sellers a total of \$442,023.12 for 142 lots of perishable agricultural commodities (CX-01-7); and Specialties owed 28 produce sellers a total of \$263,801.40 for 796 lots of perishable agricultural commodities (CX-03-7). Ms. Kondora also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of Consolidation, Farms, and Specialties and found the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those produce sellers. (Tr. 131-33.)

Ms. Kondora also secured written sworn statements from a number of the produce sellers indicating that the transactions she cited were in interstate or foreign commerce (Tr. 189-95). She verified with these produce sellers that the amounts listed in the vouchers were still unpaid before she prepared her no-pay list (Tr. 186-87). She also indicated that these produce sellers generally believed they were dealing with an entity they called “Perfectly Fresh” and did not realize the existence of the individual corporate entities (Tr. 184-86). Ms. Kondora also testified that Consolidation, Farms, and Specialties each 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, Consolidation, Farms, and Specialties still owed significant amounts to the produce sellers listed in the Complaints and that approximately 52 percent of the valid PACA Trust Claims recognized by the bankruptcy court remained unpaid.

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<sup>4</sup> The large majority of AMS’ and the PACA Branch Chief’s exhibits consists of these paired invoices and vouchers.

<sup>5</sup> There were no apparent unpaid invoices under the name of Perfectly Fresh Marketing, Inc., or Perfectly Fresh Florals, LLC.

<sup>6</sup> CX indicates that the exhibit was offered by AMS and the PACA Branch Chief, the two digit number beginning with “0” represents the last two digits of the case docket number, and last number is the exhibit number.

### **B. 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, Inc., with Jeffrey Lon Duncan, who had been in the produce business for about 15 years. Mr. Tice had expertise in managing and owning businesses and had more recently helped other companies for which he worked with strategic planning and with modernizing their business techniques. (Tr. 295-300.) In 2000-2001, Mr. Tice worked as a consultant for Fresh Point, where he met Mr. Duncan, whose principal job involved servicing the produce needs of cruise lines (Tr. 300-01). They worked together on special projects involving inventory and purchasing. While Mr. Tice had been a manager for many years, Mr. Duncan did not, in Mr. Tice's opinion, perform managerial duties. However, Mr. Tice thought Mr. Duncan's managerial skills were "quite adequate." ( Tr. 305-07.) Mr. Tice wanted Mr. Duncan as a partner to take advantage of his sales skills with cruise lines, while Mr. Tice was working on developing a relationship supplying tomatoes to Taco Bell (Tr. 307-09). Perfectly Fresh Marketing, Inc.'s PACA license indicated that 51 percent was owned by Tice, Inc., which was a company developed by Mr. Tice and his wife, Erin Tice, and that 49 percent was owned by Mr. Duncan. Mr. Tice testified that he managed the day-to-day accounts payable and receivable with Mr. Duncan. (Tr. 309.)

In July 2002, the operating agreement of Perfectly Fresh Marketing, Inc., 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 percent equity share in Perfectly Fresh Marketing, Inc., while Tice, Inc., now owned 30 percent and Mr. Duncan now owned 20 percent.<sup>7</sup> 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. 317-20, 330.) John Norton was granted preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors (RX 13 at 5, ¶ 3.4; Tr. 328). Gary Tice testified that the plan to establish the three operating companies was devised by himself, Mr. Duncan, and Mr. Tice's attorney (Tr. 325).

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<sup>7</sup> However, documents filed with the four companies' bankruptcy documents indicated that Mr. Duncan owned 49 percent of Perfectly Fresh Marketing, Inc.

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Specialties was formed on July 18, 2002, and received PACA license 021539 (CX-03-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Specialties. The PACA license does not account for the remaining 10 percent ownership. Mr. Duncan is listed as the chief financial officer and a director, Gary Tice is listed as secretary and a director, and Erin Tice is listed as president and a director. Specialties was formed to sell produce directly to supermarkets. (Tr. 336-38.)

Consolidation was the second company formed on July 18, 2002, and received PACA license 021540 (CX-02-1, 3). The PACA license indicates that: Mr. Duncan owned 10 percent of the stock in Consolidation and was president and a director; Perfectly Fresh Marketing, Inc., owned 90 percent 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 Mr. Duncan's forte.

Farms was the third company formed on July 18, 2002, and received PACA license 021541 (CX-01-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Farms and that Thomas Bennett owned the remaining 10 percent. Mr. Bennett was the president and a director of Farms. Gary Tice was listed as secretary and a director, and Erin Tice was listed as chief financial officer and a director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. (Tr. 615.)

The four companies were to be run as one entity, with Perfectly Fresh Marketing, Inc., essentially managing the overall operations, and Consolidation, Farms, and Specialties handling sales, each in its own sphere of specialization (Tr. 320-22). Mr. Tice indicated that the management of Perfectly Fresh Marketing, Inc., was generally under his control, although Mr. Norton had some control (Tr. 413-14). Mr. Tice, Mr. Bennett, and Mr. Duncan all considered that the three new companies were sales entities, with Perfectly Fresh Marketing, Inc., handling all the operations including the purchasing; Perfectly Fresh Marketing, Inc., would buy all the produce and transfer it to the appropriate company; Perfectly Fresh Marketing, Inc., leased all the warehouse space; and Perfectly Fresh Marketing, Inc., handled the receiving when produce arrived at the warehouse (Tr. 354-58). 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 Mr. Rovelo with

input from Mr. Tice. Generally, checks from customers went first into the individual company's bank accounts, but were then transferred into Perfectly Fresh Marketing, Inc.'s account to keep the other accounts at a virtual zero balance. (Tr. 366-69.) According to Mr. Tice, all the purchasing was done by Perfectly Fresh Marketing, Inc., even though the accounts payable documents examined by Ms. Kondora 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 those accounts payable documents, in terms of which company purchased which lot of produce (Tr. 354).

Shortly after Consolidation, Farms, and Specialties were formed, Mr. Norton placed Jaime O. Rovelo as the head of the accounting department and chief financial officer for all four entities (Tr. 372-77). Although the PACA licenses indicate otherwise, Mr. Tice testified there was no chief financial officer before Mr. Rovelo. Mr. Rovelo wrote all the checks for the companies on a day-to-day basis, and Mr. Rovelo reported to Mr. Tice, not to Mr. Duncan or Mr. Bennett. (*Id.*) Until the businesses began to collapse in December 2002, Mr. Rovelo made the decisions on who to pay; subsequent to that date, Mr. Tice made those decisions.

John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Ready Pac, a large supplier of produce to chain stores. Mr. Norton apparently had some issues with Ready Pac and its chief executive officer, and competing with Ready Pac was a significant aspect of his motivation for investing in Perfectly Fresh. (Tr. 317-20, 330.) Further, Erin Tice, the spouse of Gary Tice, was an officer with Ready Pac and joined Specialties (and became a co-owner of all four companies as a result of her co-ownership of Perfectly Fresh Marketing, Inc., with her husband) with the idea of using her personal relationships with Ready Pac clients to bring those customers over to Specialties (Tr. 336-38). When Ms. Tice joined Specialties, Ready Pac became concerned that the employees she had managed at Ready Pac would move with her and Ready Pac attempted to get those employees to sign contracts. Specialties hired 15 or 16 Ready Pac employees, even though Specialties had planned to hire employees at a much slower rate as the business expanded. (Tr. 336-38.)

At around the same time, the entire warehouse where Perfectly Fresh Marketing, Inc., had rented a small amount of space became available, and Perfectly Fresh Marketing, Inc., took that over. Much of the money

Mr. Norton invested was devoted to improving the warehouse. (Tr. 331-33.)

### C. 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 Mr. Norton and the Tices for tampering with its employees. According to Mr. Tice, the chief executive officer of Ready Pac was seeking to bankrupt Perfectly Fresh. (Tr. 343.) During the litigation, which was settled in November 2002, Mr. Norton decided he wanted to be treated as a lender, rather than as an owner/shareholder (Tr. 343-45).

With funding from Mr. Norton stopped as of November 2002, Mr. 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 2002, with Consolidation doing particularly well. (Tr. 349-50.) However, in December 2002, with no new funding, and Farms having significant problems due to issues with Hawaiian Pride, it became difficult to pay debts. (*Id.*) Mr. Tice testified that, at first, Mr. Roveló made the decisions as to which produce sellers should be paid, but that sometime in December 2002, Mr. Tice made all those decisions on his own (Tr. 380-81). He further testified that Mr. Bennett and Mr. Duncan had no role in deciding who would be paid. (*Id.*)

With no funding immediately at hand, Mr. 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.<sup>8</sup> The same day (February 3, 2003), the four companies moved that their separate bankruptcy petitions be consolidated for “joint administration.” (RX 4.) The record contains no evidence that Mr. Bennett or Mr. Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or by Jaime Roveló.

As part of the bankruptcy filing, Consolidation, Farms, and Specialties each filed a “Schedule F, Creditors Holding Unsecured Nonpriority Claims.” These schedules included both produce and non-produce payables. Every one of the unpaid produce sellers listed in the three disciplinary Complaints is listed in the corresponding Schedule F,

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<sup>8</sup> Shortly before filing for bankruptcy, Perfectly Fresh Marketing, Inc., transferred its operations to Perfectly Fresh Florals, LLC, based on advice from counsel (Tr. 352-54).

owing an amount equal to or greater than that alleged in the disciplinary Complaints to be unpaid.

In filing for bankruptcy, Mr. Tice indicated that he thought all the produce sellers would be paid from the proceeds of the bankruptcy auction, but the attorneys representing the produce sellers negotiated for a 60 percent cash payment of the amounts owed (Tr. 405-09). Mr. Tice also stated, in a letter to Ms. Kondora (RX 1 at 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 were [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.

#### **D. The Petitioners in the Responsibly Connected Proceedings**

1. Jaime Rovelo—After filing his three petitions to review the determinations of the PACA Branch Chief that he was responsibly connected with Consolidation, Farms, and Specialties, Mr. 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, Mr. Rovelo apparently relocated without notifying the Hearing Clerk and without leaving a forwarding address. He did not participate further in the proceedings. Because the petitioner carries the burden of proof in a responsibly connected proceeding and because no evidence was presented that would indicate that Mr. Rovelo was not responsibly connected with Consolidation, Farms, and Specialties, I must find that Mr. Rovelo was responsibly connected with the three companies. In any event, the evidence demonstrated clearly that Mr. Rovelo was: the chief financial officer of each of the three respondent companies in the disciplinary proceedings; the individual who established and administered the accounting system and signed the great majority of checks; a participant in many of the decisions as to whom to pay; and the signatory of many of the bankruptcy related documents (Tr. 372-81).

2. Jeffrey Lon Duncan—Mr. Duncan is a high school graduate who has been working in the produce industry since 1986 (Tr. 703-06). He held 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. 708-10). Mr. Duncan testified that he had no managerial responsibilities before he joined Mr. Tice (Tr. 706). He was a participant in Perfectly Fresh Marketing, Inc., when it was first organized, and was an officer, a director, and 49 percent shareholder in Perfectly Fresh Marketing, Inc. After the operating agreement was amended in July 2002, Mr. Duncan's ownership share in Perfectly Fresh Marketing, Inc., was reduced to 20 percent. He testified that, even though he was listed as supplying capital for several companies, he did not actually invest any money. (Tr. 898.) Mr. Duncan indicated his work at Perfectly Fresh, both when it was only Perfectly Fresh Marketing, Inc., and then later when he was in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines (Tr. 850-51).

Mr. Duncan indicated he had many discussions with Mr. Tice before they decided to join forces and form their own company and he was impressed with Mr. Tice's vast knowledge of, and success in, the produce industry (Tr. 715). Mr. Duncan stated he was not involved in filing for the PACA licenses, either for Perfectly Fresh Marketing, Inc., or Consolidation, and 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 Mr. Tice. (Tr. 833-40.)

Mr. Duncan did not have any role in bringing Mr. Norton into the business, although the modified business plan, including the decision to establish Consolidation, Farms, and Specialties was discussed with him (Tr. 833-34). Mr. Duncan understood that Mr. Norton was going to invest substantial funds in the companies and become a partner Perfectly Fresh Marketing, Inc. (*Id.*) Mr. Duncan did not recall being involved in any discussions concerning the Amended Operating Agreement that he signed in July 2002, stating 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. 853-54). When Ready Pac filed suit, neither Mr. Duncan nor Mr. Bennett was a party to the litigation (Tr. 856-57).

Mr. Duncan 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 Mr. Duncan's end of the business was profitable and Consolidation's profits were used in effect to subsidize the other companies. (Tr. 899-900.) Mr. Duncan 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 available to sign the check (Tr. 951).

Mr. Duncan first became aware that his suppliers were not 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 Mr. Rovelo and tell Mr. Rovelo to take care of it. Mr. Rovelo told Mr. Duncan that produce sellers were not paid due to lack of money caused by overhead and that Gary Tice told him that he was trying to obtain additional investors and reassured him that he would find the investors. (Tr. 890-92.) Mr. Duncan had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Mr. 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. 1085-86.) When Mr. Bennett was running Francisco Distributing as general manager, Mr. Tice, on behalf of Perfectly Fresh Marketing, Inc., was renting office space from Francisco Distributing (Tr. 1037-39). When Fresh America, the company that owned Francisco Distributing, decided to close down the Los Angeles division, and Mr. Bennett was told to shut down the company, he told Mr. Tice that the building was going to be available, and Mr. Tice successfully negotiated with the landlord for lease of the warehouse space (Tr. 1037-38). After that, Mr. Tice offered Mr. Bennett the position as president of Farms, along with a 10 percent ownership interest in the company (Tr. 1039). Mr. Bennett did not pay anything for the shares and stated he was involved in sales and 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).

Mr. Bennett said he considered the Tices to be his immediate supervisors (Tr. 1042). When Farms was being formed, Mr. Bennett 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 he had never signed a check on behalf of Farms (Tr. 1045).<sup>9</sup> When Mr. Bennett 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. He spent most of his time working with the rental clients. (Tr. 1041-42.)

Mr. Bennett stated he did not recall having any involvement in obtaining the PACA license for Farms, did not know of Mr. Norton's involvement until a few months after he began working for Farms, and

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<sup>9</sup> However, he did in fact sign a card authorizing him to write checks (Bennett RX 23).

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did not understand how the accounting system worked or how the vouchers and invoices were coordinated (Tr. 1048-49). Mr. Bennett began hearing about slow payment issues from his salesmen in December 2002. When Mr. Bennett asked Mr. Tice or Mr. Rovelo about the slow payment of produce sellers, he was told not to worry and the receivables would catch up. (Tr. 1049-50.) Mr. Bennett thought he could probably have found out more about the financial condition of Farms 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).

When it became evident to Mr. Bennett that the business was not doing well, he sensed that it was time to leave (Tr. 1055). Mr. Bennett suggested to Mr. Tice in early January 2003, that it was time for him (Bennett) to resign (Tr. 1056-57). He stated he resigned orally but that he subsequently wrote a letter to Mr. Tice's attorney asking that his name be removed from all corporate documents (Tr. 1058).<sup>10</sup> He stated that he was concerned for his reputation and did not want to be part of a sinking ship (Tr. 1056-57).

### DISCUSSION

#### A. Consolidation, Farms, and Specialties Violated the PACA

With respect to the disciplinary counts, AMS and the PACA Branch Chief introduced numerous documents which Ms. Kondora 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 Complaints. Further, AMS and the PACA Branch Chief introduced bankruptcy schedules, prepared by Consolidation, Farms, and Specialties, which confirmed that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, the respondent companies admitted they filed the bankruptcy schedules referred to in the Complaints, but also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. Consolidation, Farms, and Specialties contend the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Perfectly Fresh Marketing, Inc., which is not a party to the instant consolidated proceeding. For the reasons discussed in this Decision and Order, *infra*, I reject the contention that the debts were not incurred by each of the respondent companies and find Consolidation, Farms, and Specialties

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<sup>10</sup> However, Mr. Bennett testified he did not have a copy of that letter.

each violated the PACA by failing to make full payment promptly for produce as listed in the three Complaints.

1. Consolidation's, Farms', and Specialties' own records clearly establish the unpaid debts. Each of the three respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase 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. Consolidation, Farms, and Specialties are in the peculiar position of denying the validity of their own records.

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

The testimony of both Mr. Bennett and Mr. Duncan also supports the contention that the entities they ran were not making full payments promptly. Mr. Bennett testified he was made aware by his salesman in early December 2002 that some of Farms' vendors were not getting paid on time; he inquired of Mr. Tice, and sometimes Mr. Rovelo, and was told not to worry because receivables would catch up with payables. (Tr. 1049-50.) Similarly, Mr. Duncan began receiving calls from the produce sellers complaining about slow payments in December 2002 and January 2003. When Mr. Duncan received a payment complaint from a vendor, he would get the invoice, give it to Mr. Rovelo, and tell him to take care of it. (Tr. 890-92.)

One of the principal arguments made by counsel for Consolidation, Farms, Specialties, Mr. Duncan, and Mr. Bennett is that the law firm handling the bankruptcy advised Mr. Tice and Mr. Rovelo to associate

payables with receivables for each of the three entities (Tr. 402-03), 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.) Mr. 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 3 days later. If Consolidation, Farms, and Specialties are trying to imply that over that weekend an entire voucher system was created along with the more than 1,000 vouchers that were linked with the pre-existing invoices, they are unpersuasive. Mr. Tice’s uncertain and 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 entities purchased the produce for which payment was not forthcoming.

Thus, the accounts payable documents of Consolidation, Farms, and Specialties establish 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 were signed under penalty of perjury. Consolidation’s, Farms’, and Specialties’ arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts or that they indicate that Perfectly Fresh Marketing, Inc., and not the entity filing the Schedule F actually incurred the debt, are unconvincing and inconsistent with the documents. Moreover, these arguments are inconsistent with established United States Department of Agriculture precedent holding that documents filed in bankruptcy proceedings may constitute an admission of the filing party.

The creditors listed as holding unsecured claims in each of the Schedule F’s are remarkably similar to the produce sellers listed in the accounts payable. Further, in each of their answers, Consolidation, Farms, and Specialties 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.”<sup>11</sup> While this consolidated proceeding would appear to be open and shut,<sup>12</sup> Consolidation, Farms, and Specialties, in their answers, also denied the allegations that they failed to make full payment promptly. Although Consolidation, Farms, and Specialties contend otherwise, I find the admissions in the bankruptcy filings do constitute admissions that these debts for produce did exist at the time of the filings, and Consolidation’s, Farms’, and Specialties’ 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 produce sellers holding claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993). Consolidation, Farms, and Specialties contend that these and other cases cited by AMS and the PACA Branch Chief are distinguishable because only a single entity was involved in the cited cases. They argue these cases do not apply when there are multiple entities involved and application of these cases to a situation where multiple entities have allocated their debt would be an unwarranted “dramatic extension of the law.” (Respondents’ and Petitioners’ Reply Brief at 3-5.) However, I agree with AMS and the PACA Branch Chief that the cases actually do support a finding that, when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then the bankruptcy filer has admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion raised by Consolidation, Farms, Specialties, and Mr. Duncan in their reply brief (Respondents’ and Petitioners’ Reply Brief at 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 by the operation of the debtor’s business pursuant to . . . [the PACA]” constitutes “clear” evidence that the produce sellers listed in each Schedule F were not produce sellers of the company that listed them as a creditor. Just because those who sold produce to the various entities

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<sup>11</sup> I quote 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.

<sup>12</sup> AMS and the PACA Branch Chief filed a Motion for Expedited Decision Without Hearing in the instant consolidated proceeding on this issue.

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 the companies’ request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered the consolidation an indicator that the bankruptcy schedules filed by each company meant something other than what the Schedule F plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in this consolidated proceeding.

3. I also find considerable merit in the assertion, raised by AMS and the PACA Branch Chief, that Consolidation, Farms, and Specialties should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning other than that indicated on the face of their records and bankruptcy filings. 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 that preserves 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 Consolidation’s, Farms’, and Specialties’ position in the disciplinary proceedings—that all the debts were incurred by Perfectly Fresh Marketing, Inc.—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 (6th Cir. 1982). Here, if I find that all the debts were only owed by Perfectly

Fresh Marketing, Inc., and that Consolidation, Farms, and Specialties are debt free, I would be making a finding utterly inconsistent with the documents Consolidation, Farms, and Specialties filed with the bankruptcy court, 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 Consolidation, Farms, and Specialties in fact did not owe produce sellers, then they would not be liable for violations of the PACA, a position that would make it difficult for AMS and the PACA Branch Chief to ensure that they carry out their statutory mandate of policing the produce industry. Consolidation, Farms, and Specialties cannot be allowed to list one set of creditors in the bankruptcy court and totally repudiate that list in the instant consolidated proceeding. This inconsistency would undermine the integrity of the judicial process.

4. The violations were willful, flagrant, and repeated. Consolidation, Farms, and Specialties vigorously contend that, even if there were violations, they were not willful or flagrant. However, long-standing case law interpreting these terms makes 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 Scamcorp, Inc.*, 57 Agric. Dec. 527, 551-53 (1998); *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 713-14 (1994). The fact that each of the three respondent companies continued to order and receive, and not pay for, produce, putting numerous growers and sellers at risk, establishes they were clearly operating in disregard of the payment requirements of the PACA and committing willful violations. Principals of the companies involved, including Mr. Tice, Mr. Bennett, and Mr. Duncan, knew that payments were not being made in a timely fashion. Mr. Bennett and Mr. Duncan, in particular, did little more than inquire of Mr. Rovelo and Mr. Tice concerning the status of payments to their produce sellers and took no actions to correct the situation. Consolidation’s, Farms’, and Specialties’ attempts to find new investors and concern about paying the produce sellers 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 PACA.

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Likewise, the conduct of Consolidation, Farms, and Specialties was flagrant as that term is used in the PACA. In determining whether a violation is flagrant, I factor in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). The number of violations (286 for Consolidation, 142 for Farms, and 796 for Specialties), the amount unpaid (over \$373,000 for Consolidation, over \$442,000 for Farms, 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. Consolidation, Farms, and Specialties attacked aspects of the investigation, both in terms of methodology and thoroughness. The PACA Branch investigation in this case followed the same general methodology employed in numerous other non-payment cases and has been approved in my 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. Consolidation, Farms, and Specialties contended in their reply brief that it was “amazing” for AMS to rely on Ms. Kondora’s findings to establish that Consolidation, Farms, and Specialties had entered into the transactions that are the subject of these consolidated matters because Ms. Kondora had no first-hand knowledge of Consolidation’s, Farms’, and Specialties’ operations. (Reply Brief at 8.) Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that Consolidation, Farms, and Specialties had ceased doing business by the time the investigation was commenced.

Instead, Ms. Kondora 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 produce sellers who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no-pay tables indicating which produce sellers were not paid by the respective entity and in what amount. That the produce sellers Ms. Kondora talked with did not necessarily know which Perfectly Fresh entity with which they were dealing, or that these produce sellers generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that the produce sellers confirmed that the particular Perfectly Fresh entity with which they dealt

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 Ms. Kondora created. I find no basis for concluding that Ms. Kondora's investigation was inappropriate.

## **B. The Responsibly Connected Cases**

### **1. Jaime Rovelo Was Responsibly Connected With Consolidation, Farms, and Specialties**

Jaime Rovelo was notified by the PACA Branch Chief that he was found to be responsibly connected with Consolidation, Farms, and Specialties. In June 2005, Mr. Rovelo filed a petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings. Since the burden of proof is on the petitioner in a responsibly connected proceeding, and since Mr. Rovelo did not introduce any evidence that would refute the PACA Branch Chief's determinations, the Chief ALJ found that Mr. Rovelo was responsibly connected with Consolidation, Farms, and Specialties. Mr. Rovelo did not appeal the Chief ALJ's decision; therefore, the responsibly connected determinations regarding Mr. Rovelo are not before me.

### **2. Jeffrey Lon Duncan Was Responsibly Connected With Consolidation**

Jeffrey Lon Duncan, who was president, a board member, and a 10 percent shareholder in Consolidation (he was also a 20 percent shareholder in Perfectly Fresh Marketing, Inc., which owned 90 percent of 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 the PACA and (2) was only nominally a director and officer of a violating PACA 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 percent owner of Perfectly Fresh Marketing, Inc., when that company was established and signed the Amended Operating Agreement that changed the organization of that company on July 28, 2002, and reduced his share of ownership to 20 percent, with the

addition of John Norton to the ownership team. When establishing Perfectly Fresh Marketing, Inc., Consolidation, Farms, and Specialties, Mr. Duncan relied heavily on the expertise and experience of Gary Tice. Both Mr. Duncan and Mr. Tice portrayed Mr. Duncan as somewhat naive in the area of founding and managing a business. Mr. Duncan testified he signed whatever documents Mr. Tice or the attorney told him to sign and all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. Mr. Duncan stated he might have perused the Amended Operating Agreement, but he believed Mr. Tice and his attorney would not take advantage of him (Tr. 846-49). Mr. Duncan was in his office most days and managed the cruise business.

Under the Amended Operating Agreement, Mr. Duncan was appointed president and a director, and was made 10 percent owner, of Consolidation. He testified he never made any capital investment in Consolidation; therefore, 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 Mr. Duncan, understood Mr. Duncan was taking care of his own cruise accounts and stated Mr. Duncan had his own strong customer base. Mr. Hinderer also speculated that his company stopped selling to Perfectly Fresh relatively early, but stated he thinks Produce International was paid in full because Mr. Duncan “took care of us.” (Tr. 801.) He speculated that Mr. Duncan “exerted pressure somehow” to keep the payments coming. (Tr. 802.)

When Consolidation’s produce sellers began complaining about slow payments in December 2002 or January 2003, Mr. Duncan would get the invoices and give them to Mr. Rovelo and tell him to take care of the customer (Tr. 890-92). Even though he knew Consolidation was not making payments promptly, he continued working on his sales (Tr. 893-94). Mr. Duncan indicated he did not decide which produce sellers should be paid, but he gave Mr. Rovelo individual invoices and asked him to take care of things. No evidence was introduced as to whether Mr. Rovelo did, in fact, pay the produce sellers that Mr. Duncan requested be paid.

I find Jeffrey Lon Duncan was actively involved in activities resulting in violations of the PACA. While he clearly was not a 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 produce sellers were not paid either fully or promptly, is sufficient to constitute active

involvement. In *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999), I 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 produce sellers are not getting paid pursuant to the requirements of the PACA has been held to constitute involvement in activities resulting in a violation of the PACA. *In re Janet S. Orloff* (Order Denying Pet. for Reconsideration), 62 Agric. Dec. 281, 290-92 (2003). That Mr. Duncan had employees working under his direction who continued to order 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 Mr. Duncan's participation in activities resulting in a violation of the PACA. Each of the unpaid obligations listed in Consolidation's own records and in its bankruptcy filing constituted a debt incurred when Mr. Duncan was managing the sales operations of Consolidation. In this position, Mr. Duncan inherently exercised "judgment, discretion, or control" as those terms are used in *Norinsberg*.

Even if Mr. Duncan were to be found not actively involved in the activities that resulted in violations of the PACA, he failed to meet his burden of proving that he was only a nominal president and director of Consolidation. Mr. Duncan, whose entire 15-year career (as of the time Perfectly Fresh Marketing, Inc., 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 Mr. Tice's judgment and expertise. Mr. Duncan was hardly a novice in the business, and although much has been made of Mr. Tice's dominance in decision-making matters, I find Mr. 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 his or her 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. U.S. Dep't of Agric.*, 711 F. 2d 406, 409 (D.C. Cir. 1983). However, Mr. Duncan was an experienced operator who entered into a business with Mr. Tice in order to earn more money when the business became profitable.

That Mr. Duncan 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 established to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before the violative period, he did not handle the check-writing duties.

### **3. Jeffrey Lon Duncan Was Not Responsibly Connected With Specialties**

Unlike with Consolidation, where Mr. Duncan ran the day-to-day operations of the cruise supply business, Mr. 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. Mr. Duncan had no direct ownership in Specialties and owned 18 percent of Specialties indirectly through his 20 percent ownership in Perfectly Fresh Marketing, Inc., which owned 90 percent 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 officer during the period when Specialties violated the PACA and that no board of directors meetings of Specialties ever occurred. The record contains no evidence that Mr. Duncan was even aware he was listed as a director or chief financial officer of Specialties. Other than his indirect 18 percent ownership of the company, Mr. Duncan appears to have no relationship with Specialties. Furthermore, I do not find, based on the facts before me, that indirect ownership meets the responsibly connected ownership requirement of the PACA, *i.e.*, "holder of more than 10 percent of the outstanding stock of a corporation or association." (7 U.S.C. § 499a(b)(9).)

The record contains no evidence that Mr. 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 Mr. Duncan was unquestionably the expert and manager of the business and

where Mr. Duncan or those under his direction continued to order produce well after he knew produce suppliers were not being paid fully and promptly, Specialties presents a situation in which Mr. Duncan had no control over pertinent events. The employees at Specialties were employed by Erin Tice and had no connection with Mr. Duncan.

While Mr. Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice's Ready Pac employees joined Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Mr. Norton wielded the majority vote of Perfectly Fresh Marketing, Inc., and that he had no knowledge of, or planned role in, the business. Mr. Duncan was only an indirect shareholder in Specialties and he neither acted as nor was aware of his listed titles as chief financial officer and director of Specialties. The fact that Mr. Duncan had absolutely no discernible role in the operation of Specialties supports a finding that he was only a nominal director and officer of Specialties.

#### **4. Thomas Bennett Was Responsibly Connected With Farms**

Thomas Bennett, who was a 10 percent shareholder, president, and a director of 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 the PACA and (2) was only nominally a director and officer 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.

Mr. 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 Sysco, and then ran Francisco Distributing for 11 years. He had known Gary Tice on a professional level. Mr. Tice (actually Perfectly Fresh Marketing, Inc.) was leasing space from Francisco Distributing when Mr. Bennett was told that Francisco Distributing was closing down; Mr. Bennett told Mr. Tice that the whole building would be available. In addition to leasing the additional space, Mr. Tice offered positions to Mr. Bennett and some of the sales force that he had managed at Francisco Distributing. Mr. Bennett was offered the position of president of Farms, along with a 10 percent ownership share in the new company. He never actually invested 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 Mr. Tice and Mr. Tice's attorney told him to sign. Mr. Bennett 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. Mr. Bennett stated 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 managed the sales staff who worked for him and did contact the clients. When Mr. Bennett realized that Farms had excess storage space, he started an outside storage business on behalf of Farms and spent more time working on that enterprise than on Farms’ produce business. (Tr. 1041-42.) Mr. Bennett stated he first heard about slow payments from his salesmen in December 2002, and he would inform Mr. Tice or Mr. Rovelo who told him not to worry. He testified he probably could have found out more about the financial condition of Farms and the other companies had he asked. (Tr. 1049-50.) David Hewitt, one of Farms’ former employees, confirmed that Mr. Bennett hired him (Mr. Hewitt was one of the Francisco Distributing employees that Mr. Bennett brought to Farms), was his manager, and oversaw the operations of Farms. Mr. Hewitt stated that Mr. Bennett apparently reported to others. (Tr. 604-07, 612.)

I find Thomas Bennett was actively involved in the activities resulting in violations of the PACA. As the president of Farms, he managed 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,<sup>13</sup> a significant number of these purchases were made while he was serving as president of Farms. Like Mr. Duncan, Mr. Bennett allowed his employees to continue ordering produce even after he became aware that his produce sellers were getting paid slowly, if at all. This activity, in itself, constitutes active involvement.

Even if Mr. Bennett could be found not to be actively involved in activities resulting in violations of the PACA, he would only avoid responsibly connected status if his positions as president and director in Farms were nominal. I find his position as president was 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

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<sup>13</sup> He stated he resigned in early January 2003, but there is no evidence supporting a specific date.

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, Mr. 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, Mr. Duncan, Mr. Bennett was hardly the type of unknowledgeable, powerless individual the court was contemplating in the *Minotto* decision. In fact, Mr. Bennett alerted Mr. Tice that some office space in the building that Perfectly Fresh Marketing, Inc., was leasing was going to be vacated by Francisco Distributing, his then current employer. As a result of ensuing discussions with Mr. Tice, Mr. Bennett became the president of, and 10 percent shareholder in, Farms and found immediate employment for many of the people who worked for him at Francisco Distributing, who would otherwise be terminated when that operation ceased. Such was the extent of Mr. Bennett's participation in the operation of Farms that, on his own, he sub-let 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 Farms. In addition, as a 10 percent shareholder, Mr. Bennett was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Mr. Bennett played a lesser overall role with respect to Farms than Mr. Duncan did with respect to both Consolidation and Perfectly Fresh Marketing, Inc., and that both Mr. Bennett and Mr. Duncan were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Mr. Bennett nor Mr. Duncan was able to demonstrate that he was not actively involved in activities resulting in a violation of the PACA. And neither Mr. Bennett nor Mr. Duncan was able to demonstrate that his role as president was nominal.

#### **ISSUES ON APPEAL**

Consolidation, Farms, and Specialties argue on appeal that there is not substantial evidence to support the Chief ALJ's decision that they violated the PACA. The companies rely extensively on the testimony of Gary Tice to support their version of the case. The problem the companies have with this position is that the Chief ALJ found that Mr. Tice's testimony was contradictory, inconsistent, unsupportable and it lacked credibility. After reviewing Mr. Tice's testimony and the other evidence, I agree with the Chief ALJ.

Furthermore, Consolidation, Farms, and Specialties, on appeal, do nothing more than rehash their unsuccessful arguments made before the Chief ALJ. They provide no new reasoning, argument, or support for me to reverse the Chief ALJ's decision. As I note in this Decision and Order, *supra*, the Chief ALJ amply discussed the reasons why Consolidation, Farms, and Specialties violated the PACA. I include those discussions in this decision.

However, I do find important a discussion of the companies' position that Perfectly Fresh Marketing, Inc., made all purchases, and therefore, Perfectly Fresh Marketing, Inc., is the firm that failed to make payments in accordance with the PACA. This argument provides Consolidation, Farms, and Specialties little comfort. The business structure established for the Perfectly Fresh family of companies appears to be a scheme and device which attempts to insulate Consolidation, Farms, and Specialties and their officers and shareholders, from any liability for violations under the PACA. I find Perfectly Fresh Marketing, Inc., in essence, serves as the respondent companies' agent and the responsibility for payments under the PACA rests not only with Perfectly Fresh Marketing, Inc., but also flows through Perfectly Fresh Marketing, Inc., and rests with Consolidation, Farms, and Specialties. Therefore, I find the Chief ALJ correctly held that Consolidation, Farms, and Specialties committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of perishable agricultural commodities.

The Chief ALJ found that Mr. Duncan and Mr. Bennett were responsibly connected and I agree. Their arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I state in this Decision and Order, *supra*, 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 was 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, 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected, based on the

records at the agency, the opportunity to demonstrate that he is “not responsible” for the violation of the PACA. (H.R. Rep. No. 104-207, at 11, *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 [the PACA] and 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. U.S. Dep’t of Agric.*, 162 F.3d 1194 (1998). The Court articulated the basic 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).)

Next, the Court indicated that, 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 the violation of the PACA and that the individual was a nominal officer, nominal director, or nominal shareholder of the violating company. In the alternative to proving that the individual nominally held the statutory role, 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

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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 Mr. Duncan, he is responsibly connected and subject to the licensing and employment restrictions unless he demonstrates by a preponderance of the evidence:

1. that he was not actively involved in any of the activities resulting in the PACA violations; and
2. that he was either a nominal shareholder, nominal director, and nominal officer of Consolidation or that Consolidation was the alter ego of its other owners.<sup>14</sup>

Similarly, Mr. Bennett must satisfy the requirements of this test regarding his relationship with Farms if he is to avoid a responsibly connected determination.

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. Mr. Duncan, Mr. Bennett, and other participants in responsibly connected proceedings fail to comprehend the critical component of being nominal – that the individual becomes the officer, director, or shareholder for the convenience and benefit of the company or the owners of the company, not because of his own ambition or entrepreneurial desires. “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, 1231 (D.C. Cir. 1997), quoting *Minotto v. U.S. Dep’t of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983).

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<sup>14</sup> The two prongs of the test are joined by the conjunctive “and.” If Mr. Duncan 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 a 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.

Mr. Duncan and Mr. Bennett each was the president of his respective company. Each owned 10 percent of the shares of the company.<sup>15</sup> Mr. Duncan was a founding member of the Perfectly Fresh family of companies. When Mr. Duncan and Mr. Tice founded Consolidation, Farms, and Specialties as subsidiaries of Perfectly Fresh Marketing, Inc., Mr. Duncan became president of Consolidation. This appointment of Mr. Duncan as president was done not to make it easier for Mr. Tice and Perfectly Fresh Marketing, Inc., but rather with entrepreneurial intent. Under this circumstance, I find Mr. Duncan had an “actual, significant nexus with” Consolidation.

Mr. Bennett assisted Mr. Tice in obtaining a facility for Perfectly Fresh Marketing, Inc., that was being vacated by Mr. Bennett’s employer. Mr. Tice offered Mr. Bennett the president’s job at Farms and allowed Mr. Bennett to hire and manage a sales force and initiate a storage business for the benefit of Farms. These actions show Mr. Bennett had an “actual, significant nexus with” Farms.

Another aspect of the concept of nominal that is rarely, if ever, discussed is disparate levels of power and authority between the nominal officer and the individual who appoints him. Lilly Minotto was a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings. *Minotto*, 711 F.2d at 408; Jean-Pierre Bell was a salesman who was made president of a PACA licensee to mediate disputes between the two owners, *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994); Carl Quinn was a truck driver who was made vice president of a PACA licensee to satisfy the statutory requirement for specific numbers of officers, *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); and Michael Norinsberg was the son of the president of a PACA licensee who was made secretary and treasurer of the corporation so somebody was available to sign checks. *Norinsburg*, 162 F.3d at 1198. In each of these cases, the nominal officer had no power and was an officer in name only to solve a corporate need. Mr. Duncan and Mr. Bennett were real officers, even if they chose not to exercise that authority. As the United States Court of Appeals for the District of Columbia Circuit noted, a situation in which the affiliation is purely nominal and the so-called officer had no powers at all is radically

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<sup>15</sup> These ownership interests bar Mr. Duncan and Mr. Bennett 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*, 63 Agric. Dec 388, 411 n.5 (2004), *aff’d per curiam*, 131 F. App’x 404 (4th Cir. 2005).

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different from one in which a genuine officer simply does not use the powers of his office. *Quinn*, 510 F.2d at 756.

Mr. Duncan and Mr. Bennett had the burden to overcome this evidence. They failed to do so. Therefore, Mr. Duncan was a true, not nominal, officer of Consolidation and was responsibly connected with Consolidation and Mr. Bennett was a true, not nominal, officer of Farms and was responsibly connected with Farms.

### FINDINGS OF FACT

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

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

3. Perfectly Fresh Farms, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Thomas Bennett, was the holder of PACA license 021541 from August 2002 until the PACA license expired on August 21, 2003.

4. During the period October 27, 2002, through February 21, 2003, Perfectly Fresh Farms, Inc., 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. Perfectly Fresh Consolidation, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Jeffrey Lon Duncan, was the holder of PACA license 021540 from August 2002 until the PACA license expired on August 21, 2003.

6. During the period November 17, 2002, through February 15, 2003, Perfectly Fresh Consolidation, Inc., 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. Perfectly Fresh Specialties, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc. (and whose PACA license did not account for the remaining 10 percent ownership), was the

holder of PACA license 021539 from August 2002 until the PACA license expired on August 21, 2003.

8. During the period November 1, 2002, through February 20, 2003, Perfectly Fresh Specialties, Inc., 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 of, and a 10 percent shareholder in, Perfectly Fresh Farms, Inc., during much of the time period when Perfectly Fresh Farms, Inc., was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing, Thomas Bennett had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Perfectly Fresh Farms, Inc., throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10. Jeffrey Lon Duncan was president of, and a 10 percent shareholder in, Perfectly Fresh Consolidation, Inc., from the time when Perfectly Fresh Consolidation, Inc., was created through the time it filed for bankruptcy. As of the date of the hearing, Jeffrey Lon Duncan had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Perfectly Fresh Consolidation, Inc., 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. Jeffrey Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc., during the time that Perfectly Fresh Specialties, Inc., committed violations of the PACA. Even though the PACA license application listed Mr. Duncan as chief financial officer and a director of Perfectly Fresh Specialties, Inc., his role with that company, if any, was purely nominal.

### **CONCLUSIONS OF LAW**

1. Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities in the amount of \$442,023.12, during the period October 27, 2002, through February 21, 2003.

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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 of the PACA.

3. Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities in the amount of \$373,944.19, during the period November 17, 2002, through February 15, 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 of the PACA.

5. Perfectly Fresh Specialties, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of \$263,801.40, during the period November 1, 2002, through February 20, 2003.

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

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

8. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., during the time Perfectly Fresh Consolidation, Inc., committed violations of the PACA. As such, Mr. Duncan is subject to the licensing and employment restrictions of the PACA.

9. Jeffrey Lon Duncan was not responsibly connected with Perfectly Fresh Specialties, Inc., during the time Perfectly Fresh Specialties, Inc., committed violations of the PACA.

### **ORDER**

1. Perfectly Fresh Consolidation, 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 Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Consolidation, Inc.

2. Perfectly Fresh Farms, 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 Perfectly Fresh Farms, Inc.'s violations

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

3. Perfectly Fresh Specialties, 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 Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Specialties, Inc.

4. Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Thomas Bennett is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Mr. Bennett.

5. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Jeffrey Lon Duncan is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Mr. Duncan.

#### **RIGHT TO JUDICIAL REVIEW**

Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; Thomas Bennett; and Jeffrey Lon Duncan each has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial Review must be sought within 60 days after entry of the Order in this Decision and Order.<sup>16</sup> The date of entry of the Order in this Decision and Order is June 12, 2009.

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<sup>16</sup> 28 U.S.C. § 2344.

**PERISHABLE AGRICULTURAL COMMODITIES ACT****REPARATIONS****DEPARTMENTAL DECISIONS****CHARLES JOHNSON COMPANY v. THE ALPHAS COMPANY,  
INC.****PACA Docket No. R-07-114.****Decision and Order.****Filed August 22, 2008.***[Editor's Note: This case was on appeal see case below].***Practice and Procedure – Recovery of Unpaid Obligations Allowed.**

Where Complainant sought recovery of the f.o.b. plus freight contract price of lettuce sold to Respondent, but Complainant admitted that it had not yet paid the freight, we found that where the freight invoice was in evidence, and the record lacked any evidence to substantiate Respondent's claim of freeze damage in transit, Complainant remained obligated to pay the freight invoice and was therefore entitled to recover the full f.o.b. plus freight price of the lettuce from Respondent.

Patrice H. Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant: Pro Se.

McCarron &amp; Diess, Respondent's Attorney.

*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 \$66,370.00 in connection with six truckloads of iceberg lettuce 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, admitting liability to Complainant in the amount of \$34,259.60. In accordance with Section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued on October 4, 2007, requiring the payment by Respondent to Complainant of the undisputed amount of \$34,259.60, with interest thereon at the rate of 4.05 percent per annum from June 1, 2007, until

paid, plus the amount of \$300.00. Respondent's liability for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for payment of the undisputed amount had been issued.

Although the remaining amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. 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, Charles Johnson Company, is a corporation whose post office address is P.O. Box 95, Las Cruces, New Mexico, 88004-0095. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, The Alphas Company, Inc., is a corporation whose post office address is 87-89 New England Produce Center, Chelsea, Massachusetts, 02150-1703. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On April 26, 2007, Complainant shipped one truckload of lettuce, under pickup number 104, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-6 billing Respondent for 660 cartons of naked lettuce 24's at \$7.50 per carton, or \$4,950.00, and 240 cartons of cello lettuce 24's at \$10.50 per carton, or \$2,520.00, plus \$23.50 for a temperature recorder and \$3,700.00 for freight, for a total f.o.b. plus freight invoice price of \$11,193.50.
4. Respondent reported selling the lettuce mentioned in Finding of Fact 3 at an average sales price of \$14.21 per carton for the 660 cartons of naked lettuce 24's, and \$13.55 per carton for the 240 cartons of cello lettuce 24's, for a gross sales amount of \$12,634.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$2,526.80, and paid Complainant the balance of \$10,107.20.
5. On April 26, 2007, Complainant shipped one truckload of lettuce, under pickup number 108, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant

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thereafter prepared invoice number LCS-8 billing Respondent for 670 cartons of naked lettuce 24's at \$7.50 per carton, or \$5,025.00, and 220 cartons of cello lettuce 24's at \$10.50 per carton, or \$2,310.00, plus \$23.50 for a temperature recorder and \$3,700.00 for freight, but less \$1,500.00 for a "claim against trucker as reported by Alphas," for a net f.o.b. plus freight invoice price of \$9,558.50.

6. Respondent reported selling the lettuce mentioned in Finding of Fact 5 at an average sales price of \$3.12 per carton for the 670 cartons of naked lettuce 24's, and \$9.17 per carton for the 220 cartons of cello lettuce 24's, for a gross sales amount of \$4,259.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$851.80, and paid Complainant the balance of \$3,407.20.

7. On April 28, 2007, Complainant shipped one truckload of lettuce, under pickup number 113, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-39 billing Respondent for 215 cartons of naked lettuce 24's at \$7.50 per carton, or \$1,612.50, and 700 cartons of cello lettuce 24's at \$10.50 per carton, or \$7,350.00, plus \$23.50 for a temperature recorder and \$3,700.00 for freight, for a total f.o.b. plus freight invoice price of \$12,686.00.

8. Respondent reported selling the lettuce mentioned in Finding of Fact 7 at an average sales price of \$9.06 per carton for the 700 cartons of cello lettuce 24's, and \$0.00 per carton for the 215 cartons of naked lettuce 24's, for a gross sales amount of \$5,980.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$1,196.00, and paid Complainant the balance of \$4,784.00.

9. On May 2, 2007, Complainant shipped one truckload of lettuce, under pickup number 121, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-74 billing Respondent for 960 cartons of cello lettuce 24's at \$10.50 per carton, or \$10,080.00, plus \$23.50 for a temperature recorder and \$3,700.00 for freight, for a total f.o.b. plus freight invoice price of \$13,803.50.

10. Respondent reported selling the 960 cartons of cello lettuce 24's mentioned in Finding of Fact 9 at an average sales price of \$22.42 per carton, for a gross sales amount of \$14,796.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$2,959.80, and paid Complainant the balance of \$11,836.80.

11. On May 2, 2007, Complainant shipped one truckload of lettuce, under pickup number 122, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-75 billing Respondent for 940

cartons of liner palletized lettuce 24's at \$9.25 per carton, or \$8,695.00, plus \$23.50 for a temperature recorder and \$3,700.00 for freight, for a total f.o.b. plus freight invoice price of \$12,418.50.

12. On May 7, 2007, at 9:25 a.m., a U.S.D.A. inspection was performed on 320 cartons of the lettuce mentioned in Finding of Fact 11, at the place of business of Respondent, in Chelsea, Massachusetts, the report of which disclosed, in pertinent part, as follows:

<b>Temperatures:</b> 29 to 31°F		<b>NUMBER OF CONTAINERS:</b> 320 CARTON(S)		<b>ORIGIN:</b> CA
<b>Markings:</b> MARKINGS: CHARLEY 24 HEADS LINER PRODUCE OF USA SHIPPED BY CHARLES JOHNSON CO SCOTTSDALE AZ				
<b>INJURY</b>	<b>DAM</b>	<b>SER. DAM</b>	<b>V.S.DA M</b>	<b>OFFSIZE/DEFECTS</b>
<b>GRADE:</b>				
<b>LOT DESC:</b>		INSPECTION: RESTRICTED TO FREEZING ONLY AT APPLICANT'S REQUEST TEMPERATURES(4): 30°F, 29°F, 31°F, 31°F  ALL PALLETS IN NOSE OF TRAILER SOME TO ALL CARTONS SCATTERED (MIXED) THOUGHT [sic] LAYERS PRODUCT IS FROZEN AND OR SHOW FREEING [sic] INJURY. FREEZING INJURY BEING A DARK GLASSY TRANSLUCENT APPEARENCE [sic] EXTENDING INWARD FROM TOP SIDES AND OR ENDS 1/2" TO COMPLETE CARTON. AFFECTING SOME TO ALL HEADS. SO LOCATED TO INDICATE FREEZING OCCURRED AFTER PACKING.		

13. Respondent reported selling the 940 cartons of liner palletized lettuce 24's mentioned in Finding of Fact 11 at an average sales price of \$7.02 per carton, for a gross sales amount of \$4,633.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$926.60, the U.S.D.A. inspection fee of \$56.00, and a disposal fee of \$550.00, and paid Complainant the balance of \$3,100.40.

14. On May 10, 2007, Complainant shipped one truckload of lettuce, under pickup number 159, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant

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thereafter prepared invoice number LCS-186 billing Respondent for 320 cartons of cello lettuce 24's at \$8.00 per carton, or \$2,560.00, and 600 cartons of liner palletized lettuce 24's at \$6.75 per carton, or \$4,050.00, plus \$23.50 for a temperature recorder and \$3,800.00 for freight, for a total f.o.b. plus freight invoice price of \$10,433.50.

15. Respondent reported selling the lettuce mentioned in Finding of Fact 14 at an average sales price of \$1.94 per carton for the 320 cartons of cello lettuce 24's, and \$0.00 per carton for the 600 cartons of naked lettuce 24's, for a gross sales amount of \$1,280.00. From this amount, Respondent deducted commission at a rate of 20 percent, or \$256.00, and paid Complainant the balance of \$1,024.00.

16. The informal complaint was filed on June 14, 2007, which is within nine months from the accrual of the cause of action.

### Conclusions

This dispute concerns Respondent's liability for six truckloads of iceberg lettuce purchased from Complainant. Complainant asserts that Respondent purchased and accepted the six loads of lettuce in question at f.o.b. plus freight prices totaling \$66,370.00. Respondent asserts, to the contrary, that the loads were not ordered and that it only agreed to accept the lettuce on a "P.A.S." (price after sale) basis. Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *Vernon C. Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Bert Guerin*, 27 Agric. Dec. 384 (1968).

We will first consider the evidence submitted by Complainant to substantiate its contention that the lettuce was sold at the f.o.b. plus freight prices billed to Respondent. Attached to the Complaint are copies of the invoices Complainant prepared for each of the six loads of lettuce in question.<sup>1</sup> Each invoice lists fixed f.o.b. prices for the lettuce and includes an additional charge for freight, in accordance with Complainant's allegation of f.o.b. plus freight terms. Complainant's President, Charles Johnson, asserts in Complainant's Opening Statement that, "My procedure is to have invoices prepared and mailed the day after shipment, but there are Sunday exceptions."<sup>2</sup> Complainant also submitted copies of the "Sales Order and Passing" that it prepared for

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<sup>1</sup> See Complaint Exhibits 1, 7, 14, 20, 24, and 32.

<sup>2</sup> See Opening Statement ¶8.

each shipment.<sup>3</sup> Complainant's Charles Johnson describes these documents in his sworn Opening Statement, wherein he states, in pertinent part, as follows:

...I and all other salesman, prepare a Sales Order and Passing document. That document is then passed to the person in my office who hires trucks and then to the dispatcher who prepares the loading order for the cooler. The next morning the manifest and truck name is written on the Sales Order and passing and then, with my final approval, is faxed by Judy Sosa in my office to the customer. This procedure was followed on all of The Alphas Company shipments. The right hand column of that document is for price and terms of sale and charges for freight and temperature recorders. Alphas was faxed all of that information on every load and not once did anyone call objecting to the "Terms of Sale". That was an ideal time for Alphas to object and that is one reason I use this particular document – I want everybody to be on the same page and all details of the sale confirmed in writing.

Complainant also submitted copies of the bills of lading and load confirmations for the shipments, the latter of which bear a preprinted statement that reads "ALL LETTUCE IS SHIPPED FOB PLUS FREIGHT."<sup>4</sup> These documents are, however, evidence of the freight terms negotiated between Complainant and the carrier, so they do not directly pertain to the contracts negotiated between Complainant and Respondent.

As we mentioned, Respondent denies purchasing the lettuce at the f.o.b. plus freight prices billed by Complainant and asserts that the price terms of the contracts were "P.A.S." (price after sale). The term "price after sale" is not defined in either the Uniform Commercial Code (U.C.C.) or the Act and Regulations. It is considered a subcategory of the "open price term" (U.C.C. Section 2-305(1)), and is generally understood as meaning that the parties will agree upon a price after the buyer effects its resales.<sup>5</sup> Aside from its sworn allegation

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<sup>3</sup> See Complaint Exhibits 2, 13, 15, 25, and 33, and Opening Statement Exhibit 37.

<sup>4</sup> See Complaint Exhibits 4-6, 8, 9-9A, 16-17, 19, 21-22, 28, 34, and 36.

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

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to this effect, the only other evidence offered by Respondent to support its contention that the lettuce was sold price after sale are copies of lot settlement reports and accounts of sale showing the results of its resale of the lettuce. The term "P.A.S." does not, however, appear on any of these documents.<sup>6</sup>

With respect to the documentation submitted by Complainant, Respondent denies receiving Complainant's "Sales Order and Passing," and states that the only paperwork received were the bills of lading that were received upon receipt of the loads.

We note, however, that Respondent also acknowledges receiving Complainant's invoices billing Respondent for the lettuce at f.o.b. plus freight prices. In his sworn Answering Statement, Respondent's President, John ("Yanni") Alphas, states specifically that "[w]e were only aware of the cost applied to these loads once we received the invoices generated by [Complainant]."<sup>7</sup> While it is apparently Mr. Alphas' contention that the invoices were used only to inform Respondent of the cost of the lettuce,<sup>8</sup> there is no indication of this on the invoices. Therefore, when Respondent received these invoices indicating the sale of the lettuce at the f.o.b. plus freight prices listed thereon, Respondent had an obligation to promptly notify Complainant that it understood the price terms of the contract to be other than what was reflected on the invoice. Respondent's failure to do so is considered strong evidence that such terms were correctly stated. See *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630 (1983); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218 (1960). We also note that while Respondent states it did not issue any purchase orders for the lettuce, Respondent submitted several copies of Complainant's invoices whereon there are handwritten purchase order numbers and lot numbers that were presumably added by Respondent.<sup>9</sup> Respondent's Yanni Alphas also asserts in his sworn Answering Statement that three of the loads were shipped to Respondent's New York facility in the Bronx, and that all three loads had to be diverted because the New York facility could not take them in. Mr. Alphas maintains that if the loads were ordered, Respondent would not have had

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<sup>6</sup> See Answer Exhibits 15, 17-19, 22-24, 27-29, 31-32, 35, 37-38, and 41-42.

<sup>7</sup> See Answering Statement ¶9.

<sup>8</sup> The invoice amounts billed by Complainant are used as the product cost on the lot settlement reports prepared by Respondent. See Answer Exhibits 17-18, 22-23, 27-28, 31, 37, and 41-42.

<sup>9</sup> See Answer Exhibits 16, 20, and 30.

to divert them to Chelsea, Massachusetts.<sup>10</sup> In response to this allegation, Complainant's Charles Johnson asserts in Complainant's sworn Statement in Reply that Respondent's Yanni Alphas instructed him to ship all loads to the facility in Chelsea, Massachusetts. Mr. Johnson refers to the documents submitted with the Complaint, including the bills of lading, load confirmations and freight invoices, to substantiate this allegation. None of these documents indicate that the shipments were ever destined for anywhere except Respondent's Massachusetts facility.<sup>11</sup> Complainant also attached to its Statement in Reply a sworn statement from its transportation manager, Patricia Quintanilla, wherein Ms. Quintanilla states, in pertinent part, "I was never asked by Charles Johnson or Yanni Alphas to hire trucks for New York City. My confirmations and bills of lading show only Boston as the destination."<sup>12</sup> Therefore, since there is no indication that the lettuce was ever diverted from New York to Massachusetts, Respondent's argument that the alleged diversion supports its allegation that the lettuce was not ordered is without merit.

Finally, we note that Complainant's Charles Johnson asserts in Complainant's sworn Opening Statement that he called Yanni Alphas when Respondent's payments were past due, at which time Mr. Johnson states Mr. Alphas made no mention of having a problem with the terms of sale. Mr. Johnson alleges Mr. Alphas said, "I will drag this out, which will give me longer to pay."<sup>13</sup> In response to this allegation, Yanni Alphas asserts in Respondent's sworn Answering Statement that he never made this statement and that he wants his files cleaned up off his desk and the shippers paid as soon as possible.<sup>14</sup> Complainant thereafter attached to its Statement in Reply a sworn statement from Judy Sosa, an employee of Complainant whose responsibilities include collecting past due invoices, wherein Ms. Sosa states she called Yanni Alphas and was told that "I will pay when they make me." Ms. Sosa states Mr. Alphas "said nothing about having a dispute with Charley Johnson over Terms of Sale."<sup>15</sup>

Based upon our review of the evidence submitted as detailed above, we find that the preponderance of the evidence supports Complainant's contention that the six loads of lettuce in question were sold to Respondent at the f.o.b. plus freight amount invoiced. Moreover, as

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<sup>10</sup> See Answering Statement ¶5.

<sup>11</sup> See Complaint Exhibits 3-6, 8, 9-9A, 12, 16-18, 19, 21-23, 28, 31, and 34-36.

<sup>12</sup> See Statement in Reply Exhibit 57. Respondent's Massachusetts facility is in Chelsea, which is an inner urban suburb of Boston.

<sup>13</sup> See Opening Statement ¶9.  
<sup>14</sup> See Answering Statement ¶10.

<sup>15</sup> See Statement in Reply Exhibit 58.

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there is no dispute that Respondent accepted and resold the subject loads of lettuce, Respondent is liable to Complainant for the lettuce it accepted at the agreed purchase prices totaling \$70,093.50,<sup>16</sup> less any damages resulting from any breach of contract by Complainant. In this regard, Respondent asserts in its sworn Answer that one load arrived warm and that two other loads arrived frozen.<sup>17</sup> We have already determined that lettuce was sold under f.o.b. terms.<sup>18</sup> The Regulations (7 C.F.R. § 46.43(i)) define f.o.b. as meaning:

. . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that *the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.* (Emphasis supplied).

Both parties attribute the temperature problems with the shipments in question to mishandling by the carrier in transit.<sup>19</sup> Therefore, since Respondent, as buyer, assumed the risk of any in-transit damage under the f.o.b. terms of these sales, Respondent is obligated to pay Complainant the agreed purchase price of the lettuce it accepted, and may seek redress from the carrier for any damages allegedly sustained as a result of the improper carriage of the product. If, however, the seller procures an adjustment from the carrier because of the transportation loss, the seller is, as a matter of law, the agent of the buyer, and the seller must pass on to the buyer all of the proceeds of the adjustment, less any agreed and disclosed service charge. *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979). In the instant case, the record shows Complainant adjusted the invoice price of the lettuce shipped under pickup number 108 (invoice number LCS-8) by \$1,500.00 to account for a “claim against trucker as

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<sup>16</sup> This amount differs from the amount sought in the Complaint because Complainant is not seeking recovery of the freight and recorder fees totaling \$3,723.50 billed on invoice number LCS-75.

<sup>17</sup> See Answer ¶5.

<sup>18</sup> We note that in connection with its argument that the lettuce was purchased price after sale, Respondent asserts that it did not purchase the lettuce f.o.b.; however, these terms are not mutually exclusive. A sale of goods on a price after sale basis may be f.o.b., delivered, or some variation thereof, in accordance with the parties' agreement. *See Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865 (1991).

<sup>19</sup> See Answering Statement p. 3 and Statement in Reply p. 1.

reported by Alphas.”<sup>20</sup> As Complainant’s Charles Johnson explains in Complainant’s Statement in Reply:

A deduction was made from the truck broker and was shown as a line item deduction on the corrected invoice to Alphas. The deduction amount was confirmed by Yanni Alphas with Patty Quintanilla, transportation manager.<sup>21</sup>

Accordingly, we find that Respondent is liable to Complainant for the adjusted invoice price of \$9,558.50 for the lettuce in this shipment.

For the lettuce shipped under pickup number 122 (invoice number LCS-75), Complainant states:

Upon delivery a USDA inspection revealed freeze damage caused by the truck. As an FOB sale and as the in-transit risk lies with the receiver, complainant expects payment of the FOB price of \$8,695.00. Complainant also asks for an account of sales to determine if any additional monies are due.<sup>22</sup>

It appears based on this statement that Complainant is only seeking to recover the f.o.b. price of the lettuce because of the freight claim, but that if the proceeds from the sale of the lettuce are sufficient to pay all or some of the freight cost as well, then those proceeds should be remitted to Complainant to be applied to the freight bill. After Complainant made this statement in the Complaint, Respondent submitted a sworn Answer to which it attached an account of sales that reflects a net return of only \$3,100.40. As this amount is substantially less than the \$8,695.00 f.o.b. price of the lettuce, there are no additional proceeds available to pay the freight. Complainant’s Charles Johnson explains in Complainant’s Statement in Reply that:

A claim was filed against the trucker..., but so far no settlement has been reached. My office did not have any idea of the deduction amount until Alphas paid the undisputed amount due Charles Johnson Company. That delayed payment has delayed settlement of this file. Alphas may have to go after the trucker in court to settle this.<sup>23</sup>

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<sup>20</sup> See Complaint Exhibit 7.

<sup>21</sup> See Statement in Reply ¶4.

<sup>22</sup> See Complaint ¶8.

<sup>23</sup> See Statement in Reply ¶5.

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It therefore appears that while Complainant has initiated a claim against the carrier on Respondent's behalf, it has no intention of pursuing the claim any further. Moreover, since no proceeds from the claim have been collected, Complainant would normally be entitled to recover the full f.o.b. plus freight price of the lettuce of \$12,418.50. However, since Complainant has only requested payment of the \$8,695.00 f.o.b. price of the lettuce, and Respondent's account of sale indicates that there are no additional proceeds available from the sale of the lettuce to pay the freight, Complainant's recovery should be limited to the \$8,695.00 f.o.b. amount requested. Any issues regarding the payment of freight or the damages allegedly caused by in-transit freezing should be resolved between Respondent and the carrier in a different forum.

Finally, for the lettuce shipped under pickup number 159 (LCS-186), Complainant's Charles Johnson states, "I did not pay any freight to the trucker and I have filed a claim for any loss... There was no USDA inspection which makes any claim very dubious."<sup>24</sup> While it therefore appears that Complainant has at least initiated a claim against the carrier on Respondent's behalf, there is no indication that any proceeds from the claim have been collected. Consequently, no deduction from the invoice price of the lettuce is warranted. Although the invoice price of the lettuce includes freight that Complainant has not yet paid, the record includes a copy of the freight company's invoice billing Complainant for freight.<sup>25</sup> In the absence of an inspection or other evidence to show that the lettuce arrived with freeze damage as alleged, we presume that Complainant remains obligated to pay the carrier its contracted freight rate. Therefore, Complainant's attempted recovery of the f.o.b. plus freight amount billed to Respondent for this shipment of lettuce is entirely appropriate under the circumstances.

Based on our review of the evidence and for the reasons cited, we conclude that the total amount due Complainant from Respondent for the six truckloads of iceberg lettuce in question is the \$66,370.00 claimed in the Complaint. This amount should, however, be reduced by the \$34,259.60 that Respondent paid Complainant pursuant to the Order Requiring Payment of Undisputed Amount issued on October 4, 2007. This leaves a balance due Complainant from Respondent of \$32,110.40.

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<sup>24</sup> See Statement in Reply ¶6.

<sup>25</sup> See Complaint Exhibit 35.

Respondent's failure to pay Complainant \$32,110.40 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 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. Respondent has, however, already paid Complainant the \$300.00 handling fee pursuant to the Order Requiring Payment of Undisputed Amount issued on October 4, 2007. Therefore, recovery of the \$300.00 handling fee will not be awarded here.

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**Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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**CHARLES JOHNSON COMPANY v. THE ALPHAS COMPANY,  
INC.**

**PACA Docket No. R-07-114.**

**Filed April 21, 2009.**

**Practice and Procedure – Recovery of Unpaid Obligations Allowed.**

Where Complainant sought recovery of the f.o.b. plus freight contract price of lettuce sold to Respondent, but Complainant admitted that it had not yet paid the freight, we found that where the freight invoice was in evidence, and the record lacked any evidence to substantiate Respondent's claim of freeze damage in transit, Complainant remained obligated to pay the freight invoice and was therefore entitled to recover the full f.o.b. plus freight price of the lettuce from Respondent.

Patrice H. Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant: Pro Se.

McCarron & Diess, Respondent's Attorney.

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

**Order on Reconsideration**

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on August 22, 2008, in which Respondent was ordered to pay Complainant, as reparation, \$32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid. On October 6, 2008, the Department received from Respondent a Petition for Reconsideration of the Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a reply. On October 27, 2008, Complainant notified the Department it did not intend to submit a reply to Respondent's Petition. Before we consider the issues raised by Respondent in its Petition, we should briefly review of the details of this case. The dispute involves six

truckloads of iceberg lettuce Complainant allegedly sold to Respondent at f.o.b. plus freight prices totaling \$66,370.00. In defense of its failure to pay Complainant this amount, Respondent asserted the terms of sale were "P.A.S." (price after sale), and that it owed Complainant only \$34,259.60 on this basis. Respondent was ordered to pay Complainant the undisputed amount owed of \$34,259.60 before the Decision and Order issued. In the Decision and Order we determined the preponderance of the evidence, including invoices, sales orders, and affidavit testimony, supported Complainant's allegations with respect to the contract terms. Accordingly, Respondent was ordered to pay Complainant the disputed invoice balance of \$32,110.40.

In its Petition, Respondent argues first that Complainant, as the proponent of the claim and the essential term at issue in this case, has the burden of proving a fixed sales price agreement by a preponderance of the evidence. Respondent cites our decision in *Del Rio Growers, Inc. v. Anthony Gagliano & Company, Inc.*, 47 Agric. Dec. 476 (1988), as supporting this contention. We note, however, that in *Del Rio*, the Complainant asserted the existence of a contract of sale, whereas the Respondent maintained it only agreed to handle the goods on consignment. In other words, in *Del Rio*, there was a dispute as to whether a contract of sale was effected, or whether the goods were merely consigned. In the instant case, on the other hand, there is no dispute a contract of sale was effected. Only the terms of sale are in controversy. Under such circumstances, we have repeatedly held the burden rests upon each party to prove their respective allegations with respect to the terms of the contract by a preponderance of the evidence. See, e.g., *Justice v. Eastern Potato Dealers*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Geurin*, 27 Agric. Dec. 384 (1968); *Israel Klein Co. v. S. Otis Sullivan & Company*, 17 Agric. Dec. 500 (1958). Applying this standard, the evidence submitted by Complainant supporting its allegation of f.o.b. plus freight sale terms clearly preponderated over Respondent's allegation of price after sale terms, as the latter was not supported by any ancillary evidence.

Respondent next refers to the testimony of Complainant's Charles Johnson wherein he asserted, "My procedure is to have invoices prepared and mailed the day after shipment, but there are Sunday exceptions" (D&O, p.7, citing Opening Statement, p.2). Respondent contends the most noteworthy aspect of this statement is that it does not specifically state the invoices here in question were actually prepared and mailed the day after shipment. We note, however, that earlier in Mr. Johnson's statement, where he describes the procedure for preparing and issuing Complainant's sales order and passing documents, Mr. Johnson

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affirmed the procedure was “followed on all of The Alphas Company shipments.” (See Opening Statement, p.2). We believe it is reasonable to infer from this that Mr. Johnson’s statement concerning the procedure for preparing and mailing invoices was intended to apply to the sales of lettuce at issue in this dispute.

Respondent next argues that further doubt is cast upon Mr. Johnson’s contention the invoices were mailed the day after shipment by the fact that Complainant generated different invoices for at least three of the loads of lettuce. Specifically, Respondent states that as part of its informal complaint, Complainant submitted invoices for the first three shipments of lettuce which included a notation that reads “LESS 1.00 ALLOWANCE ON NAKED.” Respondent states these invoices suggest there were prior invoices which were later adjusted to reflect the \$1.00 allowance. While this is certainly possible, it does not appear to be the case here. Review of the record discloses the sales order and passing documents Complainant prepared for these shipments include a similar notation concerning an allowance on the naked lettuce (see Complaint Exhibits 2, 13 and 15). As the sales order and passing documents were, according to Complainant’s Charles Johnson, prepared prior to the invoices, we can reasonably presume the first invoices prepared by Complainant included the allowance notation. While it is true that Complainant subsequently prepared revised invoices showing the price of the lettuce reduced by \$1.00 per carton without any mention of the allowance (see Complaint Exhibits 1, 11 and 14), the invoices Respondent submitted with its Answer, which are presumably the invoices that Respondent received from Complainant, include the allowance notation (see Answer Exhibits 16, 20 and 25). Therefore, whether or not Complainant prepared multiple versions of the invoice, it appears Respondent received the earliest invoices Complainant prepared.

Along the same vein, Respondent states the invoice for LCS-8 contains the wording “LESS CLAIM AGAINST TRUCKER AS REPORTED BY ALPHAS (\$1,500.00),” and argues that this invoice could not have been generated until the load arrived (see Complaint Exhibit 7). While that is certainly true, the copy of invoice LCS-8 submitted with Respondent’s Answer (Answer Exhibit 20) does not bear any mention of the truck claim. It is therefore apparent once again that Respondent received the earliest version of the invoice prepared by Complainant.

Respondent next argues Complainant’s failure to submit necessary evidence, such as fax transmittal records, phone records, or a statement from the individual who purportedly faxed Complainant’s sales order

and passing documents to Respondent, should lead to the conclusion that these documents were never faxed. We hasten to point out, however, that a determination was never made as to whether Complainant sustained its burden to prove these documents were sent to Respondent; so Respondent's alleged receipt of these documents was not a factor that was considered in determining whether Complainant had sustained its burden of proof concerning the alleged terms of sale. Nevertheless, to the extent the sales order and passing documents memorialized Complainant's understanding of the terms of sale at the time the contract was formed, there was additional evidence in support of Complainant's allegations with respect to the contract terms.

Respondent next takes issue with our finding that Respondent's admitted receipt of Complainant's invoices billing it at f.o.b. plus freight prices placed an obligation upon Respondent to promptly notify Complainant that the terms were not correctly stated. Citing *Merit Packing Company v. Pamco Airfresh, Inc.*, 47 Agric. Dec. 1345 (1988) and *Del Rio Growers, Inc. v. Anthony Gagliano & Company, Inc.*, 47 Agric. Dec. 476 (1988), Respondent argues that merely sending an invoice with terms of sale does not prove there was a contract. There is, however, no dispute that a contract of sale existed in the instant case. Moreover, we note that in *Merit Packing*, the Complainant was not able to establish the Respondent had any other involvement in the transaction aside from receiving an invoice; whereas here, the Respondent admits purchasing the lettuce but asserts the price terms were different from those asserted by Complainant. Similarly, in *Del Rio*, there is a dispute as to the existence of a contract of sale, with the Complainant asserting the goods were sold at a fixed price, and the Respondent asserting the goods were received on consignment. In addition, in *Del Rio*, the Respondent submitted evidence that it took prompt exception to the invoice received from the Complainant. Here, Respondent has admitted to the purchase of the lettuce and has failed to offer any evidence showing it took exception to the invoices received from Complainant showing the sale of the lettuce at fixed f.o.b. plus freight prices.

Respondent next argues that *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630 (1983), the case cited to support our conclusion the invoices received without objection by Respondent should be considered evidence of the contract terms agreed upon between the parties, is not relevant to the case at hand. Specifically, Respondent states the circumstances in *Pemberton* are substantially different from the case at issue here, because in *Pemberton*, the Respondent buyer had received numerous invoices from the Complainant seller in earlier transactions reflecting the exclusion of

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certain defects, and the Respondent had not objected to those invoices. We note, however, that while the time span at issue in the instant case is substantially less than that in *Pemberton*, the transactions in question nevertheless covered a span of two weeks, so if the invoices were issued promptly as Complainant asserts, Respondent may have been in receipt of the invoices for the initial transactions before the later transactions took place. More importantly, we note Respondent asserts in connection with this argument that it repeatedly advised Complainant it understood the sales terms to be P.A.S., and that Complainant's Charles Johnson never denied that past sales to Respondent were on a P.A.S. basis. Review of the evidence discloses, however, that while Mr. Yanni Alphas of Respondent asserts P.A.S. terms were discussed with Mr. Johnson and agreed upon (see Answer, p.1), Mr. Alphas never claims he repeatedly advised Complainant the terms were P.A.S. Moreover, Mr. Johnson clearly refutes Respondent's contention that past sales were P.A.S. when he states in his Opening Statement: "I have never offered lettuce to The Alphas Company on a price after sale basis." (See Opening Statement, p.1).

Finally, Respondent argues the decision's findings were incorrect with respect to the terms of sale because the prices asserted by Complainant would have guaranteed that Respondent would lose money on each load. Respondent bases this argument on the USDA Market News prices for the Boston Terminal Market on the date the lettuce was delivered. We note, however, that if Respondent was basing its purchasing decisions on Boston market prices, the prices at the time of delivery would not have been available to Respondent at the time of sale. Therefore, if such a comparison is to be made, the Boston market prices on the date of sale must be used. Those prices are not, however, in evidence. Moreover, we are also aware that purchase decisions are made for a variety of reasons, so there may have been other factors more important than market price that influenced Respondent's decision to purchase the lettuce. For this reason, we are very hesitant to base our determination as to what was agreed upon at the time of sale on what appears to have been reasonable based on market circumstances. Furthermore, we hasten to point out that such speculation would not be necessary if Respondent had provided any evidence to substantiate its allegation that the contract terms were price after sale. Complainant, on the other hand, supplied copies of invoices that were admittedly received by Respondent, and that clearly reflect the f.o.b. plus freight fixed price terms that Complainant alleges were agreed upon.

In order to satisfy its burden in this case, the evidence submitted by Complainant needed only to preponderate in its favor by the narrowest

of margins. See 9 Wigmore, *Evidence*, § 2483 *et seq.* (*Chadbourne rev.* 1981). On the basis of the evidence submitted, we conclude that Complainant satisfied that burden.

Upon reconsideration of the evidence and for the reasons cited, we are denying Respondent's Petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act.

### **Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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**NEW GENERATION PRODUCE CORP. v. NEW YORK  
SUPERMARKET, INC.  
PACA Docket No. R-09-011.  
Decision and Order.  
Filed June 26, 2009.**

### **Estoppel to Deny Agency – Collection Agency - Authority.**

Where Respondent remitted payment to a collection agent in settlement of its indebtedness to Complainant, but Respondent failed to establish that the agent was bestowed by Complainant with either actual or apparent authority to collect on Complainant's behalf, held that Respondent's sole reliance on the representation of the agent that it was authorized to settle the indebtedness on Complainant's behalf was neither reasonable nor legally sufficient to absolve it of liability to Complainant.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Lawrence Meuers for AMS.

Avi Rosengarten for Respondent.

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

### **Preliminary Statement**

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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 \$108,994.00 in connection with 85 truckloads of mixed produce shipped in the course of interstate commerce.

A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file an Answer. Respondent failed to submit an Answer within the requisite period of time, so a Default Order was issued on December 18, 2007, awarding Complainant the full amount of its claim. The Department subsequently received from Respondent a Petition to Reopen the Complaint. In the Petition, Respondent offered a defense that could at least mitigate the award requested by Complainant. Therefore, in order to properly determine the validity of the allegations made by the parties, and to weigh all the facts on the merits, it was necessary to reopen the Complaint. Accordingly, on April 10, 2008, an Order granting Respondent's Petition to Reopen the Complaint was issued.

Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 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), however, no ROI was prepared in this case.<sup>1</sup> In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a Brief.

**Findings of Fact**

1. Complainant, New Generation Produce Corp., is a corporation whose post office address is 195 Lombardy Street, Brooklyn, New York,

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<sup>1</sup> Where the informal handling of the claim by a P.A.C.A. Branch office generates correspondence and other documents pertinent to the dispute, a Report of Investigation is prepared by the Department. These documents become a part of the record considered by the Presiding Officer in deciding the case. In the instant case, Respondent did not respond to the informal complaint submitted by Complainant, so no Report of Investigation was prepared.

11222-5417. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, New York Supermarket, Inc., is a corporation whose post office address is 8266 Broadway, Elmhurst, New York, 11373-3353. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On July 8, 2006, Complainant sold to Respondent under invoice number 72177, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Fuji apples at \$26.00 per carton, or \$1,274.00, 12 cartons of bananas at \$12.50 per carton, or \$150.00, 16 cartons of white peaches at \$22.00 per carton, or \$352.00, and 20 cartons of kiwis at \$11.00 per carton, or \$220.00, for a total invoice price of \$1,996.00. Respondent has not paid this invoice.

4. On July 8, 2006, Complainant sold to Respondent under invoice number 72202, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Hass avocados at \$32.00 per carton, for a total invoice price of \$320.00. Respondent has not paid this invoice.

5. On July 9, 2006, Complainant sold to Respondent under invoice number 72240, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at \$12.50 per carton, for a total invoice price of \$225.00. Respondent has not paid this invoice.

6. On July 10, 2006, Complainant sold to Respondent under invoice number 72267, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at \$22.00 per carton, or \$220.00, 10 cartons of papayas at \$11.50 per carton, or \$115.00, 12 cartons of bananas at \$12.50 per carton, or \$150.00, 14 cartons of cantaloupes at \$13.00 per carton, or \$182.00, 5 cartons of pineapples at \$17.00 per carton, or \$85.00, and 10 cartons of black seedless grapes at \$28.00 per carton, or \$280.00, for a total invoice price of \$1,032.00. Respondent has not paid this invoice.

7. On July 11, 2006, Complainant sold to Respondent under invoice number 72398, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at \$12.50 per carton, for a total invoice price of \$225.00. Respondent has not paid this invoice.

8. On July 12, 2006, Complainant sold to Respondent under invoice number 72468, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of Navel oranges at \$18.50

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per carton, or \$999.00, 10 cartons of papayas at \$11.50 per carton, or \$115.00, 5 cartons of white peaches at \$21.00 per carton, or \$105.00, 7 cartons of Packham pears at \$28.00 per carton, or \$196.00, 6 cartons of Maradol papayas at \$23.00 per carton, or \$138.00, 10 cartons of gold kiwis at \$18.00 per carton, or \$180.00, and 10 cartons of cherries at \$27.00 per carton, or \$270.00, for a total invoice price of \$2,003.00. Respondent has not paid this invoice.

9. On July 12, 2006, Complainant sold to Respondent under invoice number 72477, and delivered to one of Respondent's retail locations in the greater New York City area, 25 cartons of Fuji apples at \$29.00 per carton, for a total invoice price of \$725.00. Respondent has not paid this invoice.

10. On July 12, 2006, Complainant sold to Respondent under invoice number 72506, and delivered to one of Respondent's retail locations in the greater New York City area, 16 cartons of Saturn peaches at \$19.00 per carton, for a total invoice price of \$304.00. Respondent has not paid this invoice.

11. On July 13, 2006, Complainant sold to Respondent under invoice number 72585, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Braeburn apples at \$21.00 per carton, for a total invoice price of \$1,029.00. Respondent has not paid this invoice.

12. On July 14, 2006, Complainant sold to Respondent under invoice number 72624, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at \$27.00 per carton, or \$189.00, 10 cartons of Red Globe grapes at \$21.00 per carton, or \$210.00, 10 cartons of papayas at \$12.00 per carton, or \$120.00, 18 cartons of bananas at \$12.00 per carton, or \$216.00, 20 cartons of kiwis at \$12.00 per carton, or \$240.00, 15 cartons of gold kiwis at \$18.00 per carton, or \$270.00, 10 cartons of Superior grapes at \$16.00 per carton, or \$160.00, 10 cartons of black seedless grapes at \$26.00 per carton, or \$260.00, and 5 cartons of pineapples at \$16.00 per carton, or \$80.00, for a total invoice price of \$1,745.00. Respondent has not paid this invoice.

13. On July 15, 2006, Complainant sold to Respondent under invoice number 72730, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at \$11.50 per carton, for a total invoice price of \$207.00. Respondent has not paid this invoice.

14. On July 16, 2006, Complainant sold to Respondent under invoice number 72795, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of papayas at \$11.50 per

carton, or \$115.00, 10 cartons of bananas at \$11.50 per carton, or \$115.00, and 24 cartons of white peaches at \$21.50 per carton, or \$516.00, for a total invoice price of \$746.00. Respondent has not paid this invoice.

15. On July 17, 2006, Complainant sold to Respondent under invoice number 72835, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at \$11.50 per carton, or \$172.50, 12 cartons of bananas at \$12.00 per carton, or \$144.00, 5 cartons of grapefruits at \$16.00 per carton, or \$80.00, 10 cartons of Saturn peaches at \$18.00 per carton, or \$180.00, 10 cartons of honeydews at \$12.00 per carton, or \$120.00, and 10 cartons of Packham pears at \$30.00 per carton, or \$300.00, for a total invoice price of \$996.50. Respondent has not paid this invoice.

16. On July 18, 2006, Complainant sold to Respondent under invoice number 72966, and delivered to one of Respondent's retail locations in the greater New York City area, 45 cartons of Navel oranges at \$17.00 per carton, or \$765.00, 12 cartons of bananas at \$11.00 per carton, or \$132.00, 36 cartons of Korean melons at \$10.00 per carton, or \$360.00, 16 cartons of Wickson plums at \$28.00 per carton, or \$448.00, and 10 cartons of Golden Delicious apples at \$23.00 per carton, or \$230.00, for a total invoice price of \$1,935.00. Respondent has not paid this invoice.

17. On July 19, 2006, Complainant sold to Respondent under invoice number 73024, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at \$20.00 per carton, or \$200.00, 12 cartons of bananas at \$11.00 per carton, or \$132.00, 5 cartons of pineapples at \$16.00 per carton, or \$80.00, 10 cartons of grapefruits at \$16.00 per carton, or \$160.00, 5 cartons of gold kiwis at \$18.00 per carton, or \$90.00, and 5 cartons of cantaloupes at \$17.00 per carton, or \$85.00, for a total invoice price of \$747.00. Respondent has not paid this invoice.

18. On July 21, 2006, Complainant sold to Respondent under invoice number 73159, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of Red Delicious apples at \$27.00 per carton, or \$135.00, 10 cartons of papayas at \$11.50 per carton, or \$115.00, 10 cartons of mangos at \$6.00 per carton, or \$60.00, 7 cartons of bananas at \$10.00 per carton, or \$70.00, 5 cartons of pineapples at \$16.00 per carton, or \$80.00, 10 cartons of Thompson seedless grapes at \$14.00 per carton, or \$140.00, 10 cartons of Saturn peaches at \$14.50 per carton, or \$145.00, 10 cartons of gold kiwis at \$18.00 per carton, or \$180.00, 10 cartons of loose kiwis at \$12.00 per

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carton, or \$120.00, 10 cartons of kiwis at \$11.00 per carton, or \$110.00, and 10 cartons of black seedless grapes at \$10.00 per carton, or \$100.00, for a total invoice price of \$1,255.00. Respondent has not paid this invoice.

19. On July 21, 2006, Complainant sold to Respondent under invoice number 73199, and delivered to one of Respondent's retail locations in the greater New York City area, 2 bins of watermelons at \$230.00 per bin, for a total invoice price of \$460.00. Respondent has not paid this invoice.

20. On July 22, 2006, Complainant sold to Respondent under invoice number 73213, and delivered to one of Respondent's retail locations in the greater New York City area, 12 cartons of bananas at \$11.50 per carton, or \$138.00, 5 cartons of cantaloupes at \$17.00 per carton, or \$85.00, 10 cartons of strawberries at \$13.00 per carton, or \$130.00, and 5 cartons of Granny Smith apples at \$24.00 per carton, or \$120.00, for a total invoice price of \$473.00. Respondent has not paid this invoice.

21. On July 23, 2006, Complainant sold to Respondent under invoice number 73332, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at \$12.00 per carton, or \$180.00, 24 cartons of bananas at \$11.50 per carton, or \$276.00, and 20 cartons of mangos at \$10.00 per carton, or \$200.00, for a total invoice price of \$656.00. Respondent has not paid this invoice.

22. On July 24, 2006, Complainant sold to Respondent under invoice number 73367, and delivered to one of Respondent's retail locations in the greater New York City area, 53 cartons of Fuji apples at \$27.00 per carton, or \$1,431.00, 10 cartons of Saturn peaches at \$14.50 per carton, or \$145.00, 5 cartons of sugar plums at \$38.00 per carton, or \$190.00, 7 cartons of Golden Delicious apples at \$22.00 per carton, or \$154.00, 5 cartons of cantaloupes at \$17.00 per carton, or \$85.00, 5 cartons of pineapples at \$16.00 per carton, or \$80.00, 16 cartons of dapple fruits at \$24.00 per carton, or \$384.00, and 28 cartons of Fuji apples at \$31.00 per carton, or \$868.00, for a total invoice price of \$3,337.00. Respondent has not paid this invoice.

23. On July 24, 2006, Complainant sold to Respondent under invoice number 73428, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of papayas at \$11.50 per carton, or \$115.00, 16 bins of watermelons at \$220.00 per bin, or \$3,520.00, and 14 cartons of "Hammie" at \$18.00 per carton, or \$252.00, for a total invoice price of \$3,887.00. Respondent has not paid this invoice.

24. On July 25, 2006, Complainant sold to Respondent under invoice number 73523, and delivered to one of Respondent's retail locations in

the greater New York City area, 12 cartons of bananas at \$11.50 per carton, for a total invoice price of \$138.00. Respondent has not paid this invoice.

25. On July 26, 2006, Complainant sold to Respondent under invoice number 73568, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at \$16.00 per carton, or \$160.00, 10 cartons of mangos at \$9.50 per carton, or \$95.00, 5 cartons of pineapples at \$15.00 per carton, or \$75.00, and 10 cartons of gold kiwis at \$18.00 per carton, or \$180.00, for a total invoice price of \$510.00. Respondent has not paid this invoice.

26. On July 26, 2006, Complainant sold to Respondent under invoice number 73628, and delivered to one of Respondent's retail locations in the greater New York City area, 14 bins of watermelons at \$240.00 per bin, or \$3,360.00, and 10 cartons of sugar plums at \$35.00 per carton, or \$350.00, for a total invoice price of \$3,710.00. Respondent has not paid this invoice.

27. On July 27, 2006, Complainant sold to Respondent under invoice number 73711, and delivered to one of Respondent's retail locations in the greater New York City area, 12 cartons of bananas at \$11.00 per carton, or \$132.00, 5 cartons of cantaloupes at \$17.00 per carton, or \$85.00, and 10 cartons of kiwis at \$12.00 per carton, or \$120.00, for a total invoice price of \$337.00. Respondent has not paid this invoice.

28. On July 28, 2006, Complainant sold to Respondent under invoice number 73735, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at \$26.00 per carton, or \$182.00, 12 cartons of papayas at \$11.50 per carton, or \$138.00, 10 cartons of golden kiwis at \$18.00 per carton, or \$180.00, 5 cartons of pineapples at \$14.00 per carton, or \$70.00, 7 cartons of Granny Smith apples at \$29.00 per carton, or \$203.00, 7 cartons of Golden Delicious apples at \$25.00 per carton, or \$175.00, 5 cartons of grapefruits at \$16.00 per carton, or \$80.00, 10 cartons of loose kiwis at \$19.00 per carton, or \$190.00, and 10 cartons of black plums at \$22.00 per carton, or \$220.00, for a total invoice price of \$1,438.00. Respondent has not paid this invoice.

29. On July 28, 2006, Complainant sold to Respondent under invoice number 73795, and delivered to one of Respondent's retail locations in the greater New York City area, 34 cartons of Valencia oranges (Sunkist) at \$28.00 per carton, or \$952.00, 18 cartons of bananas at \$11.00 per carton, or \$198.00, 27 cartons of Valencia oranges (Ultimate) at \$20.00 per carton, or \$540.00, 10 cartons of kiwis at \$12.00 per

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carton, or \$120.00, and 10 cartons of black seedless grapes at \$24.00 per carton, or \$240.00, for a total invoice price of \$2,050.00. Respondent has not paid this invoice.

30. On July 29, 2006, Complainant sold to Respondent under invoice number 73865, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at \$11.00 per carton, or \$198.00, 10 cartons of yellow peaches at \$16.00 per carton, or \$160.00, 5 cartons of Hass avocados at \$31.00 per carton, or \$155.00, and 16 cartons of Saturn peaches at \$16.00 per carton, or \$256.00, for a total invoice price of \$769.00. Respondent has not paid this invoice.

31. On July 30, 2006, Complainant sold to Respondent under invoice number 73935, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at \$11.50 per carton, or \$172.50, and 10 cartons of mangos at \$10.00 per carton, or \$100.00, for a total invoice price of \$272.50. Respondent has not paid this invoice.

32. On July 31, 2006, Complainant sold to Respondent under invoice number 74021, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at \$11.00 per carton, or \$198.00, 10 cartons of mangos at \$10.00 per carton, or \$100.00, and 10 cartons of white nectarines at \$20.00 per carton, or \$200.00, for a total invoice price of \$498.00. Respondent has not paid this invoice.

33. On August 1, 2006, Complainant sold to Respondent under invoice number 74089, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at \$11.50 per carton, or \$172.50, 12 cartons of bananas at \$11.00 per carton, or \$132.00, 35 cartons of "Hammie" at \$18.00 per carton, or \$630.00, 5 cartons of pineapples at \$14.00 per carton, \$70.00, 5 cartons of Hass avocados at \$31.00 per carton, or \$155.00, 5 cartons of grapefruits at \$16.00 per carton, or \$80.00, 10 cartons of loose kiwis at \$19.00 per carton, or \$190.00, 10 cartons of honeydews at \$10.00 per carton, or \$100.00, 10 cartons of yellow peaches at \$16.00 per carton, or \$160.00, and 30 cartons of clementines at \$4.00 per carton, or \$120.00, for a total invoice price of \$1,809.50. Respondent has not paid this invoice.

34. On August 1, 2006, Complainant sold to Respondent under invoice number 74132, and delivered to one of Respondent's retail locations in the greater New York City area, 4 bins of watermelons at \$230.00 per bin, for a total invoice price of \$920.00. Respondent has not paid this invoice.

35. On August 2, 2006, Complainant sold to Respondent under invoice number 74206, and delivered to one of Respondent's retail locations in

the greater New York City area, 15 cartons of papayas at \$11.50 per carton, or \$172.50, 10 cartons of black plums at \$22.00 per carton, or \$220.00, and 5 cartons of sugar plums at \$27.00 per carton, or \$135.00, for a total invoice price of \$527.50. Respondent has not paid this invoice.

36. On August 4, 2006, Complainant sold to Respondent under invoice number 74365, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at \$27.00 per carton, or \$189.00, 27 cartons of Valencia oranges at \$17.50 per carton, or \$472.50, 10 cartons of Red Globe grapes at \$10.00 per carton, or \$100.00, 15 cartons of kiwis at \$12.00 per carton, or \$180.00, 10 cartons of Golden Delicious apples at \$25.00 per carton, or \$250.00, 10 cartons of black seedless grapes at \$26.00 per carton, or \$260.00, 10 cartons of gold kiwis at \$18.00 per carton, or \$180.00, and 24 cartons of mangos at \$10.00 per carton, or \$240.00, for a total invoice price of \$1,871.50. Respondent has not paid this invoice.

37. On August 5, 2006, Complainant sold to Respondent under invoice number 74498, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at \$25.00 per carton, or \$250.00, 10 cartons of papayas at \$12.00 per carton, or \$120.00, 10 cartons of yellow peaches at \$16.00 per carton, or \$160.00, 5 cartons of Friar plums at \$24.00 per carton, or \$120.00, and 5 cartons of Granny Smith apples at \$19.00 per carton, or \$95.00, for a total invoice price of \$745.00. Respondent has not paid this invoice.

38. On August 7, 2006, Complainant sold to Respondent under invoice number 75488, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of papayas at \$20.00 per carton, or \$100.00, 10 cartons of papaya 8's at \$11.50 per carton, or \$115.00, 10 cartons of loose kiwis at \$19.00 per carton, or \$190.00, 6 cartons of grapefruits at \$16.00 per carton, or \$96.00, and 7 cartons of yellow peaches at \$16.00 per carton, or \$112.00, for a total invoice price of \$613.00. Respondent has not paid this invoice.

39. On August 9, 2006, Complainant sold to Respondent under invoice number 74662, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of longan nuts at \$90.00 per carton, or \$450.00, 2 cartons of papayas at \$18.00 per carton, or \$36.00, 5 cartons of Golden Delicious apples at \$28.00 per carton, or \$140.00, 5 cartons of pineapples at \$14.00 per carton, or \$70.00, 40 cartons of clementines at \$4.25 per carton, or \$170.00, 10 cartons of black seedless

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grapes at \$26.00 per carton, or \$260.00, and 10 cartons of [illeg] at \$11.50 per carton, or \$115.00, for a total invoice price of \$1,241.00. Respondent has not paid this invoice.

40. On August 11, 2006, Complainant sold to Respondent under invoice number 74819, and delivered to one of Respondent's retail locations in the greater New York City area, 28 cartons of Fuji apples at \$31.00 per carton, or \$868.00, 27 cartons of \$25.00 per carton, or \$675.00, 10 cartons of kiwis at \$16.00 per carton, or \$160.00, 10 cartons of loose kiwis at \$19.00 per carton, or \$190.00, 10 cartons of gold kiwis at \$19.00 per carton, or \$190.00, 10 cartons of black seedless grapes at \$26.00 per carton, or \$260.00, 7 cartons of Golden Delicious apples at \$28.00 per carton, or \$196.00, 8 cartons of Granny Smith apples at \$26.00 per carton, or \$208.00, and 10 cartons of pineapples at \$14.00 per carton, or \$140.00, for a total invoice price of \$2,887.00. Respondent has not paid this invoice.

41. On December 9, 2006, Complainant sold to Respondent under invoice number 83673, and delivered to one of Respondent's retail locations in the greater New York City area, 28 cartons of Gala apples at \$25.00 per carton, for a total invoice price of \$700.00. Respondent has not paid this invoice.

42. On December 11, 2006, Complainant sold to Respondent under invoice number 83765, and delivered to one of Respondent's retail locations in the greater New York City area, 27 cartons of tangerines at \$21.00 per carton, or \$567.00, 20 cartons of Red Globe grapes at \$20.00 per carton, or \$400.00, 60 cartons of papayas at \$10.50 per carton, or \$630.00, 24 cartons of "Korean Golden [illeg]" at \$19.50 per carton, or \$468.00, 10 cartons of kiwis at \$20.00 per carton, or \$200.00, and 20 cartons of Red Navel oranges at \$15.00 per carton, or \$300.00, for a total invoice price of \$2,565.00. Respondent has not paid this invoice.

43. On December 11, 2006, Complainant sold to Respondent under invoice number 83790, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of Navel oranges at \$14.50 per carton, or \$783.00, 57 cartons of Red Navel oranges at \$15.00 per carton, or \$855.00, 30 cartons of red pommelos at \$10.00 per carton, or \$300.00, 8 cartons of loquats at \$20.00 per carton, or \$160.00, and 36 cartons of mangos at \$12.00 per carton, or \$432.00, for a total invoice price of \$2,530.00. Respondent has not paid this invoice.

44. On December 11, 2006, Complainant sold to Respondent under invoice number 83805, and delivered to one of Respondent's retail locations in the greater New York City area, 42 cartons of "Korean Golden [illeg]" at \$19.50 per carton, for a total invoice price of \$819.00. Respondent has not paid this invoice.

45. On December 11, 2006, Complainant sold to Respondent under invoice number 83818, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of durian at \$28.00 per carton, or \$840.00, and 30 cartons of clementines at \$4.00 per carton, or \$120.00, for a total invoice price of \$960.00. Respondent has not paid this invoice.

46. On December 13, 2006, Complainant sold to Respondent under invoice number 83892, and delivered to one of Respondent's retail locations in the greater New York City area, 51 cartons of "Korean Golden [illeg]" at \$16.00 per carton, or \$816.00, 7 cartons of loquats at \$21.00 per carton, or \$147.00, and 10 cartons of grapefruits at \$12.00 per carton, or \$120.00, for a total invoice price of \$1,083.00. Respondent has not paid this invoice.

47. On December 13, 2006, Complainant sold to Respondent under invoice number 83917, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of tangerines at \$18.00 per carton, or \$972.00, 126 cartons of papayas at \$11.50 per carton, or \$1,449.00, 5 cartons of Ataulfo mangos (baby) at \$19.00 per carton, or \$95.00, 60 cartons of Ataulfo mangos at \$13.00 per carton, or \$780.00, 36 cartons of mangos at \$13.50 per carton, or \$486.00, and 20 cartons of pommelos at \$22.00 per carton, or \$440.00, for a total invoice price of \$4,222.00. Respondent has not paid this invoice.

48. On December 13, 2006, Complainant sold to Respondent under invoice number 83925, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Fuji apples at \$23.00 per carton, for a total invoice price of \$1,127.00. Respondent has not paid this invoice.

49. On December 14, 2006, Complainant sold to Respondent under invoice number 83947, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of mangos at \$9.50 per carton, or \$285.00, 10 cartons of loquats at \$15.00 per carton, or \$150.00, 30 cartons of clementines at \$4.00 per carton, or \$120.00, and 24 cartons of "Korean Shingo" at \$16.00 per carton, or \$384.00, for a total invoice price of \$939.00. Respondent has not paid this invoice.

50. On December 15, 2006, Complainant sold to Respondent under invoice number 84067, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at \$5.75 per carton, or \$690.00, 58 cartons of blackberries at \$10.00 per carton, or \$580.00, and 20 cartons of "stem & leaf"

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tangerines at \$19.00 per carton, or \$380.00, for a total invoice price of \$1,650.00. Respondent has not paid this invoice.

51. On December 16, 2006, Complainant sold to Respondent under invoice number 85329, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Fuji apples at \$28.00 per carton, or \$980.00, 36 cartons of tangerines at \$20.00 per carton, or \$720.00, and 30 cartons of papayas at \$10.50 per carton, or \$315.00, for a total invoice price of \$2,015.00. Respondent has not paid this invoice.

52. On December 16, 2006, Complainant sold to Respondent under invoice number 85345, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of pommelos at \$22.00 per carton, for a total invoice price of \$440.00. Respondent has not paid this invoice.

53. On December 17, 2006, Complainant sold to Respondent under invoice number 85421, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of Navel oranges at \$16.00 per carton, or \$320.00, 30 cartons of Red Navel oranges at \$15.00 per carton, or \$450.00, and 20 cartons of clementines at \$5.00 per carton, or \$100.00, for a total invoice price of \$870.00. Respondent has not paid this invoice.

54. On December 18, 2006, Complainant sold to Respondent under invoice number 85447, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at \$6.00 per carton, or \$720.00, 24 cartons of Hass avocados at \$19.00 per carton, or \$456.00, and 54 cartons of Red Navel oranges at \$15.00 per carton, or \$810.00, for a total invoice price of \$1,986.00. Respondent has not paid this invoice.

55. On December 18, 2006, Complainant sold to Respondent under invoice number 85440, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Delicious apples at \$24.00 per carton, or \$240.00, 30 cartons of papayas at \$10.50 per carton, or \$315.00, 10 cartons of Hass avocados at \$19.00 per carton, or \$190.00, and 14 cartons of bagged Gala apples at \$26.00 per carton, or \$364.00, for a total invoice price of \$1,109.00. Respondent has not paid this invoice.

56. On December 18, 2006, Complainant sold to Respondent under invoice number 85455, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Granny Smith apples at \$25.00 per carton, for a total invoice price of \$250.00. Respondent has not paid this invoice.

57. On December 18, 2006, Complainant sold to Respondent under invoice number 85503, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Autumn Royal grapes at \$30.00 per carton, for a total invoice price of \$1,050.00. Respondent has not paid this invoice.

58. On December 19, 2006, Complainant sold to Respondent under invoice number 85541, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of clementines at \$5.00 per carton, for a total invoice price of \$300.00. Respondent has not paid this invoice.

59. On December 19, 2006, Complainant sold to Respondent under invoice number 85550, and delivered to one of Respondent's retail locations in the greater New York City area, 9 cartons of "stem & leaf" tangerines at \$19.00 per carton, or \$171.00, and 28 cartons of Gala apples at \$25.00 per carton, or \$700.00, for a total invoice price of \$871.00. Respondent has not paid this invoice.

60. On December 20, 2006, Complainant sold to Respondent under invoice number 85601, and delivered to one of Respondent's retail locations in the greater New York City area, 36 cartons of Navel oranges at \$16.00 per carton, or \$576.00, 30 cartons of papayas at \$10.50 per carton, or \$315.00, 30 cartons of durian at \$28.00 per carton, or \$840.00, 10 cartons of Golden Delicious apples at \$24.00 per carton, or \$240.00, and 32 cartons of "Golden Korean" at \$17.00 per carton, or \$544.00, for a total invoice price of \$2,515.00. Respondent has not paid this invoice.

61. On December 20, 2006, Complainant sold to Respondent under invoice number 85610, and delivered to one of Respondent's retail locations in the greater New York City area, 24 cartons of green seedless grapes at \$24.00 per carton, or \$576.00, 64 cartons of "Korean Golden" at \$20.00 per carton, or \$1,280.00, 63 cartons of pommelos at \$22.50 per carton, or \$1,417.50, and 6 cartons of "stem & leaf" tangerines at \$19.00 per carton, or \$114.00, for a total invoice price of \$3,387.50. Respondent has not paid this invoice.

62. On December 20, 2006, Complainant sold to Respondent under invoice number 85646, and delivered to one of Respondent's retail locations in the greater New York City area, 36 cartons of pommelos at \$22.50 per carton, for a total invoice price of \$810.00. Respondent has not paid this invoice.

63. On December 21, 2006, Complainant sold to Respondent under invoice number 85688, and delivered to one of Respondent's retail locations in the greater New York City area, 14 cartons of Red Delicious

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apples at \$22.00 per carton, or \$308.00, 14 cartons of Golden Delicious apples at \$24.00 per carton, or \$336.00, and 14 cartons of Granny Smith apples at \$25.00 per carton, or \$350.00, for a total invoice price of \$994.00. Respondent has not paid this invoice.

64. On December 22, 2006, Complainant sold to Respondent under invoice number 85745, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of longan nuts at \$90.00 per carton, or \$1,800.00, 10 cartons of star fruit at \$20.00 per carton, or \$200.00, 10 cartons of kiwis at \$18.00 per carton, or \$180.00, 10 cartons of bagged clementines at \$34.00 per carton, or \$340.00, and 10 cartons of grapefruits at \$13.00 per carton, or \$130.00, for a total invoice price of \$2,650.00. Respondent has not paid this invoice.

65. On December 22, 2006, Complainant sold to Respondent under invoice number 85775, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of longan nuts at \$90.00 per carton, or \$450.00, 21 cartons of blueberries at \$25.00 per carton, or \$525.00, 10 cartons of bagged clementines at \$34.00 per carton, or \$340.00, 10 cartons of "stem & leaf" tangerines at \$15.00 per carton, or \$150.00, 10 cartons of kiwis at \$18.00 per carton, or \$180.00, and 10 cartons of star fruit at \$20.00 per carton, or \$200.00, for a total invoice price of \$1,845.00. Respondent has not paid this invoice.

66. On December 23, 2006, Complainant sold to Respondent under invoice number 85810, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of papayas at \$11.50 per carton, for a total invoice price of \$690.00. Respondent has not paid this invoice.

67. On December 23, 2006, Complainant sold to Respondent under invoice number 85835, and delivered to one of Respondent's retail locations in the greater New York City area, 96 cartons of papayas at \$11.50 per carton, for a total invoice price of \$1,104.00. Respondent has not paid this invoice.

68. On December 24, 2006, Complainant sold to Respondent under invoice number 85935, and delivered to one of Respondent's retail locations in the greater New York City area, 21 cartons of Fuji apples at \$27.00 per carton, for a total invoice price of \$567.00. Respondent has not paid this invoice.

69. On December 25, 2006, Complainant sold to Respondent under invoice number 85962, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Fuji apples at \$27.00 per carton, or \$945.00, 27 cartons of Red Navel oranges at \$16.00 per carton, or \$432.00, and 32 cartons of "Korean Golden" at

\$19.00 per carton, or \$608.00, for a total invoice price of \$1,985.00. Respondent has not paid this invoice.

70. On December 26, 2006, Complainant sold to Respondent under invoice number 86007, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of Fuyu persimmons at \$5.50 per carton, or \$330.00, and 32 cartons of "Korean Golden" at \$16.50 per carton, or \$528.00, for a total invoice price of \$858.00. Respondent has not paid this invoice.

71. On December 26, 2006, Complainant sold to Respondent under invoice number 86012, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at \$5.50 per carton, or \$660.00, 32 cartons of cherries at \$33.00 per carton, or \$1,056.00, 32 cartons of loose kiwis at \$17.00 per carton, or \$544.00, 10 cartons of kiwis at \$18.00 per carton, or \$180.00, and 7 cartons of Granny Smith apples at \$25.00 per carton, or \$175.00, for a total invoice price of \$2,615.00. Respondent has not paid this invoice.

72. On December 26, 2006, Complainant sold to Respondent under invoice number 86057, and delivered to one of Respondent's retail locations in the greater New York City area, 94 cartons of papayas at \$10.50 per carton, for a total invoice price of \$987.00. Respondent has not paid this invoice.

73. On December 27, 2006, Complainant sold to Respondent under invoice number 86092, and delivered to one of Respondent's retail locations in the greater New York City area, 27 cartons of Navel oranges at \$15.00 per carton, or \$405.00, 120 cartons of Fuyu persimmons at \$5.50 per carton, or \$660.00, and 24 cartons of "Korean [illeg]" at \$15.00 per carton, or \$360.00, for a total invoice price of \$1,425.00. Respondent has not paid this invoice.

74. On December 27, 2006, Complainant sold to Respondent under invoice number 86103, and delivered to one of Respondent's retail locations in the greater New York City area, 130 cartons of papayas at \$11.50 per carton, or \$1,495.00, and 25 cartons of pommelos at \$12.00 per carton, or \$300.00, for a total invoice price of \$1,795.00. Respondent has not paid this invoice.

75. On December 27, 2006, Complainant sold to Respondent under invoice number 86128, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Golden Delicious apples at \$24.00 per carton, or \$240.00, and 32 cartons of

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“Korean Golden” at \$16.50 per carton, or \$528.00, for a total invoice price of \$768.00. Respondent has not paid this invoice.

76. On December 28, 2006, Complainant sold to Respondent under invoice number 86155, and delivered to one of Respondent’s retail locations in the greater New York City area, 24 cartons of “Korean Golden” at \$19.00 per carton, or \$456.00, and 16 cartons of cherries at \$29.00 per carton, or \$464.00, for a total invoice price of \$920.00. Respondent has not paid this invoice.

77. On December 28, 2006, Complainant sold to Respondent under invoice number 86174, and delivered to one of Respondent’s retail locations in the greater New York City area, 24 cartons of mangos at \$7.50 per carton, for a total invoice price of \$180.00. Respondent has not paid this invoice.

78. On December 29, 2006, Complainant sold to Respondent under invoice number 86216, and delivered to one of Respondent’s retail locations in the greater New York City area, 10 cartons of durian at \$29.00 per carton, or \$290.00, 60 cartons of [illeg] at \$6.25 per carton, or \$375.00, and 40 cartons of clementines at \$5.00 per carton, or \$200.00, for a total invoice price of \$865.00. Respondent has not paid this invoice.

79. On December 29, 2006, Complainant sold to Respondent under invoice number 86252, and delivered to one of Respondent’s retail locations in the greater New York City area, 60 cartons of mangos at \$7.50 per carton, or \$450.00, 120 cartons of Fuyu persimmons at \$6.25 per carton, or \$750.00, 60 cartons of strawberries at \$11.00 per carton, or \$660.00, 90 cartons of “Fragrant” at \$17.00 per carton, or \$1,530.00, and 15 cartons of blackberries at \$13.00 per carton, or \$195.00, for a total invoice price of \$3,585.00. Respondent has not paid this invoice.

80. On December 30, 2006, Complainant sold to Respondent under invoice number 86327, and delivered to one of Respondent’s retail locations in the greater New York City area, 20 cartons of papayas at \$10.00 per carton, or \$200.00, and 36 cartons of Red Navel oranges at \$16.00 per carton, or \$576.00, for a total invoice price of \$776.00. Respondent has not paid this invoice.

81. On December 30, 2006, Complainant sold to Respondent under invoice number 86343, and delivered to one of Respondent’s retail locations in the greater New York City area, 48 cartons of bananas at \$13.50 per carton, or \$648.00, 10 cartons of blackberries at \$13.00 per carton, or \$130.00, and 24 cartons of loquats at \$28.00 per carton, or \$672.00, for a total invoice price of \$1,450.00. Respondent has not paid this invoice.

82. On December 30, 2006, Complainant sold to Respondent under invoice number 86369, and delivered to one of Respondent's retail locations in the greater New York City area, 76 cartons of Fuyu persimmons at \$6.50 per carton, for a total invoice price of \$494.00. Respondent has not paid this invoice.

83. On December 31, 2006, Complainant sold to Respondent under invoice number 86397, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of clementines at \$5.00 per carton, for a total invoice price of \$300.00. Respondent has not paid this invoice.

84. On December 31, 2006, Complainant sold to Respondent under invoice number 86406, and delivered to one of Respondent's retail locations in the greater New York City area, 100 cartons of mangos at \$7.00 per carton, or \$700.00, 38 cartons of bananas at \$13.00 per carton, or \$494.00, 50 cartons of Autumn Royal grapes at \$30.00 per carton, or \$1,500.00, and 20 cartons of clementines at \$34.00 per carton, or \$680.00, for a total invoice price of \$3,374.00. Respondent has not paid this invoice.

85. On January 1, 2007, Complainant sold to Respondent under invoice number 86429, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of Fuji apples at \$20.00 per carton, or \$600.00, 60 cartons of papayas at \$11.50 per carton, or \$690.00, 20 cartons of apricots at \$7.00 per carton, or \$140.00, 5 cartons of Granny Smith apples at \$22.00 per carton, or \$110.00, 32 cartons of "Korean Golden" at \$19.00 per carton, or \$608.00, and 10 cartons of loquats at \$28.00 per carton, or \$280.00, for a total invoice price of \$2,428.00. Respondent has not paid this invoice.

86. On January 1, 2007, Complainant sold to Respondent under invoice number 86441, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of Autumn Royal grapes at \$30.00 per carton, or \$600.00, and 10 cartons of Hass avocados at \$25.00 per carton, or \$250.00, for a total invoice price of \$850.00. Respondent has not paid this invoice.

87. On January 1, 2007, Complainant sold to Respondent under invoice number 86479, and delivered to one of Respondent's retail locations in the greater New York City area, 19 cartons of Fuji apples at \$28.00 per carton, or \$532.00, 32 cartons of "Korean Golden" at \$16.50 per carton, or \$528.00, and 10 cartons of Hass avocados at \$22.00 per carton, or \$220.00, for a total invoice price of \$1,280.00. Respondent has not paid this invoice.

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88. The informal complaint was filed on January 17, 2007, which is within nine months from the date the cause of action accrued.

**Conclusions**

Complainant brings this action to recover the agreed purchase price for 85 loads of fresh produce sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling \$108,994.00. As evidence in support of this contention, Complainant submitted copies of its invoices billing Respondent for the commodities, each of which Complainant states is “initialed by New York Supermarket’s buyer acknowledging receipt of the Produce and agreement to the prices listed on the invoice.”<sup>2</sup>

Respondent, in its Motion to Reopen the Complaint, asserts that Complainant breached its contracts with Respondent by consistently failing to deliver the agreed upon quantity, type and quality of commodity.<sup>3</sup> Notably, Respondent does not deny purchasing and accepting the commodities at the contract prices asserted by Complainant. Rather, Respondent merely asserts that the commodities did not comply with the contract requirements. Consequently, we find that the preponderance of the evidence supports Complainant’s contention that Respondent purchased and accepted the 85 loads of produce in question at agreed purchase prices totaling \$108,994.00.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller.<sup>4</sup> Where goods are accepted the buyer has the burden of proof to establish a breach of contract.<sup>5</sup> While Respondent asserts that the commodities it purchased from Complainant did not comply with the contract requirements, Respondent did not submit any evidence to substantiate this contention. In the absence of any evidence showing that the commodities Respondent purchased did not conform

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<sup>2</sup> See Opening Statement ¶22.

<sup>3</sup> See Respondent’s Petition to Reopen Proceeding Following Order of Default, p.5.

<sup>4</sup> *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

<sup>5</sup> See U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

to the contract requirements, Respondent is liable to Complainant for the commodities at the full purchase prices totaling \$108,994.00.

In further defense of its failure to pay Complainant for the subject loads of produce, Respondent's Quan Yang asserts in his sworn Answering Statement that on March 18, 2008, he was contacted by counsel for Complainant, Mr. Ronald Hager, of the law firm Cox, Wells & Associates. During the course of the conversation, Mr. Yang states Mr. Hager proposed that Respondent tender \$25,179.25 to Complainant in settlement of the matter. In return, Mr. Yang states Mr. Hager represented that Complainant would withdraw the Complaint. On March 18, 2008, Mr. Hager prepared a letter memorializing this offer, a copy of which is attached to the Answering Statement and reads, in pertinent part, as follows:

Pursuant to our phone conversation this morning, please be advised that my firm represents New Generation Produce, on a past due account in the amount of \$50,358.50.

On behalf of my client my firm will accept the sum of \$25,179.25 as settlement in full of any and all monies due.

It is my understanding that for this settlement to be in effect a check in the amount of \$25,179.25 must be picked up at your office no later than tomorrow March 19, 2008, between the hours of 12:00 and 3:00 p.m. via my courier Federal Express at my firm's expense. My Federal Express account # is 3690-5020-6. I will make the necessary arrangements.

Please make your check payable to the firm of Cox Wells & Associates and forward to the above referenced address.<sup>6</sup>

As per the letter's instructions, Mr. Yang states on March 19, 2008, Respondent sent two checks made out in equal amounts totaling \$25,179.26 to Mr. Hager's attention via Federal Express. Copies of the both the front and back of the checks are attached to Respondent's Answering Statement as Exhibit B. The backs of the checks show that the checks were deposited into the account of Cox, Wells & Associates. Respondent asserts that since it has already tendered the agreed upon

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<sup>6</sup> See Answering Statement Exhibit A.

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amount in satisfaction of the claims made herein, Complainant should be forced to stand by its promise by having the Complaint dismissed and the matter closed.

In response to Respondent's allegation of a settlement agreement, Complainant's Andrew Chau asserts in his sworn Statement in Reply that Complainant's receipt of Respondent's Answering Statement was the first time Complainant became aware that any such payment had been made. Mr. Chau explains that on or about March 12, 2008, he received a solicitation call from Frances Gennino, who said she was from a company named Creditors Service Bureau (hereafter "CSB"). According to Mr. Chau, Ms. Gennino said the company was a collection agency that had developed a very successful program to recover past due accounts receivable and had very good luck in its collection efforts. Mr. Chau states Ms. Gennino requested the names of some companies from which Complainant had been having difficulty collecting and requested that Complainant send CSB some past due statements. Mr. Chau states further that Ms. Gennino stated that CSB would review the statements and get back to Complainant with a claims proposal. At that time, Mr. Chau states Complainant faxed CSB statements regarding five of its delinquent accounts, including Respondent and Kessina Farms. Mr. Chau states CSB followed up its phone call with a letter, a copy of which is attached to the Answering Statement as Exhibit B. The letter sets forth in detail the services that CSB offers and the terms under which it conducts its collection efforts on behalf of its clients. Attached to the letter is a Power of Attorney addressed to Cox, Wells & Associates (hereafter "Cox"), from Complainant, which reads as follows:

Please accept this letter as appointment to act as agent for New Generation Produce, on all matters relating to the \$92,398.00 owed by NY Supermarkets. We hereby grant you Power of Attorney to carry out your duties to resolve this claim.

Very Truly Yours,

\_\_\_\_\_  
Katherine Chau

At the time Complainant received the letter and Power of Attorney from CSB, Mr. Chau states Complainant began to believe that

something was not quite “above board” about CSB, so Complainant did not sign the Power of Attorney for Cox or agree to hire CSB. On May 1, 2008, Mr. Chau states Complainant received the following fax from CSB<sup>7</sup>:

March 12, 2008  
TO: Adrian Produce Inc.

ATTN: Katherine Chau

FROM: Frances Gennino  
FILE: 23222  
RE: CONFIRMATION

Thank you for allowing Creditors Service Bureau to serve as your collection agent for the following account(s). Your debtor(s) have already been contacted by our collection department “Cox, Wells & Associates”. Should they contact you, please refer them back to our company. There will be no charge to you if we do not collect. 15% on collections over \$10,000.00, under one year old; 20% over one year old, 25% on collections under \$10,000.00 under one year old, 33 1/3 % over one year old. If client terminates our services during period of debtor’s partial payments, then client owes 50% to Creditors Service Bureau of outstanding debt placed for collection. When accounts require skip-tracing, second placements, attorney litigation, settlements, installments, debts under \$300.00, partial payments, and bad checks, the fee is 50% of the monies recovered. Creditors Service Bureau reserves the right to settle accounts. Should checks be received by you in our name, endorse as our agent and deposit TODAY. We will do the same, time is of the essence. Remittances will be forwarded 90 days from receipt of full and final payment. If anything does not comport with your understanding of our arrangement, please contact our offices by the end of this business day. Unless you do so, this confirmation will constitute our full and final agreement concerning this matter. We know you will be satisfied with our service.

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<sup>7</sup> See Statement in Reply ¶15 and Exhibit B.

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NAME OF DEBTOR                      AMOUNT DUE

NY Supermarkets	\$92,398.00
Kessina Farms	\$21,964.50
Jump Tech Construction	\$500,000.00
Fat Kee	\$23,020.00
TNP Food Market	\$26,822.00

Please sign and return this confirmation if corrections are needed.

\_\_\_\_\_/s/\_\_\_\_\_

Francis Gennino                      Katherine Chau  
National Accounts Director      Owner

Because Complainant had not hired CSB, and the fax was not addressed to Complainant, Mr. Chau states Complainant ignored this fax. On or about May 7, 2008, Mr. Chau states Complainant received a letter from CSB informing Complainant that CSB had collected \$4,258.75 from Kessina Farms, from which it was deducting \$2,129.38 for its services and enclosing a check made payable to Complainant in the amount of \$2,129.38.<sup>8</sup> A copy of this letter is attached to the Statement in Reply as Exhibit C. On the same date, Mr. Chau states Complainant sent a fax to CSB informing them to cease all collection as of May 7, 2008. A copy of the fax is attached to the Statement in Reply as Exhibit D. Mr. Chau states Complainant was never informed by CSB or Cox that they were attempting to collect against Respondent or that they were going to attempt to settle with Respondent. Mr. Chau states further that Complainant was unaware that CSB or Cox had received any money from Respondent and that Complainant has not received any money from CSB or Cox from the alleged settlement with Respondent. Mr. Chau states he believes Respondent has been scammed by CSB and Cox, and notes that while there is a valid Pennsylvania corporation by the name of "Cox, Wells & Associates,"<sup>9</sup> there is no attorney named

<sup>8</sup> Statement in Reply ¶16.

<sup>9</sup> See Statement in Reply Exhibit E.

Ronald Hager in Pennsylvania, and there are also no attorneys named Cox or Wells in Erie, Pennsylvania, or the surrounding area. To substantiate this contention, Mr. Chau attached as Exhibits F and G to his Statement in Reply copies of attorney listings from the Disciplinary Board of the Supreme Court of Pennsylvania. Finally, Mr. Chau states Complainant has sent a demand letter to CSB and Cox demanding repayment to Complainant or Respondent of the \$25,179.25 that was wrongly paid to Cox. A copy of the demand letter, which was prepared by Complainant's attorney, is attached to the Statement in Reply as Exhibit H.

Counsel for Complainant subsequently submitted a Brief asserting that since Respondent has raised no other defense other than the alleged settlement with Cox, there are essentially only two issues that remain to be considered: 1) whether Respondent had a reasonable basis to rely upon the representations of Cox; and 2) whether the alleged payment of \$25,179.25 by Respondent to Cox relieves it of liability to Complainant for the outstanding invoices. Complainant submits that the answer to both of these questions is "no." To support this contention, Complainant asserts first that there is no direct evidence of any agency relationship between Complainant and Cox. In the absence of direct evidence of an agency relationship, Complainant states Respondent must argue that Cox had the apparent authority to act on behalf of Complainant when it negotiated the alleged compromise settlement of the outstanding invoices. Citing *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964), Complainant states it has long been held that the necessary elements to establish apparent authority are "that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent, **there must be a representation of the agency by the principal, there must be reliance upon such representation by a third party**, and such representation must have been acted upon in good faith to the injury of that third party." (Emphasis added).<sup>10</sup>

In the instant matter, Complainant states it never authorized Cox to act as its agent for the purpose of collecting past due accounts, nor did it knowingly permit Cox to appear to be its agent. Even assuming that Cox was under the mistaken impression that it was operating as Complainant's agent, Complainant states a representation of such agency must be made by the principal (Complainant), to the third party

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<sup>10</sup> See Brief p.5.

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(Respondent), and that Respondent has offered no evidence of a representation by Complainant that Cox was acting as its agent. Complainant states Respondent has put forth only one item of evidence regarding an alleged connection between Complainant and Cox, that being the correspondence from Mr. Hager. Complainant states it is obviously Respondent's contention that it relied in good faith upon Mr. Hager's representation of acting on behalf of Complainant because it sent two checks via Federal Express to Mr. Hager's attention the day after receiving his correspondence. Complainant also states, however, that it is difficult to accept this contention given that approximately three months prior to receiving Mr. Hager's correspondence, Respondent had received notice of a Default Order entered against it by the Department, requiring Respondent to pay Complainant \$108,994.00, plus interest and the \$300.00 filing fee. Complainant states that when Respondent received correspondence advising that Cox was retained to collect a past due account of less than half that amount, \$50,385.50, Respondent should have first asked whether Cox was referring to a different account than the one Respondent had just defaulted on. Instead, Complainant states Respondent apparently never questioned the discrepancy and agreed to pay the even lower amount of \$25,179.25. Supposing for the sake of argument that Cox was acting as Complainant's agent, Complainant poses the following questions:

Why would it state the past due account as being \$50,358.50?

Why would it agree to take half that amount in settlement of the debt when Complainant already had a Default Order against Respondent for the full amount of the debt?

Why would it agree to settle with Respondent for any amount less than the full reparation award prior to the Department's decision to reopen the proceeding?

Complainant asserts that the only logical and reasonable answer to these questions is that Cox was acting on its own accord, with no express or implied authority from Complainant, and without even having correct information with regard to the past due amount owed by Respondent.

Complainant next asserts that this matter is analogous to *Floriza Sales Company, Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988), wherein a third party purchased produce from Floriza Sales Company, Inc. ("Floriza"), but advised the seller that it was affiliated

with Pamco Air Fresh, Inc. (“Pamco”) and instructed Floriza to send its invoices to Pamco for payment, which it did. When the invoices went unpaid, Floriza filed a Complaint against Pamco, who in response denied responsibility for the invoices and denied any agency relationship with the third party. Complainant states PACA found no direct evidence of an agency relationship between Pamco and the third party, but held that if apparent authority of the third party could be demonstrated from the facts, Pamco would be estopped from denying responsibility for the invoices. In applying the four elements set forth in *Sunny Sally*,<sup>11</sup> Complainant states PACA found no evidence that Pamco represented to Floriza, or any other entity, that the third party had authority to act as its agent in directing Floriza to send invoices to Pamco. Similarly here, Complainant states Respondent has offered no evidence that Complainant represented to it, or any other entity, that Cox had authority to act as its agent in negotiating the alleged compromise settlement of the outstanding invoices. Moreover, even if Cox was under the false impression that it was acting as Complainant’s agent, Complainant states it had no authority to resolve the outstanding invoices with Respondent. Citing *Pasco County Peach Ass’n v. J.F. Solley & Co., Inc.*, 146 F.2d 880,883 (4<sup>th</sup> Cir. 1945), *et al*, Complainant states “(w)hen one deals with or through an agent, he assumes all the risks of lack of authority in the agent.” Complainant states further that “(t)he burden of any necessary diligence to ascertain the agent’s authority rests on the party dealing with the agent.” *Id.* at 883. Complainant states Respondent has offered no proof that it met the burden of “necessary diligence to ascertain” Cox’s authority, if any, and asserts that Respondent’s mistaken reliance upon Cox’s representations does not relieve it of liability for payment of the outstanding invoices to Complainant.

Finally, Complainant states that since both parties are located in the state of New York, it is pertinent to review New York State Court cases for guidance on the issue of apparent authority. In this regard, Complainant cites *Hallock v. State of New York*, 64 N.Y.2d 224 (1984), wherein the court held that “(e)ssential to the creation of apparent authority are **words or conduct of the principal, communicated to a third party**, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. **The agent cannot by his own acts imbue himself with apparent authority.**”<sup>12</sup> Applying these principals to the instant matter, Complainant states it is clear that

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<sup>11</sup> *Supra.*

<sup>12</sup> *Id.* at 231 (emphasis added).

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Respondent may not rely upon a claim that Cox had the apparent authority to act on behalf of Complainant, as Respondent provided no evidence of words or conduct communicated by Complainant suggesting Cox was acting as its agent. Further, Complainant states Respondent may not rely, as it attempts to do in its Answering Statement, upon Mr. Hager's correspondence of May 18, 2008, as Cox could not vest itself with apparent authority.

While Complainant cites a number of other New York cases to substantiate its claims, we need not delve any further into precedent to determine that Respondent has not established any basis for finding that Cox had either actual or apparent authority to settle the subject transactions on behalf of Complainant. First, on the issue of actual authority, although Complainant has admitted sending copies of its receivables to CSB, including those for Respondent, Complainant has also stated that further discussions were to take place and that no agreement for CSB or Cox to handle collections on behalf of Complainant was ever reached. This claim is supported by the fact that the documents Complainant received from CSB include a place for Complainant to sign indicating its acquiescence to the terms stated in the document, and none of the documents in question are signed.<sup>13</sup> Absent any other evidence showing that Complainant specifically authorized CSB or Cox to act as its agent in collecting the receivables owed by Respondent,<sup>14</sup> we conclude that neither CSB nor Cox was bestowed with such authority.

On the issue of apparent authority, Respondent offers no evidence indicating that Complainant directly communicated to Respondent that CSB or Cox had authority to act on Complainant's behalf. Without such evidence, Respondent cannot reasonably argue that it relied on representations made by Complainant when it made the alleged settlement payment to Cox to satisfy its indebtedness to Complainant. Hence, we are in agreement with Complainant's argument in its Brief that Respondent's sole reliance on representations made by Cox was neither reasonable nor legally sufficient to absolve it of liability to Complainant.

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<sup>13</sup> See Statement in Reply Exhibits A and B.

<sup>14</sup> Although Complainant's apparent acceptance of a check from CSB representing payment of 50 percent of the debt owed by Kessina Farms may be seen as evidence that Complainant authorized CSB to make collection efforts on its behalf (see Statement in Reply Exhibit C), Complainant vehemently denies hiring CSB or Cox to act as its collection agent and has shown that upon receipt of the check in question, on or about May 7, 2007, it promptly notified CSB via fax to cease all collection efforts (see Statement in Reply Exhibit D).

Although we have not found evidence sufficient to support Respondent's implicit contention that CSB or Cox had actual or apparent authority to settle Respondent's indebtedness on behalf of Complainant, there remains for our consideration the issue of whether Respondent's payment to Cox meets the criteria for an accord and satisfaction. In order to find that the matter was settled through an accord and satisfaction, the following elements must be established: (1) Respondent must show that it in good faith tendered an instrument to Complainant as full satisfaction of the claim; (2) the amount of the claim must be unliquidated or subject to a bona fide dispute; (3) and Complainant must have obtained payment of the instrument.<sup>15</sup>

Respondent issued the two alleged settlement checks on March 19, 2008. At that time, Complainant had been served with Respondent's Motion to Reopen and was therefore aware that Respondent was disputing the claim on the basis of Complainant's alleged failure to ship the proper quantity, type and quality of fruit. Although Respondent did not submit any evidence to substantiate this contention, we find that the allegation alone is sufficient to establish the existence of a bona fide dispute. We have, however, already determined that Cox, the third party to whom the checks were issued, did not have actual or apparent authority to act on behalf of Complainant. Therefore, the acceptance of the checks by Cox does not constitute acceptance by Complainant. Consequently, without evidence that Complainant obtained payment from the checks tendered by Respondent, we conclude that Respondent has failed to sustain its burden to prove that the matter at issue herein was settled through accord and satisfaction.

As Respondent raises no other defense for its failure to pay Complainant for the commodities it purchased and accepted, we conclude that Respondent is liable to Complainant for the 85 truckloads of mixed produce in question at the agreed purchase prices totaling \$108,994.00.

Respondent's failure to pay Complainant \$108,994.00 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.*

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<sup>15</sup> U.C.C. § 3-311.

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*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. , 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 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 \$108,994.00, with interest thereon at the rate of 0.51 % 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

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**MISCELLANEOUS ORDERS**

**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.**

**Order Granting Joint Motion for Modification of October 15, 2008, Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova.**

**Filed March 10, 2009.**

**PACA.**

Eric Paul and Jonathan Gordy, for Associate Deputy Administrator and Acting Chief, AMS.

Gina Genova, Santa Barbara, CA, for Tuscany Farms, Inc.; Joe Genova & Associates, Inc; and Joe A. Genova.

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

On October 15, 2008, I issued a Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, all of whom filed a timely appeal of the Decision and Order with the United States Court of Appeals for the Ninth Circuit. In February 2009, the parties entered an agreement for settlement of the appeal to the United States Court of Appeals for the Ninth Circuit. The settlement agreement provides that Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova “agree to request a dismissal, with prejudice, of their Petition for Review in the U.S. Court of Appeals for the Ninth Circuit within five days after the Judicial Officer enters an order modifying the date when Decision and Order becomes final and effective to April 30, 2009.

On March 9, 2009, the parties filed a Joint Motion for Modification of the Final and Effective Date of the October 15, 2008, Decision and Order. For good reason shown, I grant the March 9, 2009, Joint Motion for Modification of the Final and Effective Date and modify the Order

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in the October 15, 2008, Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, as follows:<sup>1</sup>

**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 April 30, 2009.

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 April 30, 2009.

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 April 30, 2009.

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**In re: BRIAN O'D. WHITE, a/k/a BRIAN O. WHITE.**  
**PACA-APP Docket No. 03-0019.**  
**Dismissal Order.**  
**April 2, 2009.**

**PACA.**

Christopher P Young-Morales for AMS.

Luis A. Toro for Respondent.

*Dismissal Order by Administrative Law Judge Jill S. Clifton.*

**Order Dismissing Case.**

<sup>1</sup> On January 13, 2009, Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova filed a motion for stay of the October 15, 2008, Decision and Order pending review by the United States Court of Appeals for the Ninth Circuit. The Hearing Clerk did not previously transmit the Motion for Stay Pending Review to the Office of the Judicial Officer for a ruling. In light of the instant Order Granting Joint Motion for Modification of Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, I find the Motion for Stay Pending Review moot.

Petitioner Brian O'D. White, also known as Brian O White ("Petitioner White"), is represented by Luis A. Toro, Esq. (and Joel Kieseey of the same law firm). Respondent Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"), is represented by Christopher P. Young-Morales, Esq.

Regarding the underlying disciplinary action, on October 28, 2008, I issued an Order Dismissing Case. That case was PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce. AMS confirms, by letter filed April 1, 2009, that no employment or licensing restrictions under the PACA (7 U.S.C. § 499d(b), 499h(b)) are sought against Petitioner White; that AMS regards as moot the issue of Petitioner White's responsibly connected status (7 U.S.C. § 499a(b)(9)); and that Petitioner White, accordingly, withdraws his petition for review filed August 20, 2003.

Consequently, I order this case DISMISSED. Copies of this Dismissal shall be served (by regular mail) by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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**In re: MARK R. LARAMIE.**  
**PACA-APP Docket No. 04-0002.**  
**Dismissal Order.**  
**April 2, 2009.**

**PACA.**

Christopher P. Young-Morales for AMS.  
Luis A. Toro for Respondent.  
*Dismissal Order by Administrative Law Judge Jill S. Clifton.*

#### **Order Dismissing Case**

Petitioner Mark R. Laramie ("Petitioner Laramie") is represented by Luis A. Toro, Esq. (and Joel Kieseey of the same law firm). Respondent Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"), is represented by Christopher P. Young-Morales, Esq.

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Regarding the underlying disciplinary action, on October 28, 2008, I issued an Order Dismissing Case. That case was PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce. AMS confirms, by letter filed April 1, 2009, that no employment or licensing restrictions under the PACA (7 U.S.C. § 499d(b), 499h(b)) are sought against Petitioner Laramie; that AMS regards as moot the issue of Petitioner Laramie's responsibly connected status (7 U.S.C. § 499a(b)(9)); and that Petitioner Laramie, accordingly, withdraws his petition for review filed November 7, 2003.

Consequently, I order this case DISMISSED. Copies of this Dismissal shall be served (by regular mail) by the Hearing Clerk upon each of the parties.  
Done at Washington, D.C.

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**In re: DONALD R. BEUCKE.**  
**PACA-APP Docket No. 04-0014.**  
**In re: KEITH K. KEYESKI.**  
**PACA-APP Docket No. 04-0020.**  
**Order Lifting Stay Order as to Donald R. Beucke.**  
**Filed May 19, 2009.**

**PACA-APP – Perishable agricultural commodities – Order lifting stay order.**

Charles L. Kendall, for Respondent.  
Effie F. Anastassiou, Salinas, CA, for Petitioner Beucke.  
*Order issued by William G. Jenson, Judicial Officer.*

On November 8, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Beucke to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).<sup>1</sup>

On November 28, 2006, in response to “Petitioner Donald Beucke’s Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review,” I stayed *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for

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<sup>1</sup> *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006).

judicial review.<sup>2</sup> On April 23, 2009, the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed “Respondent’s Motion to Lift Stay Order.” On May 18, 2009, Petitioner Beucke filed a response in opposition to the motion to lift stay. On May 19, 2009, the Hearing Clerk transmitted the record to me for a ruling on Respondent’s Motion to Lift Stay Order.

Proceedings for judicial review are concluded. Petitioner Beucke has raised no meritorious basis for my denying Respondent’s Motion to Lift Stay Order. Therefore, the November 28, 2006, Stay Order as to Donald R. Beucke is lifted and the order issued in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), as it relates to Donald R. Beucke, is effective, as follows.

### ORDER

I affirm Respondent’s August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Beucke.

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<sup>2</sup>*In re Donald R. Beucke* (Stay Order as to Donald R. Beucke), 66 Agric. Dec. 932 (2006).

**PERISHABLE AGRICULTURAL COMMODITIES ACT****DEFAULT DECISIONS****In re: OCEAN VIEW PRODUCE, INC.****PACA Docket No. D-08-0064.****Default Decision.****January 15, 2009.****PACA – Default.**

Ciarra A. Toomey for AMS.

Respondent Pro se.

*Default Decision by Administrative Law Judge Victor W. Palmer.***Decision Without Hearing by  
Reason of Admissions**

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter “PACA”), the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45; hereinafter “Regulations”), instituted by a Complaint filed on February 22, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter “Complainant”).

Complainant alleged that Respondent Ocean View Produce, Inc., a corporation organized and existing under the laws of the State of Florida (hereinafter “Respondent”), committed willful, flagrant, and repeated violations section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to make payment promptly to 19 sellers in the amount of \$208,863.17 for 58 lots of perishable agricultural commodities that the Respondent had purchased, received, and accepted in interstate commerce during the period August 20, 2005 through July 13, 2007. Because Respondent’s license had terminated due to Respondent’s failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.139; hereinafter “Rules of Practice”).

On March 21, 2008, Respondent, acting through counsel, filed an Answer to Complaint admitting that it “owes 7 suppliers an estimated

total of \$67,647.10.” (Answer ¶ III.) Respondent further admitted that “the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims.” (*Id.*) These admissions demonstrate that Respondent is in violation of the prompt payment requirements of the PACA.

Under section 2(4) of the PACA, it is unlawful for any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect to any transaction involving a perishable agricultural commodity purchased, received, or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4); *see also Magnolia Fruit & Produce Co. v. U.S. Dep’t of Agric.*, 50 Agric. Dec. 854, 857 (5th Cir. 1991) (“[A] merchant violates the PACA simply by failing to ‘Make full payment promptly’ in an interstate transaction, for any perishable agricultural commodity.” (citing 7 U.S.C. § 499b(4))); “Full payment promptly” is defined by the Regulations as payment within 10 days of acceptance, unless the parties agree in writing to different payment terms *before entering into the transaction* and full payment occurs within the period upon which the parties agree. 7 C.F.R. § 46.2(aa)(5), (11). In other words, the prompt payment provisions of the statute and the Regulations apply to all transactions subject to the PACA unless there is “an express agreement at the time the contract is made . . . [and] the agreement [is] in writing.” *In re: The Caito Produce Co.*, 48 Agric. Dec. 602, 610 (1989) (citing 7 C.F.R. § 46.2(aa)(11)).

There is no evidence that Respondent and its produce sellers had written agreements at the time of the transactions allowing for a different payment schedule than that specified in the PACA and the Regulations, nor was this defense offered by Respondent in its Answer. Instead, Respondent admitted it “incurred significant debt through non-payment by [its] clients, some of whom have simply vanished or otherwise gone out of business, and that [it has] instituted credit and collection procedures to avoid such problems in the future.” (Answer, page 2).

Settlement or compromise of a PACA produce debt for a reduced amount based on the receiver’s financial difficulties does not constitute full payment under the Act. *In re: Tuscany Farms, Inc.*, 2007 WL 3170429, 11 (U.S.D.A. Aug. 2007); *United Fruit and Vegetable Co., Inc. v. Director of the Fruit and Vegetable Division, et al.*, 41 Agric. Dec. 89, 91 (1982) (finding that even if United Fruit had provided the court with records proving the company had entered into compromises with the sellers, “such compromises would not have changed the fact that United Fruit had, on numerous occasions, failed to pay in full for perishables that had been ordered and delivered. Thus, there were still

violations of 7 U.S.C. § 499b (4) which makes it unlawful “to fail or refuse truly and correctly to account and make full payment promptly \* \* \*”).

Respondent admitted in its Answer that although “there are monies owed on certain listed accounts...the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims.” (*Id.*) The settlement and/or compromise of several of the outstanding claims by the shippers does not ameliorate Respondent’s violations of the PACA.

On March 17, 2006, Evans Fruit Company, Inc., (hereinafter “Evans”) filed a PACA trust action against Respondent and Manuel Lopez in the United States District Court, Southern District of Florida (Case No. 06-20679). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$80,206.25 due and owing to Evans. On April 6, 2006, Respondent entered a Stipulation and the Court issued an Order for Judgment against Respondent. The Order states that Respondent has stipulated and agreed that “judgment shall be entered in favor of Evans in the aggregate amount of \$95,150.46, inclusive of interest and attorney’s fees.”

On January 8, 2007, Western Pacific Produce (hereinafter “Western”) filed a PACA trust action against Respondent in the United States District Court, Southern District of Florida (Case No. 07-20043). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$81,383.67 due and owing to Western. On February 1, 2008, the United States District Court, Southern District of Florida, entered an Order Granting Motion for Entry of Default Final Judgment against Respondent. The Judgment was entered on behalf of Western Pacific Produce against Respondent “in the amount of \$72,991.27 (from the invoices), \$5,638.00 in interest through July 1, 2007, and an additional \$4,708 in interest through today’s date.” The total judgment amounted to \$83,337.27. On April 9, 2008, Corona College Heights Orange and Lemon Association (hereinafter “CCH”) filed a PACA trust action against Respondent and Manuel Lopez in the United States District Court, Southern District of Florida (Case No. 08-20962). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of \$11,911.60 due and owing to CCH. On June 13, 2008, CCH and Respondent entered into a Stipulation for Entry of Judgment. The parties stipulated that on or about August 2007, Respondent paid CCH “the sum of \$2,000.00, thereby reducing the principal amount owed to CCH to \$9,911.60.” The parties further stipulated that “the total balance due to Plaintiff CCH from Defendant

Ocean View is \$18,740.89, including principal in the amount of \$9,911.60 and interest in the amount of \$3,074.92, plus attorneys' fees and costs totaling \$5,754.37." On June 19, 2008, the Court entered an Order of Judgment against Respondent stating that CCH "is a valid trust beneficiary under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §449e(c), against [Respondent] and Manuel Lopez in the aggregate amount of \$18,748.89."

On December 6, 2006, Del Monte Fresh Produce N.A., Inc., (hereinafter Del Monte) and Associated Potato Growers, (hereinafter "Associated") filed an Amended PACA trust complaint in an action against Respondent in the United States District Court, Southern District of Florida (Case No. 06-22636). In its Complaint, Del Monte alleged that it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce from July 14, 2006 through September 7, 2006. Associated alleged it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce on January 17, 2006. The trust complaint further alleged that Respondent failed to make full payment promptly, leaving the combined sum of \$27,786.60 due and owing to Del Monte and Associated.

On October 25, 2007, Del Monte and Associated moved for Entry of Judgment against Respondent for \$35,000 in the United States District Court, Southern District of Florida. Attached to the motion was a stipulated judgment signed by Respondent which stated that "between January 17, 2006 and July 14, 2006, Plaintiff[s] sold on credit and delivered perishable agricultural commodities to [Ocean View Produce], all of which remains due and owing." However, on October 31, 2007, the motion was denied because the parties failed to file the settlement agreement in a timely manner. As to all of the sellers identified in the above stipulations and Orders, the amounts identified and allowed pursuant to the judgments and stipulations were greater than or equal to the amounts alleged as owed to PACA produce sellers in disciplinary complaint:

<i>Seller</i>	<i>Amount of Produce Debt Alleged in Complaint</i>	<i>Amount Admitted in Answer</i>	<i>Amount of Produce Debt in Stipulation and/or Court Judgment</i>	<i>Amount Claimed by Sellers as still owing as of 11/4/08</i>
<i>Evans</i>	\$14,399.30	\$7,000	\$80,206.25	
<i>Les Jardins</i>	\$3,125.50	\$3,125.50		\$13,665.00

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<i>Seller</i>	<i>Amount of Produce Debt Alleged in Complaint</i>	<i>Amount Admitted in Answer</i>	<i>Amount of Produce Debt in Stipulation and/or Court Judgment</i>	<i>Amount Claimed by Sellers as still owing as of 11/4/08</i>
<i>Associated Potato Growers</i>	\$9,194.00		\$9,275.00	<b>\$11,164.75</b>
<i>Del Monte</i>	<b>\$8,045.50</b>		<b>\$18,511.60</b>	
<i>Gemini Farms</i>	\$11,469.20	\$9,469.20		<b>\$24,000.00</b>
<i>Nuchief</i>	<b>\$18,847.00</b>	<b>\$15,847.00</b>		
<i>Western Pacific</i>	\$72,548.57		\$72,991.27 <sup>1</sup>	
<i>Corona-College</i>	<b>\$11,911.60</b>	<b>\$9,991.60</b>	<b>\$9,991.60</b>	
<i>Pismo-Oceano</i>	\$13,383.30	\$13,383.30		
<i>New Limeco</i>	<b>\$13,870.00</b>	<b>\$8,710.50</b>		
<i>Sun America</i>	\$4,233.40			
<i>Global Unlimited</i>	<b>\$2,545.50</b>			
<i>De Bruyn</i>	\$22,565.05			<b>\$166,450.43</b>
<i>Chicago Produce</i>	<b>\$758.25</b>			
<i>A&amp;A Produce</i>	\$297.00			
<i>National Garden</i>	<b>\$15.00</b>			
<i>Cuba Tropical</i>	\$655.00			
<i>Naam Produce</i>	<b>\$616.00</b>			
<i>La Dona American</i>	\$384.00			
<b>TOTALS</b>	<b>\$208,863.17</b>	<b>\$67,647.10</b>	<b>\$190,975.72</b>	<b>\$215,280.18</b>

<sup>1</sup> Default Judgment  
Respondent's admitted failures to pay are willful, repeated, and flagrant as a matter of law. In its Answer to Complaint, Respondent

admitted failing to make full payment promptly to at least 7 of the 19 sellers for purchases of perishable agricultural commodities. (Answer ¶ 4.) Respondent's admitted failures to pay are violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)). In its Answer, Respondent stated that "any failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose." (*Id.*) However, Respondent's violations are willful, repeated, and flagrant as a matter of law.

Violations are repeated when they include multiple, non-simultaneous violations. *See Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *In re: Scarpaci Bros.*, 60 Agric. 874, 882 (2001); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (1997). Respondent's violations are repeated because it failed to pay or promptly pay 19 individual sellers for a total of 58 lots of perishable agricultural commodities for a two-year period.

Whether a violation is flagrant is determined by looking at "the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred." *In re: Five Star Food Distrib., Inc.*, 56 Agric. Dec. (1997) at 895; *see also Reese Sales Co. v. Hardin*, 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay \$19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated and flagrant violations of the PACA); *In re: Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1205, 1232 (1996) (finding that a respondent who failed to pay \$245,873.41 to 11 sellers involving 113 separate transactions over a one year period committed repeated and flagrant violations of the PACA). Decisions have held "that whenever the total amount due and owing for produce exceeds \$5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act." *In re: Veg-Mix., Inc.*, 48 Agric. Dec. 595, 599 (1989) (citing *Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). Respondent has admitted in its Answer that it "owes suppliers an estimated total of \$67,647.10." (Answer ¶ 3.) By failing to pay \$67,647.10, a sum well over \$5,000, to 7 sellers in 20 separate transactions over an eleven month period, Respondent committed flagrant violations of the PACA.

The Department's policy regarding willfulness is that "[a] violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent's violations of the provisions of the PACA and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at

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issue. *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998). A more stringent definition of “willfulness” is used in the Fourth and Tenth Circuits where willfulness is defined as “an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.” *E.g.*, *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. U.S. Dep’t of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Regardless of the standard applied, Respondent’s violations are willful.

Respondent’s violations are willful because, based on the large number of transactions, the size of the debt, and the continuation of these violations over two-year period, Respondent knew or should have known that it did not possess sufficient funds to comply with the prompt payment provisions of the PACA. *See Five Star Food Distribs.*, 56 Agric. Dec. (1997) at 897 (finding that a respondent willfully violated the PACA when it knew or should have known that it could not make prompt payment for the produce that it ordered, yet continued to make orders over an 11 month period thereby deliberately shifting the risk of nonpayment onto the produce sellers). Respondent began failing to pay for produce in August 2005 and continued to accept shipments of produce, for which it could not pay, through July 2007. Respondent’s failure to pay its produce debt is a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which requires full payment promptly. Under these circumstances, Respondent’s violations, in addition to being repeated and flagrant, are willful.

In its Answer, Respondent states that its “failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose.” (Answer, p. 1.) Intentionality is relevant to a finding of willfulness, but “[i]t is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful.” *In re: Scarpaci Bros., Inc.*, 60 Agric. Dec. (2001) at 883. A finding of willfulness is warranted solely by a showing that Respondent “recklessly and negligently” or with “careless disregard” of the payment requirements of the PACA continued to purchase produce for many months after it knew it could not pay for its prior purchases. *See id.* at 884; *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. (1997) at 897. The Department’s Judicial Officer has determined that payment violations similar to the violations established by Respondent’s admissions would be willful as both intentional acts and acts performed with careless disregard of statutory requirements. *See In re: Tolar Farms and/or Tolar Sales, Inc.*, 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers fully and promptly for 46 lots of produce totaling

\$192,089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. (1997) at 896-97 (finding that a respondent who failed to pay 14 sellers fully and promptly for 174 lots of produce totaling \$238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. (1996) at 631 (finding that a respondent who still owed \$283,201.12 to 9 sellers on purchases of 224 lots of produce over a 16 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA).

### **III. The issuance of a Decision Without Hearing by Reason of Admissions is warranted**

Respondent has admitted in its Answer that it has failed to make full payment promptly as required by section 2(4) of the PACA (7 U.S.C. § 499b(4)). It has been repeatedly held that a hearing may be dispensed with when no material issues of fact are in dispute. *E.g., Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987); *In re: H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (1998). The Rules of Practice section 1.139 (7 C.F.R. § 1.139) provide for a decision without hearing when no answer is filed, or when the answer contains admissions to all the material allegations of fact contained in the complaint. Decisions without hearing by reason of admissions have been granted upon the motion of a complainant based on admissions made in a respondent's answer. *E.g., In re: Tolar Farms and/or Tolar Sales, Inc.*, 57 Agric. Dec. 775, 776-77 (1998); *In re: Adan O. Tinajera d/b/a Inter-Distribs.*, 56 Agric. Dec. 1040, 1040-41 (1996); *In re: Nationwide Produce Co., d/b/a/ Natural Choice*, 55 Agric. Dec. 1412, 1412-13 (1996); *In re: Austin J. Merkel Co.*, 54 Agric. Dec. 759, 759, 763 (1995). Accordingly, based on Respondent's admissions that it failed to pay 7 sellers for produce it had purchased in interstate or foreign commerce, there is no material fact in dispute warranting a hearing and the issuance of a Decision Without Hearing By Reason of Admissions is warranted.

The appropriate sanction is the finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations. Cases involving the failure to pay produce debt are classified as either "slow pay" or "no-pay." *See In re:*

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*Scamcorp, Inc.*, 57 Agric. Dec. 527, 562 n.13 (1998). In determining whether a violation should be classified as a “no-pay” violation, the Department follows the following policy:

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

As stated in *Scamcorp*, the appropriate sanction in this case is revocation of Respondent’s PACA license. However, the PACA license of Respondent terminated on August 23, 2007, pursuant to section 4(a) of the PACA (7 U.S.C. § 499a), when Respondent failed to pay the annual required fees, and thus, publication is the appropriate sanction in this disciplinary case.

The Complaint in this matter was filed on February 22, 2008. According to the Judicial Officer’s policy set forth in *Scamcorp* (*Id.* at 548-549) Respondent had 120 days from the date the Complaint was served upon it, or until on or about June 30, 2008, to come in full compliance with the PACA. The Judicial Officer stated in *Scamcorp* that “full compliance” requires “not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc., supra*, that a respondent have no credit agreements with produce sellers for more than 30 days.” *Id.* at 549.

As indicated in the affidavit of Josephine Jenkins of the PACA Branch, Agricultural Marketing Service (attached hereto as Attachment 1 and incorporated by reference), follow-up investigation revealed that as of November 4, 2008, Respondent still owed at least 6 sellers \$78,584.05 of the amount listed in the Complaint. Therefore, pursuant to *Scamcorp*, Respondent was not in full compliance with the PACA by June 30, 2008 and this case should be treated as “no-pay” case for purposes of sanction. *In re: Scamcorp*, 57 Agric. Dec. (1998) 548-9.

Respondent’s violations in this case were flagrant and repeated. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant violation of the Act is

appropriate whenever the total amount due and owing exceeds \$5,000.00). Respondent's violations were also willful. *In re: D.W. Produce*, 53 Agric. Dec. (1994) at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). Here, Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet it continued to make purchases over a lengthy period of time, and could not pay produce suppliers. Respondent's actions in this case constitute violations that were willful. *See In re: D.W. Produce*, 53 Agric. Dec. (1994) at 1678.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's Motion for a Decision Without Hearing by Reason of Admissions is granted and the following Decision and Order is issued in the disciplinary case against Respondent 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. Ocean View Produce, Inc. is a corporation organized and existing under the laws of the state of Florida. Respondent's business and mailing address is 1201 NW 23<sup>rd</sup> Street, Miami, Florida 33142-7622. Respondent's mailing address, through counsel, is c/o David P. Reiner, Reiner & Reiner, P.A., 9100 South Dadeland Boulevard, Suite 901, Miami, Florida, 33156-7415.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20051197 was issued to Respondent on August 23, 2005. This license was suspended on February 23, 2007 pursuant to section 7(d) of the PACA (7 U.S.C. § 499g (d)), when Respondent failed to pay a reparation reward. The license was subsequently terminated on August 23, 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 failed to make full payment promptly to 19 sellers in the amount of \$208,863.17 for 58 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period August 30, 2005 through July 25, 2007.
4. Respondent failed to pay at least \$78,554.05 as of 120 days after service of the Complaint.

**Conclusions**

Respondent's failure to make full payment promptly with respect to the transactions alleged in the Complaint 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: ROGERS PRODUCE, INC.**  
**PACA Docket No. D-09-0006.**  
**Default Decision.**  
**April 6, 2009.**

**PACA – Default.**

Eric Paul for AMS.  
Respondent pro se.  
*Default Decision by Administrative Law Judge Jill S. Clifton.*

**Decision and Order by Reason of Default**

1. The Complaint, filed on October 6, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) (herein frequently the "PACA"). The Complaint alleged that Rogers Produce, Inc., the Respondent, willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### **Parties and Counsel**

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "Complainant" or "AMS"). AMS is represented by Eric Paul, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309 Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Respondent is Rogers Produce, Inc. (herein frequently "Rogers Produce" or "Respondent"), a corporation registered in the State of Texas. The Respondent's business address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

### **Procedural History**

4. AMS's Motion for Decision Without Hearing by Reason of Default, filed February 19, 2009, is before me. Respondent Rogers Produce was served on February 26, 2009, with a copy of that Motion and a copy of the proposed Decision and has failed to respond.

5. Regarding service of the Complaint, on October 10, 2008, Respondent Rogers Produce was served with a copy of the Complaint by certified mail, together with a copy of the Hearing Clerk's notice letter and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq.* The Respondent's answer was due to be filed within 20 days after service, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). The time for filing an answer to the Complaint expired on October 30, 2008. The Respondent failed to file an answer, so the Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

6. 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). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

### **Findings of Fact**

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7. Rogers Produce, Inc. is a corporation registered in the State of Texas. Respondent's business address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

8. Respondent can be served by delivery made to:

(a) Roger M. Sutton, Respondent's president, director, and 100% stockholder, at his current residence address; and

(b) Robert Milbank, Jr., Respondent's Chapter 7 Trustee, at law offices of Robert Milbank, Jr., 500 N. Akard, Suite 2980, Dallas, TX 75201.

9. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1997-1788 was issued to Respondent on July 9, 1997. This license terminated on July 9, 2008, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required renewal fee.

10. Respondent, during the period November 23, 2006 through October 7, 2007, failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$597,428.10 for 116 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate commerce. The transactions are as follows:

SELLER'S NAME	LOTS	COM-MODITY	DATES ACCEPTED	DATES DUE	AMOUNT PAST DUE
Golman-Hayden Company Dallas, TX	116	Mixed Fruits & Vegetables	11/13/06 to 09/27/07	11/23/06 to 10/07/07	\$597,428.10

11. On October 10, 2007, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §701 *et seq.*) in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. This petition was designated case number 07-34995. Respondent admits in bankruptcy Schedule D. Creditors Holding Secured Claims that it owed 32 "Produce Vendors with trust fund claims pursuant to the Perishable Agricultural Commodities Act of 1930 (PACA)" undisputed amounts that totaled \$1,758,475.87, including \$652,830.75 which Respondent acknowledged that it owed to produce vendor Golman-Hayden Company.

12. On June 17, 2008, the United States Bankruptcy Judge issued an Order approving a settlement reached between Robert J. Milbank, Jr., Chapter 7 Trustee and certain PACA trust claimants pursuant to which

at least \$40,000.00 [50 % of the amounts recovered by the Chapter 7 Trustee] would be remitted to the PACA Claimants c/o Meuers Law Firm, P.L. to be held in trust for pro-rata distribution to all qualified PACA trust beneficiaries of the Debtor.

13. The gross pro-rata share of PACA trust proceeds to be distributed to seller Golman-Hayden Company will be about 3 % of its trust claim, or approximately \$18,000, before the payment of this seller's share of legal fees and expenses.

### **Conclusions**

14. The Secretary of Agriculture has jurisdiction over Respondent Rogers Produce, Inc. and the subject matter involved herein.

15. Rogers Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during November 23, 2006 through October 7, 2007, by: (1) failing to make full payment promptly of the purchase prices, or balances thereof, in the total amount of \$597,428.10 to seller Golman-Hayden Company for 116 lots of fruits and vegetables, all being perishable agricultural commodities, which Rogers Produce, Inc. purchased, received, and accepted in interstate and/or foreign commerce; (2) failing to pay 32 produce vendors with PACA trust claims amounts totaling \$1,758,475.87 (including \$652,830.75 owed to Golman-Hayden Company), which were scheduled as undisputed secured claims in Respondent's bankruptcy proceeding; and (3) because an approved gross pro-rata distribution of at least \$40,000.00 to certain qualified PACA trust beneficiaries in Respondent's bankruptcy will only pay about 3 % of their trust claim amounts.

### **Order**

16. Rogers Produce, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

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

### **Finality**

18. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with

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the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

**APPENDIX A**

**7 C.F.R.:**

**TITLE 7—AGRICULTURE**

**SUBTITLE A—OFFICE OF THE SECRETARY OF  
AGRICULTURE**

**PART 1—ADMINISTRATIVE REGULATIONS**

....

**SUBPART H—RULES OF PRACTICE GOVERNING  
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE  
SECRETARY UNDER**

**VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

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

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing

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

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

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

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

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

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

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(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

**Consent Decisions**

**Date format [YY/MM/DD]**

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

Garber Farms, PACA-D-09-0140, 09/06/24.