

AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.

PACA Docket No. D-95-0502.

Decision and Order filed January 29, 1998.

Failure to make full payment promptly — Willful, flagrant, and repeated violations — Civil penalties — License suspension — Promissory note as payment — Mitigating circumstances — Power of administrative law judge to reschedule hearing — Weight given to agency sanction recommendation — Jurisdiction of judicial officer to hear late appeal.

The Judicial Officer affirmed Judge Palmer's (Chief ALJ) Initial Decision and Order in which he found that Respondent committed violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce. The Judicial Officer found, however, that Respondent's violations of 7 U.S.C. § 499b(4) were willful, flagrant, and repeated. Based on the length of time during which Respondent's violations occurred, the number of Respondent's violations, the dollar amounts which Respondent failed to pay in accordance with the PACA, and the length of time that it took Respondent to achieve compliance with the PACA, the Judicial Officer increased the civil penalty imposed by the Chief ALJ from \$30,000 to \$82,500. An administrative law judge has broad discretion to govern the conduct of a proceeding from the time the proceeding is assigned to the filing of an appeal. The Chief ALJ did not err by rescheduling the hearing "in light of the possible government shutdown." PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance at all times with the payment provisions of the PACA. However, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts the Department's policy to encourage PACA violators to pay produce suppliers promptly. Rescheduling a hearing to give a PACA violator additional time to pay produce suppliers unnecessarily delays proceedings, which should be handled expeditiously. The current policy of the Judicial Officer with respect to "no-pay" and "slow-pay" cases may discourage the expeditious handling of these proceedings, which might delay or discourage the prompt payment of produce suppliers by a PACA violator. The Judicial Officer held that in future PACA disciplinary cases in which it is shown that a respondent has failed to pay in accordance with the PACA and a respondent is not in full compliance with the PACA within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. Respondent successfully converted the case to "slow-pay" by giving a promissory note to one of its produce sellers. Generally, a note given by a debtor for an existing debt does not extinguish the debt in the absence of an agreement to that effect and the debtor-maker bears the burden of proving that the parties intended that the note extinguish the underlying debt. Respondent proved that the parties intended that the promissory note extinguish the debt for produce. The Judicial Officer held that in future PACA disciplinary cases payment of an antecedent debt for perishable agricultural commodities with a promissory note will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position. The Judicial Officer held where a respondent has failed to pay in accordance with the PACA but that respondent is in full compliance with the PACA by the date of the hearing, or in future cases, within 120 days after the complaint is served on a respondent, or the date of the hearing, whichever occurs first (a "slow-pay" case), a civil penalty may be imposed. The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a "slow-pay" case

include: (1) the length of time a respondent was in violation of the PACA payment requirements; (2) the number of violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that the imposition of a civil penalty, in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA. The Judicial Officer stated that a civil penalty would not be an appropriate sanction in a "no-pay" case because the PACA violator's failure to get back into compliance with the PACA would indicate that the violator continues to be financially irresponsible, and the imposition of a civil penalty in a "no-pay" case would require the PACA violator to pay the civil penalty rather than produce sellers to whom the PACA violator owes money; thereby thwarting one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment promptly.

Kimberly D. Hart, for Complainant.

Michael J. Keaton, Glen Ellyn, IL, for Respondent.

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

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

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [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], by filing a Complaint on October 18, 1994.

The Complaint alleges that, during the period April 1993 through June 1994, Scamcorp, Inc., d/b/a Goodness Greeness [hereinafter Respondent], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of \$634,791.13 for 165 transactions involving perishable agricultural commodities, which Respondent purchased and accepted in interstate commerce (Compl. ¶¶ III, V). Respondent filed an Answer and Affirmative Defenses [hereinafter Answer] on December 19, 1994, in which Respondent denies violating the PACA and the Regulations (Answer at 1-2).

However, on December 20, 1995, Respondent filed Respondent's Statement of Financial Position as of December 11, 1995 Supplemental Investigation and Request for Continuance of Hearing Date [hereinafter Respondent's First Statement of Financial Position] in which Respondent states that on September 14, 1995, Respondent owed produce sellers \$278,833.56, but that Respondent had reduced its produce debt to \$217,055.37 by December 11, 1995. In a letter filed December 20, 1995, and attached to Respondent's First Statement of Financial

Position, Respondent's counsel states that he provided Respondent's First Statement of Financial Position to Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] and Complainant's counsel for the purpose of keeping all concerned apprised of the progress of Respondent's efforts "to return to full compliance with the PACA."

On March 21, 1996, Respondent filed Respondent's Statement of Financial Position as of March 20, 1996 and Status on Request for Continuance [hereinafter Respondent's Second Statement of Financial Position] in which Respondent states that: (1) as of February 26, 1996, Respondent had paid all of its produce sellers except Made In Nature, Inc.; (2) subsequent to February 26, 1996, Made In Nature, Inc., invested in Respondent's operations; (3) Respondent used the capital invested by Made In Nature, Inc., to pay Made In Nature, Inc.; and (4) Respondent now has a credit balance of \$5,446.95 with Made In Nature, Inc.

The Chief ALJ presided over a hearing on April 3, 1996, and April 4, 1996, in Chicago, Illinois. Ms. Kimberly D. Hart, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Mr. Michael J. Keaton, Esq., and Scott D. Verhey, Esq., represented Respondent.¹ On May 24, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order and Respondent filed Respondent's Trial Brief. On June 7, 1996, Complainant filed Complainant's Reply Brief and Respondent filed Respondent's Response to Complainant's Trial Brief.

On June 18, 1996, the Chief ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent violated the PACA by failing to make full payment promptly to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of \$634,791.13 overdue and unpaid on June 13, 1994; (2) concluded that Respondent fully paid all of its produce indebtedness, albeit late, by March 13, 1996, and is currently paying for produce promptly in accordance with the requirements of the PACA; and (3) assessed Respondent a civil penalty of \$30,000 (Initial Decision and Order at 9, 16).

On July 24, 1996, Complainant appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory

¹On May 27, 1997, Mr. Alan Charles Raul, Esq., of Sidley & Austin, Washington, D.C., entered an appearance on behalf of Respondent (Letter from Alan Charles Raul to Kimberly D. Hart, dated May 23, 1997, and filed May 27, 1997).

proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).² On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely Under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of This Motion [hereinafter Respondent's Motion to Dismiss Appeal]. On August 22, 1996, I issued an Informal Order stating:

On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of this Motion (hereinafter Respondent's Motion to Dismiss Appeal). If Respondent's Motion to Dismiss Appeal is denied, the time for filing Respondent's response to Complainant's appeal petition shall be extended to 21 days after entry of a Ruling on Respondent's Motion to Dismiss Appeal.

On September 10, 1996, Complainant filed Complainant's Response to Respondent's Motion to Dismiss Complainant's Appeal as Untimely Filed, and on September 18, 1996, I issued a ruling in which I found that Complainant's appeal petition was timely filed, denied Respondent's Motion to Dismiss Appeal, and extended the time for Respondent's response to Complainant's appeal petition to October 9, 1996.³ On September 27, 1996, Respondent filed Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely, and on October 22, 1996, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration of the Order Denying Motion to Dismiss Complainant's Appeal Petition as Untimely. On November 7, 1996, I denied Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely and extended the time for Respondent's response to Complainant's appeal petition to November 29, 1996.⁴

Respondent appealed the Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal and the United States Court of Appeals for the District of Columbia held that the ruling is not a final order and it was not

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

³*In re Scamcorp, Inc.*, 57 Agric. Dec. ____ (Sept. 18, 1996) (Ruling on Respondent's Motion to Dismiss Appeal).

⁴*In re Scamcorp, Inc.*, 55 Agric. Dec. 1395 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal).

demonstrated that the ruling was in clear violation of law. *Goodness Greeness v. Department of Agric.*, No. 96-1447 (D.C. Cir. Apr. 10, 1997) (Order).

On April 15, 1997, Complainant filed Status Report on Appeal Petition Filed by Respondent in the United States Court of Appeals in which Complainant informed me of the Order issued in *Goodness Greeness v. Department of Agric.*, *supra*, and requested that I provide Respondent with an opportunity to file a response to Complainant's appeal petition. I provided Respondent with additional time within which to file a response to Complainant's appeal petition, and on August 29, 1997, Respondent timely filed Respondent's Brief in Opposition to Agency's Appeal of Chief ALJ Palmer's Decision and Order [hereinafter Respondent's Response].

On September 2, 1997, the case was referred to the Judicial Officer for decision. In early September 1997, Complainant's counsel telephoned the Office of the Judicial Officer and requested an opportunity to file a supplemental brief addressing the issue of the sanction, if any, to be imposed against Respondent. I informed Respondent's counsel of Complainant's request, and on September 10, 1997, Respondent filed Respondent's Objection to Agency's Request for Supplemental Briefing. On October 2, 1997, I issued a Ruling on Motion for Leave to File Supplemental Brief granting Complainant's request to file a supplemental brief and providing Respondent with an opportunity to file a reply to Complainant's supplemental brief. On November 17, 1997, Complainant filed Complainant's Supplemental Brief, and on December 19, 1997, Respondent filed Respondent's Brief in Reply to Agency's Supplemental Brief in Further Support of Its Appeal from Chief ALJ Palmer's Decision and Order.

Complainant's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed by the parties, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I disagree with the amount of the civil penalty assessed against Respondent by the Chief ALJ and find that, under the circumstances of this case, the appropriate sanction is an \$82,500 civil penalty. Nonetheless, I agree with most of the Chief ALJ's Findings of Fact, Conclusions of Law, and Discussion and have adopted the Initial Decision and Order as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are designated by the letters "CX" and Respondent's exhibits are designated by the letters "RX." The portion of the transcript that relates to that segment of the hearing conducted on April 3, 1996, is in a single

volume containing pages numbered 2 through 261. The portion of the transcript that relates to that segment of the hearing conducted on April 4, 1996, is in a single volume containing pages numbered 2 through 102. References in this Decision and Order to "Tr. Volume I" are to the volume of the transcript that relates to the April 3, 1996, segment of the hearing and references in this Decision and Order to "Tr. Volume II" are to the volume of the transcript that relates to the April 4, 1996, segment of the hearing.

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall

not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

....

(e) Alternative civil penalties

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

7 U.S.C. § 499h(a) (1994); 7 U.S.C. §§ 499b(4), 499h(e) (Supp. I 1995).

7 C.F.R.:

TITLE 7--AGRICULTURE

.....

SUBTITLE B--REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I--AGRICULTURAL MARKETING SERVICE

.....

SUBCHAPTER B--MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

DEFINITIONS

.....

§ 46.2 Definitions.

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

.....

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

.....

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

.....

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

7 C.F.R. § 46.2(aa)(5), (11).

**CHIEF ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS MODIFIED)**

.....

FINDINGS OF FACT

1. Respondent, Scamcorp, Inc., d/b/a Goodness Greeness, is a corporation organized and existing under the laws of the State of Illinois. [Respondent's mailing address is 5959 South Lowe, Chicago, Illinois 60621-2832. [(Answer at 1; CX 2, 40.)]

2. Pursuant to the licensing provisions of the PACA, license number 911534 was issued to Respondent on August 5, 1991. [Respondent's] license has been renewed annually. . . . [(Answer at 1; CX 1.)]

3. The president of Respondent . . . is Robert Scaman, who together with his brothers, Rodney Scaman and Rick Scaman, all of whom were in their twenties, started Scamcorp, Inc., [in 1991]. The [Scaman] family has long been in the produce business, and [in approximately 1986], Robert Scaman became employed at another company as a buyer and salesperson. That company was bought . . . by a larger firm, and because he was not going to have a job, Robert Scaman and his two brothers decided to start Scamcorp, Inc. Rodney Scaman and Rick Scaman each own 15 per centum of the corporation. Rodney Scaman is a salesman for Scamcorp, Inc. Rick Scaman works outside Scamcorp, Inc., and . . . holds his shares as an investment. [Neither Robert Scaman, Rodney Scaman, nor Rick Scaman] had any managerial or financial experience when they started Scamcorp, Inc. (Tr. Volume 1 at 220-24.)

4. Respondent has 24 employees and specializes in organic . . . produce. . . . Respondent's produce comes from farms that use "natural farming" techniques in avoidance of pesticides Respondent is the second largest distributor [of organic produce] in [the United States]. Respondent's . . . share [of the organic produce market] in the City of Chicago is about 75 to 80 per centum. Respondent's . . . share [of the organic produce market] is over 75 percent in [an area] . . . consisting of the States of Illinois, Indiana, Ohio, Michigan, Kentucky, [and] Wisconsin and parts of [the States of] Iowa and Pennsylvania. . . . Respondent's customers consist of large chain stores, as well as health food stores and store front cooperatives in college towns. (Tr. Volume I at 224-28.)

5. After being founded on February 28, 1991, Respondent experienced tremendous growth. But in the summer of 1993, Respondent started having difficulty paying its bills. A certified public accountant was hired at that time, who, upon reviewing Respondent's books and records, identified a cash flow problem caused by [Respondent's] failure to collect some outstanding receivables. This [review] was the first time a professionally trained person had [examined] Respondent's books and records. Respondent next hired a bookkeeper and sought the counsel of others in the industry. For the reasons set forth in Finding [of Fact No.] 15, Respondent's financial systems were then reviewed and analyzed by Ms. Julie Moran, an expert on the financial operations of produce firms. She determined that Respondent had a number of uncollectible receivables; did not have the proper paper handling techniques in place; had grown beyond its capabilities; and lacked the proper infrastructure to support a business of its size. There were instances of Respondent paying some vendors twice and losing an invoice from another. During the next 6 months, in addition to hiring a bookkeeper, Respondent terminated unprofitable delivery routes and reduced overhead. (Tr. Volume I at 228-33; Tr. Volume II at 12-14, 37-40.)

6. On April 8, 1994, Complainant sent a certified letter to Robert Scaman, as president of Respondent, stating that "[a] recent review of the trust notices and reparation complaints filed under the Perishable Agricultural Commodities Act (PACA) against Scamcorp, Inc., indicates your firm is failing to make timely payments for fruits and vegetables" (CX 120). The letter set forth the prompt pay and trust requirements of the PACA and the pertinent provision in the Regulations defining "full payment promptly."

7. Complainant and Respondent have stipulated that Respondent violated the PACA by failing to make full and prompt payment in the amount of \$634,791.13 to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce [during the period] April 1993 [through] June 1994, as set forth in paragraph III of the Complaint (Tr. Volume I at 4-5).

8. The violations set forth in Finding [of Fact No.] 7 were found by Andrew

Furbee, an investigator employed by [the Agricultural Marketing Service, United States Department of Agriculture,] when he conducted an investigation of Respondent during the week of June 14, 199[4]. He also conducted three subsequent compliance investigations which took place in [August] and December 1995, and February 1996 (Tr. Volume I at 4, 19-21).

9. The compliance investigation conducted in [August] 1995 revealed that, between June 1994 and June 1995, Respondent had paid approximately \$60[2],000 of the \$634,791.13 produce debt [identified in the Complaint]. However, Respondent had incurred approximately \$246,000 of debt for produce purchased from seven suppliers [during the period] November 1994 [through] August 1995, which had not been paid promptly, as required by the PACA [(CX 83)]. In other words, Respondent owed approximately \$635,000 for produce in June 1994, but, by September 1995, had lowered the amount that was overdue to approximately \$278,000. . . .

10. The compliance investigation conducted in December 1995 revealed that the remainder of the . . . \$634,791.13 produce debt [identified in the Complaint] had been fully paid. . . . [The December 1995 compliance investigation also revealed that Respondent had paid approximately \$82,000 of the \$245,761.36 of roll-over debt found during the August 1995 compliance investigation, but had incurred new roll-over debt of \$49,528.55 for produce received by Respondent from four produce sellers during the period August 1995 through December 1995 (CX 91-98, 102-105; Tr. Volume I at 20).]

11. The compliance investigation conducted in February 1996 revealed that Respondent had unpaid and past due produce debt with respect to only one supplier, Made In Nature, Inc., which totaled \$206,000. All other suppliers had been fully paid. [(CX 119.)]

12. On March 13, 1996, Made In Nature, Inc., lent Respondent \$235,385.29 [(RX 10)]. Of this amount, \$200,000 was in cancellation of the produce debt Respondent owed Made In Nature, Inc., and the \$35,000 balance was made available to Respondent for its other costs and expenses unrelated to its produce debt (Tr. Volume I at 192). The president of Made In Nature, Inc., Gerald Prolman, testified that in making this loan for which Made In Nature, Inc., received a promissory note (RX 10), Made In Nature, Inc., understood and fully intended to extinguish the produce debt owed it by Respondent, give up the security of Made In Nature, Inc.'s trust lien, and fully replace Respondent's original obligation to Made In Nature, Inc., with this new obligation (Tr. Volume I at 183-185[, 191-93,] 204-05, 210-18).

13. Pursuant to the promissory note given to Made In Nature, Inc., Respondent is required to pay \$2,250 per week until the note is paid, or until the maturity date

of [the promissory note,] June 10, 1998, is reached, whichever comes first. As . . . security, Respondent gave Made In Nature, Inc., a first priority security [interest in Respondent's property, including Respondent's] goods, inventory, supplies, stock-in-trade, [equipment, trade dress, raw materials, work in progress, finished goods, material used or consumed in Respondent's business, accessories, parts, repossessions and returns thereto or therefor, accounts,] accounts receivable, [other receivables, general intangibles, chattel paper, documents, instruments, deposit accounts, money, contract rights, leases, permits, copyrights, patents, trade names and trademarks, and rights to payment of every kind, and all proceeds and products thereof] (RX 10). Robert Scaman also gave his personal guaranty of Respondent's debt to Made In Nature, Inc. (RX 10).

14. In making the loan, the president of Made In Nature, Inc., took into consideration the following facts:

a) Made In Nature, Inc., which is headquartered in California, sells organic produce it has either purchased from growers, sells for growers on commission, or is itself the grower pursuant to various investment agreements (Tr. Volume I at 165). Inasmuch as Respondent is the largest distributor in the Midwest and second largest in the [United States], its continued existence is extremely important to Made In Nature, Inc., and the small growers which it represents. The close of Respondent would devastate Made In Nature, Inc. (Tr. Volume I at 170). Although there are other potential outlets for [Made In Nature, Inc.'s] produce, Mr. Prolman does not feel [that these outlets] would be able to absorb all of [Made In Nature, Inc.'s] fruit and vegetables (Tr. Volume I at 193-94). . . . The loss of Respondent as an outlet would mean Made In Nature, Inc., would be "stuck with produce" (Tr. Volume I at 170-71), and cause repercussions up and down the marketing chain (Tr. Volume I at 170-71).

b) When Respondent encountered its financial problems, Mr. Prolman worked with Respondent on a daily basis, reviewed pertinent documents and monitored the situation (Tr. Volume I at 172-73). Mr. Prolman is impressed with Robert Scaman's honesty and the favors he performed for Made In Nature, Inc., which "helped build [Made In Nature, Inc.'s] brand in the Chicago area . . ." (Tr. Volume I at 173, 212-13.)

c) [Made In Nature, Inc., discussed an] advance of money to Respondent . . . for sometime. Made In Nature, Inc., had expressed an interest in buying a portion of the equity . . . in Respondent. [Made In Nature, Inc., continues to be interested in buying an equity interest in Respondent] and

may convert the note into an equity interest by taking stock as payment [for the note]. . . . Made In Nature, Inc., has engaged in "due diligence" in respect to Respondent's viability and has concluded that [Respondent's] operators are hard working, trustworthy, and deserving of full confidence; [Respondent's] marketing concept is viable; [Respondent] is a profitable operation with a great future . . . ; and Respondent is in the best position to seize the expanding organic food market due to its dominance of Chicago and the midwestern area (Tr. Volume I at 187-88, 205-09, 212-14, 216-17).

d) In deciding that Respondent was a profitable company, Mr. Prolman had Made In Nature, Inc.'s senior vice president, who is a highly trained analyst and who formerly headed up worldwide pineapple operations for Dole Fruit Company, review all [of Respondent's] records and books. He recommended to Mr. Prolman and to Dole Food Company that they participate financially in [Respondent]. Mr. Prolman concluded after he reviewed th[e] analysis [of Respondent], that Respondent has made money every month, is getting better and better, is paying down its debt, and is . . . viable . . . (Tr. Volume I at 207-08, 216-17).

15. Julie Moran became Respondent's business operations manager at the end of April 1994 (Tr. Volume II at 13, 30-31). Previously, she was general manager for Ocean Organic Produce, one of Respondent's suppliers (Tr. Volume II at 12, 31). The board of directors of Ocean Organic Produce asked Ms. Moran to evaluate Respondent because of a rumor that it was going out of business (Tr. Volume II at 12, 35). She did so and started to give Respondent advice based on her experience as a turnaround person, who had by then completed three successful business turnarounds of produce firms (Tr. Volume II at 33-34). Ms. Moran began her review of Respondent's records and business practices in the fall of 1993 and became Respondent's employee at the end of April 1994 (Tr. Volume II at 12). Ms. Moran concluded that Respondent's cash flow problems were the result of it being a new, rapid-growth firm that employed cash basis accounting, which can be extremely misleading to a new business (Tr. Volume II at 37). As the new business rapidly grows, more cash appears at first to be coming in[to the business] than is going out [of the business], until "things kind of catch up to themselves, then you have a cash flow problem" (Tr. Volume II at 38). Ms. Moran switched Respondent to accrual basis accounting, which allows one to know its payables in advance of actually paying them (Tr. Volume II at 38). The problems inherent in cash basis accounting are aggravated when employed by a small,

immature, growing company in that "it always seems like you're richer than you really are" (Tr. Volume II at 39).

16. Under Ms. Moran's financial guidance[, by the time of the hearing in this proceeding,] Respondent had gone from [having] negative equity to [either having] positive equity [or being within one month of having positive equity] (Tr. Volume II at 41). All produce suppliers are paid in accordance with "terms letters," which have now been obtained from them (RX 4; Tr. Volume II at 79-80). Respondent had a net profit of \$50,000 for the month of January 1996; \$50,000 for the month of February 1996; and \$60,000 for the month of March 1996. For its fiscal year, which ended on February 29, 1996, Respondent had a \$300,000 profit . . . (Tr. Volume II at 42-45). . . .

17. In the fiscal year which ended on February 29, 1996, Respondent had gross sales of \$6,750,000 (Tr. Volume II at 32). Newly obtained customer accounts (Jewel Stores, Dominick's, and A&P) should increase Respondent's revenues, and [Ms. Moran estimated that,] if [Respondent's] business is not interrupted, Respondent should realize a net profit of \$300,000 for the [fiscal] year [ending February 1997] (Tr. Volume II at 42-45). Respondent is paying \$2,250 per week, or \$117,000 per year, on the loan from Made In Nature, Inc. (RX 10). . . .

18. Respondent paid interest to those suppliers to whom [Respondent's] payments for produce were late, if the creditors asked for [interest] or were entitled to [interest] (Tr. Volume I at 248[-49]). Robert Scaman testified that business is now great (Tr. Volume I at [2]50). However, [Robert Scaman] still only takes a salary of \$1,000 per week for an 80- to 100-hour week; . . . Rodney [Scaman] is paid \$550 per week; and Rick [Scaman] does not receive any salary (Tr. Volume I at 244[-45]). None of the brothers has ever taken any profits out of the business for himself and current profits are being plowed back to increase assets (Tr. Volume I at 250-51). . . .

CONCLUSIONS

1. Respondent [willfully, flagrantly, and repeatedly] violated the PACA by failing to make full payment promptly to 35 sellers for 165 lots of [perishable agricultural commodities] purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of \$634,791.13 overdue and unpaid on June 13, 1994.

2. Respondent fully paid all of its produce indebtedness, albeit late, by March 13, 1996, and [at the time of the hearing in this proceeding was] currently paying for [perishable agricultural commodities] promptly in accordance with the requirements of the PACA.

3. The appropriate sanction to be imposed against Respondent for its

violations of the PACA is a civil penalty of [\$82,500]. . . .

DISCUSSION

The PACA requires produce dealers who buy . . . [perishable agricultural commodities] in interstate commerce to make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had, or face sanction after an administrative hearing by the Secretary for unfair conduct. (7 U.S.C. §§ 499a, 499b, 499f, and 499h.) Until recently, the available sanctions were limited to publication of the facts and circumstances of the violation, suspension of the offender's [PACA] license for a period not to exceed 90 days, and . . . revocation [of the offender's PACA license]. (7 U.S.C. § 499h(a).) However, on November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, which reads as follows:

(e) Alternative civil penalties

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

The plain meaning of this language is to give the Secretary greater flexibility in the sanctions that may be imposed for the various violations of the PACA.

. . . .

Mr. Lon F. Hatamiya, Administrator of [the] Agricultural Marketing Service, [United States Department of Agriculture, the agency] which administers the PACA, testified[, during a hearing conducted on 1995 legislation to amend the PACA, in favor of amendment of the PACA to add] monetary penalty provisions[, as follows]:

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other

disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 12 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 12.)]

Mr. Hatamiya was questioned about this statement by Congressman Bishop [as follows]:

MR. BISHOP. You want flexibility in the assessment of fees?

....

[MR. HATAMIYA.] Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes. Essentially, yes.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 34.)]

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the legislative hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary

penalty instead.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 106.)]

...
[N]o witness suggested that the amendment to assess civil penalties should be in any way limited. Charles Gray, on behalf of the American Frozen Food Institute, sought the very opposite result when he testified in favor of the proposed amendment [as follows]:

AFFI also supports the concepts underlying proposed amendment to levy civil penalties in the event of a violation of the act. This alternative sanction will give the agency desperately needed flexibility.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 63 (1995) (statement of Charles Gray, Director of Credit Administration for the J.R. Simplot Company Food Group). (RX 8 at 63.)]

Moreover, there was specific testimony that civil penalties be assessed in place of other sanctions in "slow-pay/no-pay" cases. Mr. Keith Eckel testified, on behalf of the American Farm Bureau [Federation], that slow payment and nonpayment for produce was a major problem in the industry that would not be solved by the repeal of the PACA (RX 8 at 61-62). When [Mr. Eckel was] asked by [Congressman Ewing] if he had specific recommendations to improve the PACA Program, he stated:

MR. ECKEL. Mr. Chairman, if you look at the farm bureau testimony, you'll find, number one, that in the issue of the slow pay and no pay that I highlighted, we strongly support intermediary steps short of revocation of license. We think that makes sense for the industry, and we would suggest that a schedule of fines be used to do that.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 71 (1995) (statement of Keith Eckel, President, Pennsylvania Farm Bureau). (RX 8 at 71.)]

Later, Congressman Pastor referred Mr. Hatamiya to Mr. Eckel's testimony

respecting slow payment and nonpayment in the context of the large number of trust notices that shippers file under the PACA:

MR. PASTOR. To the administration, how difficult would it be to implement some kind of program that would try to solve this particular problem and maybe reduce the number of trust notices you have to deal with?

MR. HATAMIYA. Well, I think it goes back to what we have in terms of an enforcement policy right now. The only alternative we have is either to suspend or revoke a person's license. There are no monetary penalties or fines that we can impose under the legislation. I think that's one area that if, in fact, you congressionally mandate and allow us to fine someone that's not paying promptly, then I think that would certainly assist in providing that quicker payment to whatever party involved.

MR. PASTOR. So you think the idea of having some kind of fee schedule or fine schedule may—

MR. HATAMIYA. I think that's exactly right. We don't think there's any public interest in revoking or suspending somebody's license. We think that they need to be a part of that business marketing chain. And I think that fee or fine schedule would obviously allow us to do it in a different sort of way or enforce it in a different sort of way.

[Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 81 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 81.)]

[The November 15, 1995, amendment to section 8 of the PACA, therefore, authorizes the Secretary to impose a civil penalty, in lieu of a suspension or revocation of an offender's PACA license, in cases in which the PACA licensee has failed to make full payment promptly, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).]

....

[By the date of the hearing, Respondent paid all of its produce suppliers in

full,⁵ with interest upon request, and Respondent was in compliance with the PACA.]

....

A firm that owes nearly \$635,000 to 35 sellers for [165 transactions involving perishable agricultural commodities] has committed [willful, flagrant, and repeated] violation[s] of the PACA. To discourage Respondent from future violations and to deter others from unfairly converting their [produce suppliers] into unwilling creditors, it is necessary to impose a penalty sufficient . . . to be an effective deterrent. . . .

As the new civil penalty language directs [(7 U.S.C. § 499h(e) (Supp. I 1995))], due consideration has been given to the size of [Respondent's] business, the fact that Respondent has 24 employees, and the seriousness, nature, and amount of the violation. Upon doing so, I have concluded that Respondent should [be assessed an \$82,500] civil penalty. . . .

....

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises 10 issues in Complainant's Appeal. First, Complainant contends that the Chief ALJ erred by postponing the original hearing date for the express purpose of granting Respondent additional time to pay its produce creditors. (Complainant's Appeal at 7-9.)

The record reveals that the Chief ALJ held a prehearing telephone conference with counsel for Complainant and Respondent on March 2, 1995, and that "[i]t was decided that a hearing should be scheduled in Chicago, Illinois, on October 11-13, 1995." (Summary of Prehearing Teleconference, filed March 2, 1995, at 1.) On September 14, 1995, the Chief ALJ held a telephone conference with counsel for Complainant and Respondent during which telephone conference he rescheduled the hearing for January 17-18, 1996, "[i]n light of the possible government shutdown." (Summary of Teleconference and Rescheduling of Hearing, filed September 14, 1995.) The Chief ALJ subsequently rescheduled the

⁵Complainant has argued that the note taken by Made In Nature, Inc., did not extinguish the original produce debt, but merely suspended it by changing its payment terms retroactively. However, the parties have testified that it was their intent to extinguish the original debt, they specifically so agreed, and there is no contrary evidence. See *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991).]

hearing in this proceeding three more times.⁶ However, the Chief ALJ's rescheduling of the hearing subsequent to September 14, 1995, does not appear to be the subject of Complainant's Appeal.

The Administrative Procedure Act provides, subject to published rules of the agency, administrative law judges with broad authority to manage and govern adjudicatory proceedings (5 U.S.C. § 556(c)), and the Rules of Practice provide an administrative law judge assigned a proceeding with broad discretion to manage and govern the conduct of a proceeding from the time the proceeding is assigned to the administrative law judge to the filing of an appeal. Specifically, with respect to setting the time for hearing, the Rules of Practice provide:

§ 1.141 Procedure for hearing.

....

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing. . . . If any change in the time, place, or manner of the hearing is made the Judge shall file with the Hearing Clerk a notice of such change, which shall be served upon the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

....

§ 1.144 Judges.

⁶On December 21, 1995, the Chief ALJ issued an order stating "[i]n light of scheduling conflicts, the hearing scheduled for January 17-18, 1996, is hereby rescheduled for April 3-4, 1996, in Chicago, Illinois." (Rescheduling of Hearing, filed December 21, 1995.) On December 26, 1995, the Chief ALJ issued an order stating "[i]n response to Complainant's request for an earlier hearing date, the rescheduled hearing shall be held on February 21-22, 1996, in Chicago, Illinois." (Rescheduling of Hearing, filed December 26, 1995.) On December 28, 1995, the Chief ALJ issued an order stating "Mr. Keaton advised that he would be unavailable on February 21-22, 1996, the dates selected for the rescheduled hearing. The next available date suitable to all parties was April 3 and 4, 1996. Accordingly, the hearing is rescheduled to be held in Chicago, IL on April 3 and 4, 1996." (Summary of Teleconference and Rescheduling of Hearing, filed December 28, 1995.)

....

(c) *Powers*. Subject to review as provided elsewhere in this part, the Judge, in any assigned proceeding, shall have power to:

- (1) Rule upon motions and requests;
- (2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing[.]

7 C.F.R. §§ 1.141(b)(1) (footnote omitted), .144(c)(1)-(2).

Given the broad discretion vested in administrative law judges under the Rules of Practice to set times for hearings, change times for hearings, and adjourn hearings, which broad discretion is necessary in order for administrative law judges properly to manage and to govern proceedings, I do not find that the Chief ALJ erred by rescheduling the hearing from October 11-13, 1995, to January 17-18, 1996, "in light of the possible government shutdown."

Complainant contends that at least one of the reasons the Chief ALJ rescheduled the hearing was to give Respondent additional time within which to pay outstanding produce debt and to achieve compliance with the PACA prior to the hearing. Under Department policy, compliance by the start of the hearing converts the case from a "no-pay" case to a "slow-pay" case and the sanction from revocation of Respondent's PACA license to suspension of Respondent's PACA license. However, the Chief ALJ's September 14, 1995, order rescheduling the hearing states that the Chief ALJ rescheduled the hearing because of "the possible government shutdown." (Summary of Teleconference and Rescheduling of Hearing, filed September 14, 1995.)

This proceeding is not the first proceeding in which a complainant has alleged that an administrative law judge rescheduled a PACA disciplinary proceeding in order to give a respondent additional time within which to comply with the PACA. However, the record does not establish that the Chief ALJ rescheduled the hearing for an improper reason. Thus, I do not find error, but I disagree with rescheduling a hearing to give any respondent, not in compliance with the PACA, additional time to pay produce creditors and come into compliance with the PACA.

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. The Judicial Officer's policy, adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), has been to revoke the license of any PACA licensee who has failed to pay in accordance with the PACA and owes more than a *de minimis* amount to produce sellers by the date of the hearing

or, if no hearing is to be held, by the time the answer is due. Cases in which a respondent has failed to pay by the date of the hearing are referred to as "no-pay" cases. License revocation can be avoided and the suspension of a license of a PACA licensee who has failed to pay in accordance with the PACA is ordered if a PACA violator makes full payment by the date of the hearing (or, if no hearing is to be held, by the time the answer is due) and is in full compliance with the PACA by the date of the hearing. Cases in which a respondent has paid and is in full compliance with the PACA by the time of the hearing are referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpentino Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.

The purpose of allowing PACA licensees to convert a "no-pay" case to a "slow-pay" case and avoid license revocation is to encourage PACA violators to pay their produce suppliers and attain full compliance with the PACA. If there were no opportunity to reduce the sanction, a PACA licensee against whom an action is instituted for failure to pay in accordance with the PACA and who has violated the payment provisions of the PACA may have no incentive to pay its produce suppliers. However, PACA requires *full payment promptly*, and a PACA licensee who has violated the payment provisions of the PACA should be given an incentive to pay its produce suppliers promptly. Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R. § 1.141(b)) that "the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties."

The Judicial Officer's current policy on "no-pay" and "slow-pay" cases discourages expeditious hearings, and, when hearings are delayed, prompt payment to produce sellers is delayed. Therefore, I am changing the Judicial Officer's "slow-pay"/"no-pay" policy. The new policy applies to all PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first.

The new "slow-pay"/"no-pay" policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance

with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. 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.

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. As discussed in this Decision and Order, *infra*, pp. 54-57, in any "slow-pay" case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

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.

The purpose of this new policy is to give PACA violators an incentive to pay produce suppliers promptly and to encourage the expeditious handling of these proceedings. While this new policy may have the effect of discouraging an administrative law judge from holding a hearing within 120 days of the date a complaint is served on a respondent, my experience has been that hearings in PACA disciplinary proceedings are rarely held within 120 days after the date the complaint is served on a respondent.

Second, Complainant contends that the Chief ALJ's finding that "[u]nder Ms. Moran's financial guidance, Respondent has gone from a negative equity to a positive equity" (Initial Decision and Order at 7) is not supported by the evidence (Complainant's Appeal at 10-12.)

I agree with Complainant. The Chief ALJ cites Ms. Moran's testimony at page

41 of volume II of the transcript as the basis for the finding that Respondent has gone from a negative equity to a positive equity. However, Ms. Moran did not testify that Respondent went from a negative equity to a positive equity, but instead testified as follows:

[BY MR. KEATON:]

Q. Okay. In your opinion, is Goodness Greeness in a financially sound position at this point in time?

[BY MS. MORAN:]

A. Goodness Greeness, probably for the first time in several years, if not right now, by the end of this month, will have a positive equity.

Tr. Volume II at 41.

Therefore, I have not adopted the Chief ALJ's finding that "Respondent has gone from a negative equity to a positive equity" and instead I find that "[u]nder Ms. Moran's financial guidance, by the time of the hearing in this proceeding, Respondent had gone from having negative equity to either having positive equity or being within one month of having positive equity" (Decision and Order, *supra*, p.).

Third, Complainant contends that "[t]here is no substantiating evidence contained in the record to support a finding that Respondent's profits for the next fiscal year will meet or exceed the profits from the previous fiscal year." (Complainant's Appeal at 12.) Moreover, Complainant contends that "Respondent's future financial position is irrelevant since the Secretary's concern is with Respondent's financial position at the time of the hearing." (Complainant's Appeal at 12.)

The Chief ALJ did not find, as Complainant contends, that "Respondent's profits will meet or exceed the profits from the previous fiscal year." Instead, the Chief ALJ found that Respondent "expects to have a \$300,000.00 profit for the current fiscal year" (Initial Decision and Order at 8). The record (Tr. Volume II at 42-45) supports the Chief ALJ's finding regarding Respondent's expectation of profits for the fiscal year ending February 1997, and while I give very little weight to Respondent's expectation of future profit, I do not find that the Chief ALJ erred by making a finding concerning Respondent's expectation.

Fourth, Complainant contends that the Chief ALJ's finding that "[n]one of the brothers have ever taken any profits out of the business for themselves" (Initial Decision and Order at 8) is a mitigating circumstance which does not negate the

seriousness of Respondent's violations of the PACA (Complainant's Appeal at 12-13).

I agree with Complainant's contention that the policy of Robert, Rodney, and Rick Scaman not to take profits out of the business does not negate the seriousness of Respondent's failures to make full payment promptly in accordance with the PACA. However, the record (Tr. Volume I at 250-51) supports the Chief ALJ's finding with respect to the Scaman brothers' policy not to take profits out of the business, and the Chief ALJ did not indicate in the Initial Decision and Order that Robert, Rodney, and Rick Scaman's policy not to take profits out of the business negated the seriousness of Respondent's violations of the PACA. To the contrary, the Chief ALJ found that Respondent "has committed a serious violation of the PACA." (Initial Decision and Order at 16.)

Fifth, Complainant contends that the Chief ALJ erred by failing to conclude that Respondent's violations of the payment provisions of the PACA were willful, flagrant, and repeated. (Complainant's Appeal at 13-17.)

I agree with Complainant's contention that the Chief ALJ erred by failing to find that Respondent's violations were willful, flagrant, and repeated.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.⁷

⁷See, e.g., *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Alfred's Produce*, 56 Agric. Dec. ____ (Dec. 5, 1997) (concluding that respondent's failure to pay 19 sellers \$336,153.40 for 86 lots of perishable agricultural commodities during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Tolar Farms*, 56 Agric. Dec. ____, slip op. at 16-17 (Nov. 6, 1997) (holding that respondents' failure to pay 7 sellers \$192,089.03 for 46 lots of perishable agricultural commodities during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable

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.⁸ Willfulness is reflected by

agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

⁸See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 18 (Nov. 6, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Neapolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing,

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.⁹ Respondent failed to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of \$634,791.13 for 165 transactions involving perishable agricultural commodities which Respondent had purchased and accepted in interstate commerce. These failures to pay took place over the period April 1993 through June 1994.

Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 14-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁰

or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

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

⁹See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 27-28 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ____, slip op. at 18-19 (Nov. 6, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

¹⁰See *In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 28-29 (Dec. 5 1997); *In re Tolar Farms*, 56 Agric. Dec. ____, slip op. at 19-20 (Nov. 6, 1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re*

Sixth, Complainant contends that the Chief ALJ erred by concluding that the promissory note entered into between Made In Nature, Inc., and Respondent constituted full compliance with the PACA by the time of the hearing in this proceeding. (Complainant's Appeal at 17-24.)

I disagree with Complainant's contention that Respondent was not in full compliance with the payment provisions of the PACA by the date of the hearing. A compliance investigation conducted in February 1996 revealed that Respondent had unpaid and past due produce debt with respect to only one supplier, Made In Nature, Inc., which totaled \$206,000. All other suppliers had been fully paid. (CX 119.) On March 13, 1996, Made In Nature, Inc., lent Respondent \$235,385.29 and, in exchange, took back a secured promissory note (RX 10). Of the amount loaned by Made In Nature, Inc., to Respondent, \$200,000 was in cancellation of the produce debt Respondent owed Made In Nature, Inc., and the \$35,000 balance was made available to Respondent for its other costs and expenses unrelated to its produce debt (Tr. Volume I at 192).

Generally, a note given by a debtor for an existing debt does not extinguish the debt in the absence of an agreement to that effect and the debtor-maker bears the burden of proving that the parties intended that the note extinguish the underlying debt.¹¹ Respondent has met its burden of proof. The

Full Sail Produce, Inc., 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

¹¹*See, e.g., The Emily Souder*, 84 U.S. (17 Wall.) 666, 670 (1873) (stating that the general commercial law of the world is that a promise to pay, whether in the form of notes or bills, is not itself payment in the absence of express agreement or local usage); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 561 (1866) (stating that established rule in this court is that a bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the debt unless such was the express agreement of the parties); *The Kimball*, 70 U.S. (3 Wall.) 37, 45 (1865) (stating that by the general commercial law, in England and the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties); *Downey v. Hicks*, 55 U.S. (14 How.) 240, 249 (1852) (stating that a note of the debtor himself, or of a third party, is never considered as payment of a precedent debt, unless there is a special agreement to that effect); *Lyman v. Bank of the United States*, 53 U.S. (12 How.) 225, 243 (1851) (stating that acceptance of a note does not necessarily operate as satisfaction of a debt and whether or not there was an agreement at the time to receive the notes in satisfaction of the debt or whether the circumstances attending the transaction warranted an inference that the notes were received in satisfaction of the debt were questions for the jury); *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 57 (1838) (stating that it is generally true that giving a note for a preexisting debt does not discharge the original cause of action, unless it is agreed that the note shall be taken in payment); *Peter v. Beverly*, 35 U.S. (10 Pet.) 532, 567-68 (1836) (stating that it is a well settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt unless it is expressly agreed that it is received as payment); *Sheehy v. Mandeville & Jamesson*, 10 U.S. (6 Cranch) 253, 264 (1810) (stating that the principle is well settled that a note, without special contract, would not, of itself, discharge the

original cause of action, but if, by express agreement, the note is received as payment, it satisfies the contract); *United States v. Nill*, 518 F.2d 793, 798 (5th Cir. 1975) (holding that if there is an express agreement by a creditor to receive a note as absolute payment, it will be held to be an extinguishment or payment of the precedent debt); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1086 (2d Cir. 1970) (stating that under the common law of Connecticut, the mere giving of a note does not constitute payment unless it is agreed that the note should be received as payment and the burden is on the defendant maker to establish that the parties intended the note as payment; the adoption of the Uniform Commercial Code by Connecticut does not appear to have changed the rule on the presumed intention of the parties except where a bank is the drawer, maker, or acceptor), *cert. denied*, 400 U.S. 1021 (1971); *Holcombe v. Solinger & Sons Co.*, 238 F.2d 495, 500 (5th Cir. 1956) (stating that the taking of a bill of exchange or promissory note for a debt will operate as payment if so intended); *Anthony P. Miller, Inc. v. Commissioner*, 164 F.2d 268, 269 (3d Cir. 1947) (stating that the legal rule is well recognized that the giving and acceptance of a negotiable instrument is conditional payment of the debt, but, if the parties agree, the acceptance of the negotiable paper will discharge the original debt altogether), *cert. denied*, 333 U.S. 861 (1948); *Taylor v. Tulsa Tribune Co.*, 136 F.2d 981, 983 (10th Cir. 1943) (stating that unless the parties intend otherwise, the taking of a note for a preexisting debt does not constitute payment or satisfaction of the debt, but the giving of a note with the intention or understanding that it is in payment extinguishes the original debt); *Union Cent. Life Ins., Co. v. Matthew*, 32 F.2d 97, 98-99 (9th Cir.) (holding that the taking of a note of the debtor is not payment, unless there is an agreement, express or implied, to take the note as payment and the burden of proving such agreement is on the debtor), *cert. denied*, 280 U.S. 528 (1929); *People's Nat. Bank of Hot Springs v. Moore*, 25 F.2d 599, 601 (8th Cir. 1928) (stating that the acceptance from a debtor of a bill of exchange, promissory note, or other promise to pay is not payment of the debt, unless there is an express agreement that it is received as payment, or unless there is clear and satisfactory proof of the intention that it is so received); *Union Electric Steel Co. v. Imperial Bank of Canada*, 286 F. 857, 861 (3d Cir. 1923) (stating that the general rule in the United States and in England is that the taking of a note for a preexisting debt is not payment unless there is an agreement, express or implied, to take the note as such); *Stewart v. Laberee*, 185 F. 471, 473 (9th Cir. 1911) (stating that, in the absence of an agreement between the parties that notes are received as payment of a debt, the common law rule prevails in nearly all states and is adopted in the federal courts that the original demand is not paid or extinguished by the note); *Beall v. Hudson County Water Co.*, 185 F. 179, 181 (C.C.D. N.J. 1911) (stating that the following are deemed to be settled law: (1) the acceptance of a promissory note from a debtor for a preexisting debt will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect; (2) a promissory note, as its name implies, is but a promise to pay, and, ordinarily, is no payment if it is not itself paid; (3) a promissory note may amount to payment if the creditor so intended, but such intention is not to be resolved against the creditor except by clear and convincing evidence; (4) the burden of proof is on the person who claims the benefit of the discharge); *Atlas S.S. Co., Ltd. v. Colombian Land Co.*, 102 F. 358, 359 (2d Cir. 1900) (stating that it has long been the settled rule in New York that taking a note, either of the debtor or of a third person, for a preexisting debt, is no payment, unless it be expressly agreed to take the note as payment); *The Frolic*, 20 Cas. 826 (C.C.D. La. 1870) (No. 11,856) (stating that in general, unless otherwise specifically agreed, the taking of a promissory note for a preexisting debt is treated as conditional payment only, but in some states, unless otherwise agreed, the taking of a promissory note is an absolute payment of the preexisting debt; in each case the rule is founded on a mere presumption of the supposed intention of the parties and is open to explanation and rebutter by establishing by proper proofs what the real intention of the parties was and this may be established not only by express words but by reasonable implication from the attendant circumstances); *Baker v. Draper*, 2 Cas. 458, 459 (C.C.D. Mass. 1860) (No. 766) (stating that at common law a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was

record establishes that Respondent and Made In Nature, Inc., intended that the promissory note executed by Respondent extinguish the debt for the produce purchased by Respondent from Made In Nature, Inc. Mr. Prolman, president of Made In Nature, Inc., specifically addressed the promissory note (RX 10) and Respondent's debt for produce, as follows:

BY MR. KEATON:

Q. Mr. Prolman, what do you recognize that document [referring to the promissory note (RX 10)] to be?

[BY MR. PROLMAN:]

A. That is a promissory note.

Q. Is that a document that you had a chance to be part of?

A. Yes.

the intention of the parties at the time it was given); *Sutton v. The Albatross*, 23 Cas. 465, 467 (Case No. 13,645) (C.C.E.D. Pa. 1852) (stating that taking the note of hand of the debtor is not per se legal satisfaction, unless there is evidence that the parties intended it should operate as such); *Allen v. King*, 1 Cas. 483, 484 (C.C.D. Mich. 1846) (No. 226) (stating that where a bill has been received it is not a discharge of a preexisting debt, unless there is an agreement to that effect); *Gallagher v. Roberts*, 9 Cas. 1089, 1090 (C.C.D. Pa. 1808) (No. 5,195) (holding that a bill of exchange is not, in general, to be considered satisfaction of a precedent debt, unless it is paid and accepted as such); *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872, 1873 (1991) (citing with favor a letter to respondent in which the United States Department of Agriculture stated that under the law, a note given by a debtor for an existing debt does not extinguish the debt in the absence of any agreement to that effect, but is considered to be a conditional payment of the amount due); *Federal Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121, 1123-24 (1965) (citing *American Jurisprudence* for the general rule that a note given by a debtor for a precedent debt will not be held to extinguish the debt, in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgement or memorandum of the amount ascertained to be due); *Cadenasso v. California-Mexico Distrib. Co.*, 2 Agric. Dec. 751, 753 (1943) (stating that with the exception of four states, it is generally held in the United States that a note given by a debtor to his creditor does not extinguish the debt in the absence of an express agreement to that effect; in the four excepted states (Indiana, Maine, Massachusetts, and Vermont) it is held that the giving of the note extinguishes the debt unless the contrary is agreed upon); 15 Samuel Williston & Walter H. E. Jaeger, *A Treatise on the Law of Contracts* § 1875A (3d ed. 1972) (stating that a negotiable bill or note is so far recognized as a specialty that one who is indebted by simple contract may merge and discharge the debt by his own negotiable instrument for the amount of the debt when the instrument is given and received as full satisfaction and whether it is so received depends upon the expressed intention of the parties).

Q. And in what capacity were you a party to that transaction?

A. I authorized it. I initiated it.

Q. Give us essentially what that document does. Is that really in essence to lend a set sum of money to this company, to Respondent?

A. That's exactly what it is. It's like a two part arrangement.

Q. When you say a two part arrangement, the one part being what and the second part being what?

A. Okay. The first part is that Made In Nature wanted to loan money to Goodness Greeness, to help them along with their development because they are doing very well as a company and have been for some time now. So the first part was to provide a loan.

The second part was so that they could pay for the invoices and they actually did that which paid all of our invoices, so at this point, all Goodness Greeness invoices are off our books. We're not carrying that any longer on our books. And any obligations they have are completely paid.

Q. Everybody has been referring to this [as a] conversion of a receivable, and there wasn't really any conversion. There was really just a severing of one obligation and a creation of a brand new obligation, is that right?

A. Correct.

Q. Now, you mentioned after this transaction, what is the account balance? The minute he signed that [referring to the promissory note (RX 10)], what was the account balance the Respondent had with you on those invoices?

A. Zero. They were considered paid. There was no more obligation under any of those invoices and we were completely satisfied.

Q. So there's really no, for lack of a better term, amortization, if you're familiar with that term, there's no re-amortization or re-payment structure,

this was simply a loan and a brand new obligation created, is that right?

A. That's correct.

Q. That's been your understanding of this transaction all along?

A. Yes, and it's exactly what we wanted to do.

....

[BY MS. HART:]

Q. You testified earlier as to the promissory note, that there was a new obligation being created by that note and that it was not a case of re-amortization?

[BY MR. PROLMAN:]

A. You mean that it had nothing to do with the invoices?

Q. Exactly.

A. Yeah, once the invoices were deemed paid, this note is separate to that. This is just a note, a loan to their company, as if they went to a bank and got a loan.

Q. But would you still agree that it's still a debt of the company?

....

THE WITNESS: Okay. I would think that notes are viewed as debts, yes.

....

BY MR. KEATON:

Q. Mr. Prolman, when you mentioned the debt, that this note constitutes a debt of the Respondent to your company, you testified to that, correct?

[BY MR. PROLMAN:]

A. Yes.

Q. That debt, is that now considered produce debt or is that considered, I think you brought up the analogy of a bank loan, is that simply debt or is it produce debt?

A. The produce part was wiped off our books, so we no longer carry that. It has nothing to do with produce anymore. It's just a loan to Goodness Greeness and it's a note, and then there's terms and we carry that on, I forget exactly how it's characterized but it's as a note.

Q. So to your knowledge it's not carried on your books, the books of Made In Nature, any different than, say, if you were starting up a joint venture with another company, and it's just to see if you could try your hand in the organics industry, is that right?

A. Correct. It's in the assets column and it's money that we hope to receive over time.

.....

Q. By extending this note to Goodness Greeness and by investing the sum of money you have in the company to allow them, among other things, both operating capital and to use part of the proceeds of that note, to pay off your produce receivables, that note has now taken a back seat to its produce, the Goodness Greeness produce suppliers, is that correct?

A. That's right. We have full knowledge that we gave up all of our rights when we did that.

Q. Do you have any problem with that at all?

A. No, we don't or else I wouldn't have authorized the note.

Q. You went into this transaction with your eyes wide open, regarding I have no doubt in my mind I'm going to be pay [sic] by this company, regardless of the PACA trust?

A. That's correct. And I also communicated that to Miss Hart on the phone.

Q. I'm sorry. What was that?

A. I communicated that to Miss Hart on the phone.

Q. Prior to this hearing today?

A. Yes.

Q. Did she have any reaction to that?

A. She seemed surprised. She couldn't understand why I would be doing that.

....

BY MS. HART:

Q. Mr. Prolman, you testified that you understood that once you loaned the money pursuant to the promissory note and that they took that money to pay off the produce debt and that the produce debt was wiped off of your records, that you understood that you took a back seat to other produce creditors.

[BY MR. PROLMAN:]

A. Correct.

Tr. Volume I at 183-85, 204-05, 211-14, 217.

Further, the promissory note states:

... This Note is being delivered to Holder [Made In Nature, Inc.] in satisfaction of accounts receivable held by Holder and otherwise payable by Obligor [Respondent] in a total amount equal to the face amount of this Note; upon delivery of this Note to Holder, such accounts receivable shall be canceled.

RX 10.

The promissory note is governed by, and construed according to the laws of, the State of California (RX 10). California law provides that the parties may agree that a note satisfies an obligation as follows:

§ 3310. Effect of instrument on obligation for which it was taken

....

(b) Unless otherwise agreed . . . , if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken.

Cal. Com. Code § 3310(b) (West Supp. 1998).

Complainant states that in the context of a reparation proceeding Respondent's promissory note, accompanied by the manifest intent that the note satisfy the underlying indebtedness, would operate as payment under the PACA (Complainant's Appeal at 18-20). Further, Complainant states that the "[d]ischarge of an underlying debt by the giving and acceptance of a note (with the manifest intent that the note satisfy the underlying indebtedness) can certainly be accomplished in the disciplinary context." (Complainant's Appeal at 19-20.)

However, Complainant contends that under the circumstances in this case "where there has been a failure of payment, and the consequent institution of a disciplinary action, discharge of the underlying produce debt by any means other than actual payment does not conform to the original contractual obligation . . . and should not be deemed to amount to 'payment' in law or in fact." (Complainant's Appeal at 20.)

I agree with Complainant that the goals of reparation proceedings are much different than disciplinary proceedings and that it may be necessary to view the issuance of a promissory note (with the manifest intent that the note satisfy the underlying indebtedness) as payment in accordance with the PACA in a reparation proceeding but not in a disciplinary proceeding. Further, I agree with Complainant that the substitution of one indebtedness (indebtedness for produce) with another indebtedness (a promissory note) should not, in PACA disciplinary cases, constitute payment in accordance with the PACA because, although the debt for produce has been discharged, the debt remains unpaid. However, in at least

three PACA decisions,¹² the Judicial Officer has stated that a note given by a debtor for an existing debt extinguishes the debt if there is an agreement to that effect. While all of these decisions were issued in PACA reparations proceedings, there is no indication in any of these decisions that the holding would not apply in PACA disciplinary proceedings. Further, the definition of *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) does not indicate that a promissory note extinguishes produce debt if there is an agreement to that effect for the purposes of a reparation proceeding but not for the purposes of a disciplinary proceeding. In light of the hoary court precedent, the Department's decisions in PACA reparation proceedings, and the definition of *full payment promptly* in section 46.2(aa) of the Regulations, I agree with the Chief ALJ's finding that Respondent paid its produce debt by the time of the hearing in this proceeding and that this case is a "slow-pay" case.¹³

Complainant further contends that the transaction between Made In Nature, Inc., and Respondent was not an "arms [sic] length transaction" and that

¹²*Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872 (1991); *Federal Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121 (1965); *Cadenasso v. California-Mexico Distrib. Co.*, 2 Agric. Dec. 751 (1943).

¹³I am changing the Judicial Officer's policy to apply to all PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first. The new policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. 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. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. As discussed in this Decision and Order, *infra*, pp. 54-57, in any "slow-pay" case in which the PACA licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

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.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), that a respondent have no credit agreements with produce sellers for more than 30 days.

Respondent gained a superior bargaining position over Made In Nature, Inc., after Respondent failed to pay for produce in its possession (Complainant's Appeal at 20-24). Generally, produce sellers are not in an equal bargaining position with produce purchasers who are in possession of the produce seller's perishable agricultural commodities.¹⁴ The burden is therefore on the produce purchaser to show that the agreement that the promissory note extinguishes the debt for produce is the result of an arm's length transaction and not the product of the produce purchaser's superior bargaining position. Respondent has met its burden of proof. Mr. Prolman testified that he initiated the loan and carefully examined Respondent's financial prospects prior to making the loan, as follows:

BY MR. KEATON:

Q. Mr. Prolman, what do you recognize that document [referring to the promissory note (RX 10)] to be?

[BY MR. PROLMAN:]

A. That is a promissory note.

Q. Is that a document that you had a chance to be part of?

A. Yes.

Q. And in what capacity were you a party to that transaction?

A. I authorized it. I initiated it.

....

Q. And probably in the course of that, you've done quite a bit of due diligence as to why you think this company [Respondent] is viable going forward, is that right?

A. Yes, I have, extensively.

¹⁴See *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 122 (1984) (stating that after the buyer has the produce, the parties are no longer dealing on equal terms; the seller can no longer refuse to sell; the buyer is the only one with options, *i.e.*, he can pay, or not pay, as agreed).

Q. In assessing the value of this transaction, as I'm sure you have, what are the factors you've been looking at in terms of putting a value on your decision to buy into this company?

A. Many factors. One, the character of the operators. I have full confidence in them, I trust them and they're very hard working. Number two, it's a viable concept and although they had a difficulty in the past, as all start-up businesses do, they corrected it and it's a profitable operation. And we're very clear that it's got a great future to itself and we would like to be a part of that. In fact, we're trying hard to be a part of that. In fact, it's critical that we are connected because we rely on Goodness Greeness to move our merchandise. We'd be stuck if they didn't.

Q. In your opinion is the Respondent strategically positioned within the small segment of the industry to seize upon opportunities going forward?

A. I'm sorry. I didn't understand the question.

Q. Is the Respondent at this time in a very good position to seize opportunities with this market expanding in the future?

A. Oh, he's in the best situation to do that. He dominates the Chicago or Midwestern area completely. There was another mention that there might be other companies to serve the needs. There is none other. Actually there were some but they went out of business and stuck us and didn't pay us. There is nobody else here, and they provide a very, very important function to us in going to Jewel's and Dominick's and Treasure Island and all the health food stores that are in the area.

Tr. Volume I at 183, 186-88.

Further, Mr. Prolman testified that he had a senior vice president of Dole Fruit Company analyze Respondent's books before making the loan to Respondent, as follows:

BY MR. KEATON:

Q. Lastly, you mentioned, Miss Hart touched on it a little bit, but you mentioned there was a senior vice president that analyzed the books of this company, is that right?

[BY MR. PROLMAN:]

A. Yes.

Q. The senior vice president, what was he the senior vice president of, what company was that?

A. Made In Nature, Inc.

Q. At that time did that have any connection with Dole Fruit Company?

A. Yes.

Q. To your knowledge has Dole Fruit Company ever employed people that don't know what they're doing basically?

A. This senior vice president used to head up worldwide operations, all the pineapple operations for Dole Fruit Company around the world. He's a senior executive in the company.

Q. So there's no doubt in your mind that his findings and his conclusions and his beliefs based on his review of the documents is enough to support your opinion today?

A. I can tell you that he put his career on the line for those statements and that he believed in them.

Tr. Volume I at 216-17.

Further still, the promissory note, the collateral pledge and security agreement, and the guaranty (RX 10) all indicate that the loan and promissory note were the result of an arm's length transaction and not the product of Respondent's superior bargaining position over Made In Nature, Inc. Under these circumstances, I find that Respondent has proven that the agreement, in which the promissory note (RX 10) operates to extinguish the debt Respondent owed to Made In Nature, Inc., was the result of an arm's length transaction between Respondent and Made In Nature, Inc., and was not the product of Respondent's superior bargaining position over Made In Nature, Inc.

However, I agree with Complainant that a promissory note may, by agreement

of the parties, extinguish debt, but the debt should be viewed for the purposes of PACA disciplinary proceedings as unpaid. Therefore, I am adopting the following policy: In all PACA disciplinary cases for failure to pay in accordance with the PACA, payment of antecedent debt for perishable agricultural commodities with a promissory note executed after this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first, will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the promissory note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position.¹⁵

Seventh, Complainant contends that the Chief ALJ's assessment of a civil penalty is not consistent with the intent of Congress. (Complainant's Appeal at 24-31.) Specifically, Complainant contends: (1) that "a civil penalty as a sanction is not intended to be the primary or the sole sanction alternative available to the Secretary to address violations of the PACA" (Complainant's Appeal at 25); (2) that "[t]he civil penalty alternative is not intended to be utilized as a lesser form of sanction" (Complainant's Appeal at 25); (3) that revocation and suspension of a PACA license are not "excessive" sanctions (Complainant's Appeal at 25); (4) that a "civil penalty should be considered most especially where a violator has not engaged in a pattern of violation of the PACA over years but when the violation is of an isolated kind" (Complainant's Appeal at 30); and (5) that "[t]he sanction set by the [Chief ALJ] is not consistent with the gravity of Respondent's continued violations of the PACA, its years of failure to pay and of robbing produce sellers to pay past due produce debt, and should not be upheld" (Complainant's Appeal at 30-31).

As an initial matter, Complainant does not cite and I cannot locate any place in the Initial Decision and Order in which the Chief ALJ states that a civil penalty is intended to be the primary or the sole sanction alternative available to the Secretary to address violations of the PACA or that the civil penalty alternative is intended to be utilized as some form of minimum or lesser sanction. Moreover,

¹⁵Complainant states that "'payment' normally has the connotation of payment in legal tender" and that "[d]ischarge of an underlying indebtedness by the giving and acceptance of a note (with the manifest intent that the note satisfy the underlying indebtedness) can certainly be accomplished in the disciplinary context." (Complainant's Appeal at 19-20.) The Agricultural Marketing Service may wish to consider instituting a rulemaking proceeding to amend the definition of *full payment promptly* in section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) to identify those circumstances in which payment in legal tender is required and those circumstances in which giving and accepting a promissory note, with the manifest intent that the note satisfy the underlying indebtedness, constitutes payment.

while the Chief ALJ states that the House Subcommittee on Risk Management and Specialty Crops of the House Committee on Agriculture considered a bill that would have repealed the PACA as excessive (Initial Decision and Order at 10) and states that an important segment of the produce industry sought repeal of the PACA for excessiveness in its administration (Initial Decision and Order at 14), the Chief ALJ does not state in the Initial Decision and Order that revocation and suspension of a PACA violator's license are excessive sanctions.

I agree with Complainant's contention that a civil penalty should be considered in circumstances in which a PACA violator has not engaged in a pattern of violations of the PACA over years. I also agree with Complainant that, during the period April 1993 through June 1994, Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 35 sellers of the agreed purchase prices in the total amount of \$634,791.13 for 165 transactions involving perishable agricultural commodities, which Respondent purchased and accepted in interstate commerce. Further, while Respondent reduced the debt it owed to produce sellers during the period between June 1994 and March 13, 1996, Respondent incurred substantial roll-over debt during that time, which was not paid in accordance with the PACA. Specifically, a compliance investigation conducted in August 1995, revealed that Respondent had paid approximately \$602,000 of the \$634,791.13 produce debt identified in the Complaint, but had incurred roll-over debt of \$245,761.36 for 75 lots of produce received by Respondent from seven produce sellers during the period November 1994 through August 1995 (CX 83; Tr. Volume I at 5, 19). A December 1995 compliance investigation revealed that Respondent had paid the remaining produce debt identified in the Complaint, had paid approximately \$82,000 of the \$245,761.36 of roll-over debt found during the August 1995 compliance investigation, but had incurred new roll-over debt of \$49,528.55 for produce received by Respondent from four produce sellers during the period August 1995 through December 1995 (CX 91-98, 102-105; Tr. Volume I at 20). A compliance investigation conducted on February 26, 1996, revealed that Respondent owed \$206,745.54 for 31 lots of produce purchased from one produce supplier, Made In Nature, Inc., during the period December 1994 through February 1996 (CX 109-119; Tr. Volume I at 21-22). Respondent did not pay the last of the roll-over debt and achieve compliance with the payment provisions of the PACA until March 13, 1996, when it gave Made In Nature, Inc., a promissory note (RX 10) which, as agreed by Made In Nature, Inc., and Respondent,

extinguished the debt Respondent owed to Made In Nature, Inc., for produce.¹⁶

However, I find that in "slow-pay" cases the imposition of a civil penalty in lieu of a suspension or license revocation should be considered. Neither section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995] nor the legislative history applicable to PACAA-1995 limits the Secretary's authority to impose a civil penalty for violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in lieu of a license revocation or suspension. Further, Mr. Lon Hatamiya, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, the agency which administers the PACA, testified, during a hearing conducted on 1995 legislation to amend the PACA, that it would often be in the public interest to impose a monetary penalty and allow a PACA violator to remain in business.¹⁷ Mr. Hatamiya also submitted a written statement, made part of the record of the legislative hearing, in which he states that the sanctions of suspension or revocation of a PACA license are, at times, appropriate sanctions for egregious violations of the PACA, but that in other instances the public interest could better be served by imposing a monetary penalty rather than forcing the PACA violator out of business.¹⁸

It is my view that the imposition of a civil penalty in a "slow-pay" case would not only be a strong inducement to PACA violators to pay produce suppliers and attain full compliance with the payment requirements of the PACA, but also would serve as a significant deterrent to future violations by the PACA violator and others. Therefore, I am changing the policy of the Judicial Officer, and in any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but that the respondent is in full compliance

¹⁶As discussed in this Decision and Order, *supra*, pp. 50-51, in all PACA disciplinary cases for failure to pay in accordance with the PACA, payment of antecedent debt for perishable agricultural commodities with a promissory note executed after this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first, will not constitute payment in accordance with section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)), even if a respondent can show that the parties agreed that the promissory note would extinguish the debt and constitute payment and the agreement to accept the promissory note as payment was an arm's length transaction and not the product of a respondent's superior bargaining position.

¹⁷*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 12, 34.)

¹⁸*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA). (RX 8 at 106.)

with the PACA by the date of the hearing¹⁹ (a "slow-pay" case), a civil penalty *may* be imposed. 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. The factors to be considered when deciding whether to impose a civil penalty or a license suspension in a "slow-pay" case include: (1) the length of time during which a respondent was in violation of the payment requirements of the PACA; (2) the number of a respondent's violations and the dollar amounts involved; (3) the roll-over debt, if any, incurred by the PACA violator; (4) the time that it takes the PACA violator to achieve compliance with the PACA; (5) the impact of the violations on the industry as a whole; and (6) whether the PACA violator's financial condition is such that an appropriate civil penalty, large enough to be an effective deterrent to future violations of the PACA, would not substantially increase the risk that the PACA violator's future produce sellers may not be paid in accordance with the PACA.²⁰

PACA disciplinary sanctions for failure to pay in accordance with the PACA are not punitive in nature. The PACA violator who has failed to pay in accordance with the PACA has done nothing worthy of punishment or even

¹⁹See note 13 for the "slow-pay"/"no-pay" policy applicable to PACA disciplinary cases instituted after the date this Decision and Order is published in *Agriculture Decisions*, or after personal notice of this Decision and Order served on a respondent, whichever occurs first.

²⁰In *In re Ruma Fruit & Produce, Co.*, 55 Agric. Dec. 642 (1996), the complainant took the position that if a civil penalty were to receive any consideration, the record should be reopened to provide for a thorough analysis of respondent's financial circumstances and only if respondent is financially stable should the imposition of a civil penalty be considered. I found complainant's position perplexing because the new civil penalty authority requires neither analysis of financial circumstances nor a finding that a respondent is financially stable prior to the assessment of a civil penalty in lieu of a suspension or revocation. However, I have come to the view that a PACA violator's financial condition may be considered when determining whether to impose a civil penalty in lieu of a license revocation or suspension. A respondent's financial condition should be strong enough so that the imposition of a civil penalty, in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case, would not substantially increase the risk that the PACA violator's future produce sellers would not be paid in accordance with the PACA. (The burden of proof is on a respondent who seeks a civil penalty in lieu of a license suspension to show that the respondent's financial condition is such that the imposition of a civil penalty would not substantially increase the risk that future produce sellers would not be paid in accordance with the PACA.) While revocation and suspension of a PACA violator's license may result in the reduction of a PACA violator's ability, or the PACA violator's complete inability, to pay persons to whom the violator owes money for produce at the time of the revocation or suspension, a revocation eliminates the possibility of a PACA violator purchasing more perishable agricultural commodities and failing to pay future produce sellers and a suspension eliminates the possibility of a PACA violator purchasing more perishable agricultural commodities and failing to pay future produce sellers during the period of suspension.

remotely resembling a crime. The failure to pay in accordance with the PACA is *malum prohibitum*, not *malum in se*. There is nothing inherently evil in being unable to pay one's produce sellers promptly.

Therefore, if, in a "slow-pay" case, a PACA violator's financial condition is strong enough so that the imposition of a civil penalty (in an amount that would operate as an effective deterrent to future violations of the PACA and would be appropriate under the circumstances of the case) would not substantially increase the risk that the PACA violator's future produce sellers would not be paid in accordance with the PACA and would permit a PACA violator to stay in business, a civil penalty, rather than the suspension of the PACA violator's license, should be imposed. License suspension poses a risk that a PACA violator may not pay those who sell produce to the violator between the time of the hearing and the effective date of the sanction; thereby thwarting one of the primary purposes of the PACA. This risk may be reduced if, instead of having its license suspended, a PACA violator in a financially strong condition is assessed a civil penalty. Further, license suspension might pose a greater risk of putting the PACA violator out of business than would an appropriate civil penalty, and the Administrator of the Agriculture Marketing Service, United States Department of Agriculture, issued a written statement in connection with legislative hearings which culminated in PACAA-1995 that, at least in some instances, "the public interest could better be served not by forcing the [PACA] violator out of business, but by imposing a monetary penalty instead."²¹

I have also come to the view that a civil penalty would not be an appropriate sanction in a "no-pay" case in which the violations are flagrant or repeated because the PACA violator's failure to get back into compliance with the PACA promptly would indicate that the violator continues to be financially irresponsible and limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA.²²

²¹*Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture*, 104th Cong. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA.) (RX 8 at 106.)

²²*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 18 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216, appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17,

Further, the imposition of a civil penalty in a "no-pay" case would require the PACA violator to pay the civil penalty rather than pay produce sellers to whom the PACA violator owes money and thereby thwart one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment for perishable agricultural commodities promptly.²³

Eighth, Complainant contends that the Chief ALJ erred by failing to consider evidence regarding Respondent's capitalization and financial status in determining whether a civil penalty is an appropriate sanction. (Complainant's Appeal at 31-39.) Specifically, Complainant contends: (1) that the Chief ALJ erred in ruling that Ms. Colson's testimony regarding Respondent's financial condition be stricken due to unfair surprise; (2) that the Chief ALJ erred in concluding that Respondent's financial condition was such that it could pay a civil penalty when that issue had been ruled as irrelevant for purposes of Ms. Colson's testimony and evidence; and (3) that the Chief ALJ erred in according weight to Respondent's unsubstantiated testimony regarding its financial condition when Complainant was prevented from introducing its testimony and evidence on Respondent's financial condition into the record (Complainant's Appeal at 39).

1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

²³*See In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 19-20 (Dec. 5, 1997) (stating that the appropriate sanction for no-pay cases is license revocation; allowing a respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension when the respondent had failed to pay promptly for large produce purchases over a long period of time with substantial produce debt still owing would defeat the purposes of the PACA, would not protect produce sellers, and would not serve as a sufficient deterrent to others); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (stating that the appropriate sanction for no-pay cases is license revocation; allowing a respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension when the respondent had failed to pay promptly for large produce purchases over a long period of time with substantial produce debt still owing would defeat the purposes of the PACA, would not protect produce sellers, and would not serve as a sufficient deterrent to others), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997).

The record reveals that Respondent objected to, and the Chief ALJ excluded, evidence (testimony given by Ms. Colson, an auditor with the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, and CX 121 and 122) concerning Respondent's financial capitalization and financial status, based on surprise (Tr. Volume I at 89-97). However, Complainant filed Index to Compliance Investigation Exhibits and Potential Witness List on March 7, 1996, in which Complainant states that Complainant intends to call the following witnesses:

Agency representative
Auditor
United States Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Division
PACA Branch
Trade Practices Section
Washington, D.C.

-The designated agency representative is expected to testify as to analysis performed on [R]espondent's financial documents obtained during the three compliance investigations which reflect the financial stability of the [R]espondent

Index to Compliance Investigation Exhibits and Potential Witness List at 2.

Based on Complainant's March 7, 1996, filing, I find that Respondent had ample notice that Complainant would introduce evidence concerning Respondent's financial condition and the Chief ALJ's exclusion of Ms. Colson's testimony and CX 121 and CX 122, based on surprise, was error.

Complainant further contends that the Chief ALJ erred by basing his conclusion that Respondent can pay a \$30,000 civil penalty on testimony provided by Ms. Moran and Mr. Robert Scaman because their testimony is "tainted by their obvious self-interest and the fact that neither witness produced one piece of documentary evidence to substantiate their bare allegations." (Complainant's Appeal at 39.) I infer that the Chief ALJ found Ms. Moran and Mr. Robert Scaman to be credible witnesses who are knowledgeable of the financial condition of Respondent. The record does not reveal otherwise, and I do not find that the Chief ALJ erred by basing his conclusion that Respondent can pay a \$30,000 civil penalty on testimony given by Ms. Moran and Mr. Robert Scaman.

I reviewed the testimony given by Ms. Colson, CX 121, and CX 122 carefully and weighed this evidence against the evidence presented by Respondent

regarding Respondent's financial condition. While the issue is a close one, I find that Respondent has met its burden of proving that its financial condition is such that the imposition of a civil penalty, appropriate under the circumstances in this case and large enough to deter Respondent and others from future violations of the PACA, will not substantially increase the risk that Respondent's future produce sellers will not be paid in accordance with the PACA.

Ninth, Complainant contends that the Chief ALJ "erred in according no deference at all to the [a]gency's sanction recommendation." (Complainant's Appeal at 39.)

This case is governed by the Department's sanction policy in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, *supra*, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to impose in the event that it is found that a violation occurred.²⁴

²⁴*In re Allred's Produce*, 56 Agric. Dec. ____, slip op. 42 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 527-29 (1984); *In re Larry W. Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1944 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Samuel Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978);

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.²⁵ The Chief ALJ does not indicate that he gave "no deference at all to the [a]gency's sanction recommendation" as Complainant contends. Instead, the Chief ALJ states that he rejects Complainant's sanction recommendation and sets forth his reasons for his rejection of Complainant's sanction recommendation. I do not find, as Complainant contends, that the Chief ALJ gave no deference at all to the agency's sanction recommendation.

Ms. Clare Jervis, marketing specialist, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the Department recommended a 90-day suspension of Respondent's PACA license (Tr. Volume I at 107). While appropriate factors were taken into account in arriving at this recommendation, including the number of violations, the dollar amount of the violations, the period of time of the violations, the length of time it took Respondent to pay the produce debt identified in the Complaint, the results of the August 1995, December 1995, and February 1996 compliance investigations, and Respondent's improved payment practices (Tr. Volume I at 108), I am rejecting the agency's sanction recommendation in this case. Complainant has consistently taken the position that the promissory note issued by Respondent on March 13, 1996, to Made In Nature, Inc. (RX 10), does not constitute payment and that this case is a "no-pay" case (Complainant's Supplemental Brief at 4-5; Complainant's Appeal at 17-24). Despite this position (with which I disagree for the reasons set forth in this Decision and Order, *supra*, pp. 36-50), Complainant recommends a 90-day suspension of Respondent's PACA license. A suspension of a PACA violator's license in a "no-pay" case is contrary to long-standing Department policy which has been to revoke a PACA violator's license in a "no-pay" case. Had I agreed with Complainant's position that this is a "no-pay" case, I would have revoked Respondent's license.

In re Eric Loretz, 36 Agric. Dec. 1087, 1096 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Professional Commodity Serv.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re George Rex Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

²⁵*In re Allred's Produce*, 56 Agric. Dec. ____, slip op. 43 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

I disagree with Complainant's position that Respondent was not in compliance with the PACA by the date of the hearing and find that, under the circumstances of this "slow-pay" case (which are set forth in this Decision and Order, *supra*, pp. 52-53), a civil penalty is warranted. Complainant has, at least in part, based its recommendation that Respondent's PACA license be suspended for 90 days on Complainant's view that Respondent was not in compliance with the PACA at the date of the hearing (Tr. Volume I at 112-15). Therefore, I reject the agency's recommendation, and I am assessing Respondent an \$82,500 civil penalty.

Tenth, Complainant contends that the Chief ALJ erred by failing to provide any basis for the \$30,000 civil penalty (Complainant's Appeal at 43-44.) However, the Chief ALJ states in the Initial Decision and Order that he considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) (Initial Decision and Order at 16). I do not find that the Chief ALJ's failure to more fully explain the amount of the civil penalty he imposed to be error. However, I do find that the amount of the civil penalty imposed by the Chief ALJ to be far too low in light of the seriousness, nature, and amount of Respondent's violations.

Complainant and Respondent stipulated that Respondent violated the PACA by failing to make full and prompt payment in the amount of \$634,791.13 to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, as set forth in paragraph III of the Complaint.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) provides that the Secretary may assess a civil penalty of \$2,000 for each violative transaction or each day the violation continues. Respondent engaged in 165 violative transactions and Respondent could be assessed a maximum civil penalty of \$2,000 for each of these violative transactions, for a total civil penalty of \$330,000.

Respondent's willful, flagrant, and repeated violations of the payment provisions of the PACA are serious, and they thwart one of the primary purposes of the PACA, *viz.*, the prompt payment of produce sellers. Respondent has 24 employees, and I find, based on Respondent's gross sales of approximately \$6,750,000 during Respondent's fiscal year ending February 1996, that Respondent is a medium-sized business.

Based upon the seriousness, nature, and amount of Respondent's violations, the number of Respondent's employees, and the size of Respondent's business, I have assessed a civil penalty of \$500 for each of Respondent's violative transactions. I believe that the circumstances of this case warrants the imposition of an \$82,500 civil penalty against Respondent and that this civil penalty will serve as a

significant deterrent to future violations by Respondent and others.

The civil penalty must be paid within 90 days after the date that this Decision and Order is served on Respondent. If Respondent fails to pay the civil penalty within 90 days after service of this Decision and Order on Respondent, a 50-day²⁶ suspension of Respondent's PACA license shall take effect beginning 91 days after service of this Order on Respondent.

Respondent does not appeal the Initial Decision and Order and contends that the "Chief ALJ . . . was entirely correct in imposing a civil penalty of \$30,000.00 in this case." (Respondent's Response at 32.) However, for the purpose of preserving the issue for appeal, Respondent restates its contention that Complainant's Appeal was filed after the Initial Decision and Order became final; therefore, the Judicial Officer has no jurisdiction to hear Complainant's Appeal (Respondent's Response at 3-4).

While I agree with Respondent that I have no jurisdiction to hear an appeal filed after an initial decision and order becomes final,²⁷ I disagree with

²⁶Ms. Clare Jervis, marketing specialist for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the Department recommends a 90-day suspension of Respondent's PACA license (Tr. Volume I at 107). However, Complainant has, at least in part, based its recommendation that Respondent's PACA license be suspended for 90 days on Complainant's view that Respondent was not in compliance with the PACA by the date of the hearing (Tr. Volume I at 112-15). As discussed in this Decision and Order, *supra*, pp. 36-50, I disagree with Complainant's view that Respondent was not in compliance with the PACA by the date of the hearing. Therefore, I reject the agency's recommendation, and I am imposing a 50-day suspension of Respondent's PACA license to take effect only if Respondent does not pay the civil penalty in accordance with this Decision and Order.

²⁷See *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final);

Respondent's contention that Complainant's Appeal was filed after the Initial Decision and Order became final. The reasons for my conclusion that Complainant's Appeal was timely filed are fully set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. ___ (Sept. 18, 1996) (Ruling on Respondent's Motion to Dismiss Appeal), and *In re Scamcorp, Inc.*, 55 Agric. Dec. 1395 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal), and no purpose would be served by reiterating those reasons in this Decision and Order.

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

Order

Respondent is assessed a civil penalty of \$82,500 which shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and forwarded to, and received by, James Frazier, U.S. Department of Agriculture, Agricultural Marketing Service, Fruit & Vegetable Div., PACA Branch, 1400 Independence Ave., S.W., Room 2095-South Building, Washington, DC 20250-0242, within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-95-0502. In the event the PACA Branch does not receive a certified check or money order in accordance with this Order, a 50-day suspension of Respondent's PACA license shall take effect beginning 91 days after service of this Order on Respondent.

In re Veg-Pro Distributors, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.

PACA Docket No. D-95-0502.

Ruling on Respondent's Motion for Temporary Stay of Dissemination of Decision filed February 10, 1998.

Kimberly D. Hart, for Complainant.

Michael J. Keaton, Glen Ellyn, IL, for Respondent.

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

Ruling issued by William G. Jenson, Judicial Officer.

On January 29, 1998, I issued a Decision and Order in this proceeding: (1) concluding that Scamcorp, Inc., d/b/a Goodness Greeness [hereinafter Respondent], willfully, flagrantly, and repeatedly violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly to 35 sellers for 165 lots of perishable agricultural commodities purchased in interstate commerce during the period April 1993 through June 1994, with a total amount of \$634,791.13 overdue and unpaid on June 13, 1994; (2) assessing Respondent a civil penalty of \$82,500 to be paid within 90 days after service of the Decision and Order on Respondent; and (3) providing for a 50-day suspension of Respondent's PACA license, if the \$82,500 civil penalty is not paid within 90 days after service of the Decision and Order on Respondent. *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 18, 68 (Jan. 29, 1998).

On February 5, 1998, Respondent filed a motion seeking a stay of any publication or other dissemination of the January 29, 1998, Decision and Order. (Respondent's Request for Temporary Stay of Any Publication or Other Dissemination of Decision on Appeal Pending Expiration of Period for Further Appeal [hereinafter Respondent's Motion for Stay of Dissemination].) On February 6, 1998, the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a response opposing Respondent's Motion for Stay of Dissemination. (Complainant's Response to Respondent's Motion to Judicial Officer for Temporary Stay on Publication or Other Dissemination of the Decision and Order [hereinafter Complainant's Response to Respondent's Motion for Stay of Dissemination].) On February 6, 1998, the case was referred to the Judicial Officer for a ruling on Respondent's Motion for Stay of Dissemination.

The public nature of this proceeding, the requirement that evidence and documents in the proceeding be made available to the public, and the right of those regulated by PACA to be informed of PACA decisions, militate against granting Respondent's Motion for Stay of Dissemination.

United States Department of Agriculture [hereinafter USDA] disciplinary

proceedings instituted under the PACA in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter Rules of Practice] are public proceedings.

Moreover, the January 29, 1998, Decision and Order issued in this proceeding is a final agency decision,¹ and in accordance with the Freedom of Information Act, the decision must be made available to the public, as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

....

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting

¹Section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provides that a party to the proceeding may file a petition to rehear or reargue the proceeding or to reconsider the decision of the judicial officer within 10 days after the date of service of such decision upon the party filing the petition. Nonetheless, section 1.145(i) of the Rules of Practice provides that the decision of the Judicial Officer is a final agency decision, as follows:

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer 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.

7 C.F.R. § 1.145(i).

opinions, as well as orders, made in the adjudication of cases;

....

unless the materials are promptly published and copies offered for sale. . . . To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion. . . . However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. . . . A final order . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2) (Supp. II 1996).

United States Department of Agriculture regulations implementing 5 U.S.C. § 552(a)(2) require each agency within USDA to make final opinions available for public inspection and copying, unless they are promptly published and copies offered for sale (7 C.F.R. § 1.5(a)(1)).

Even in circumstances where an agency has failed to comply with 5 U.S.C. § 552(a)(2), the agency is required to make final opinions, as well as other agency records covered in 5 U.S.C. § 552(a)(2), available to the public in accordance with 5 U.S.C. § 552(a)(3) (Supp. II 1996),² which provides as follows:

²*Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir.) (stating that the opinions and orders referred to in 5 U.S.C. § 552(a)(2), when properly requested, are required to be made available and that such requirement is judicially enforceable under 5 U.S.C. § 552(a)(3) even though the agency has failed to make the opinions and orders available as required by 5 U.S.C. § 552(a)(2)), *cert. denied*, 409 U.S. 1076 (1972); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969) (stating: (1) 5 U.S.C. § 552(a)(3) means that except with respect to records that the agency has made available under 5 U.S.C. § 552(a)(1) and (a)(2) in compliance with the Freedom of Information Act, the agency must make all other identifiable records available (unless exempted by 5 U.S.C. § 552(b)) or face judicial compulsion to do so; (2) if the agency refuses to comply with 5 U.S.C. § 552(a)(1) or (a)(2), it is then subject to suit under the processes spelled

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

....

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Further, while the Freedom of Information Act exempts certain agency records from required release (5 U.S.C § 552(b)(1)-(b)(9)), the January 29, 1998, Decision and Order does not fall within any of the exemptions.

In addition, I agree with Complainant's contention that decisions issued by the Judicial Officer set policy for USDA and that persons regulated under the PACA have the right to be informed of decisions that may affect them. Further, a sanction imposed in a PACA disciplinary proceeding is not only designed to deter future violations by the person against whom the sanction is imposed, but also is designed to deter future violations by other potential PACA violators. Dissemination of a PACA decision issued in a disciplinary proceeding informs persons regulated by the PACA of USDA policies that may affect them and may deter future violations of the PACA.

Respondent contends that a stay of any publication or other dissemination of the January 29, 1998, Decision and Order would avoid a rush to file a petition for reconsideration or a petition for judicial review. However, the time for filing a petition for reconsideration under section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) and for filing a petition for judicial review is not related in any way to the dissemination of a final agency decision to persons other than the parties to the proceeding in which the decision is issued. Instead, a petition for reconsideration must be filed within 10 days after the date of service of the

out in 5 U.S.C. § 552(a)(3); and (3) the only viable interpretation of 5 U.S.C. § 552(a)(3) is that the judicial process is available to compel the disclosure of agency records not made available under 5 U.S.C. § 552(a)(1) or (a)(2), as well as agency records referred to in 5 U.S.C. § 552(a)(3)).

decision upon the party filing the petition for reconsideration³ and a petition for judicial review of the decision must be filed with the United States court of appeals wherein venue lies within 60 days after the entry of the decision.⁴

Further, Respondent indicates that a stay of the dissemination of the January 29, 1998, Decision and Order would maintain the status quo and states that a stay of dissemination would avoid irreparable harm to Respondent's business. Although Respondent's business may be affected by the dissemination of the January 29, 1998, Decision and Order, the Decision and Order has the same legal effect on Respondent whether it is disseminated to persons other than Respondent or not.

For the foregoing reasons, Respondent's Motion for Stay of Dissemination of the January 29, 1998, Decision and Order is denied.

**In re: ANTHONY A. CAITO, PACA Docket No. APP-97-0002; JOSEPH A. CAITO, SR., PACA Docket No. APP-97-0003; JOSEPH A. CAITO, JR., PACA Docket No. APP-97-0004; THOMAS A. CAITO, PACA Docket No. APP-97-0005; JOSEPH T. KOCOT, PACA Docket No. APP-97-0006; and MAGDALINA M. MASCARI, PACA Docket No. APP-97-0007.
Decisions and Orders filed February 26, 1998.**

Responsibly connected.

Each of the Petitioners was determined to be responsibly connected to Caito & Mascari, a company found to have willfully, flagrantly, and repeatedly violated section 2(4) of the PACA by reason of failure to make full payment promptly for produce purchases.

Timothy A. Morris, for Respondent.

Stephen P. McCarron, Washington, D.C., for Petitioners.

Decisions and Orders issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative proceeding to determine whether or not the Petitioners, Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalena M. Mascari, were "responsibly

³7 C.F.R. § 1.146(a)(3).

⁴28 U.S.C. § 2344.

connected" with Caito & Mascari, Inc. (hereinafter sometimes referred to as the "Company"), of Indianapolis, Indiana, a firm that was found to have committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act ("PACA"). The Respondent determined that the Petitioners were responsibly connected to the Company pursuant to section 1(9) of the PACA during the time the Company was found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The violations of section 2(4) resulted from the Company's failure to make full payment promptly for produce purchases during the period from September 15, 1995, through May 1996, in the total amount of \$997,652.91, of which, as of August 8, 1997, \$169,869.92 remained unpaid. In addition, the Company failed to make full payment promptly for an additional \$116,657.71 for produce purchased after May 1996.

The Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, determined that each of the Petitioners was "responsibly connected" pursuant to section 1(9) of the PACA, as corporate officers and/or shareholders of the Company.

These proceedings were initiated when the head of the PACA Branch's Trade Practices Section, Jane E. Servais, wrote a letter dated November 12, 1996, to each of the six Petitioners stating: (1) that an administrative complaint had been filed against Caito & Mascari, Inc., for failure to pay when due for produce in violation of the Act, and (2) that each Petitioner, along with all other officers, directors, and holders of more than ten percent of the stock in Caito & Mascari, Inc., was determined to be responsibly connected to the Company. In a letter dated December 11, 1996, attorney Stephen P. McCarron, Esquire, stated that he represented all the Petitioners except for Anthony A. Caito. In a letter dated December 17, 1996, Petitioner Anthony A. Caito denied that he was responsibly connected to Caito & Mascari, Inc. In a letter dated January 8, 1997, the five other Petitioners, through counsel, denied they were responsibly connected to Caito & Mascari, Inc. Mr. McCarron also began representing Petitioner Anthony Caito in the time period following Mr. McCarron's letter dated January 8, 1997.

The Chief of the PACA Branch, James R. Frazier, then wrote a letter dated February 14, 1997, to Mr. McCarron for each of the six Petitioners advising that the Complaint filed against Caito & Mascari, Inc., alleged a failure to make full payment promptly to 77 sellers for 295 lots of perishable agricultural commodities totaling \$997,652.91. In each letter, Mr. Frazier further informed counsel for Petitioners that the Agency's records indicated that each Petitioner had taken an active role as an officer, director, and/or shareholder in the Company during the

period in which the alleged violations occurred and that each of them was accordingly determined to be responsibly connected.

On March 14, 1997, there were filed Petitions for Review on behalf of each of the six Petitioners. The Agency then filed documents on or about March 28, 1997, that comprised the Agency's record upon which the responsibly connected determination was made by the PACA Branch Chief for each of the Petitioners.

The Petitions were consolidated for a hearing which took place on August 26, 1997, in Indianapolis, Indiana, before Administrative Law Judge Dorothea A. Baker. At the hearing, Petitioners were represented by Stephen P. McCarron, Esquire, McCarron & Associates, Washington, D.C., and Respondent was represented by Timothy A. Morris, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Documents upon which the Chief of the PACA Branch relied in determining that a Petitioner was responsibly connected are identified as the Agency's Records (REC), while additional documents submitted by Respondent in the RC portion of the proceeding are referred to as Respondent's exhibits (AX), and documents submitted by a Petitioner are marked as Petitioner's exhibits (PX).

The disciplinary proceeding against Caito & Mascari, Inc., was conducted immediately prior to the "responsibly connected" proceedings. In 1996, the Uniform Rules of Practice were amended to provide for the joinder of disciplinary actions brought under the provisions of the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) ("PACA" or "Act") and of hearings on the status of responsibly connected ("RC") individuals under that same statute. At the combined proceeding, the disciplinary and responsibly connected proceedings were heard sequentially but witnesses in the disciplinary portion were allowed to testify as to matters relating to the responsibly connected proceedings where appropriate. There is a single transcript for the disciplinary and for all six responsibly connected proceedings.

The Respondent corporation, Caito & Mascari, Inc., offered no evidence in the disciplinary case and premised upon the undisputed evidence, which had been adduced by the Complainant, a Bench Decision was issued finding that the Respondent corporation had willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act by virtue of its failure to abide by the pay requirement provisions of said Act. Accordingly, in said Bench Decision such findings were made and publication was included in the sanction Order. The Bench Decision became final September 30, 1997, and effective October 14, 1997.

As concerns the responsibly connected proceedings, in due course the parties filed initial briefs on or about October 30, 1997. Each party had until November 17, 1997, within which to file reply briefs. No reply briefs were received.

The Decisions and Orders, issued herein, will address each of the Petitioners' cases separately in the order of the Docket Number, after a review of the applicable statutory provisions. Also, certain Findings of Fact, applicable to each of the six Petitioners, will be set forth.

All Findings of Fact are premised upon a consideration of the evidence of record. All requests, motions and proposals of the parties have been considered. To the extent not adopted herein, they have been considered immaterial or not supported by the record.

DISCUSSION OF STATUTORY PROVISIONS

Under the PACA, it is unlawful for any licensee to employ an individual who has been found to have been responsibly connected with an entity that has been determined to have flagrantly and repeatedly violated the Act. Responsible connection is determined by the status of the individual in the violating entity. The Act provides that if one is an officer, director, partner, or shareholder owning more than 10 percent of the violating entity's stock, one is responsibly connected to that entity. A person who has been determined to be responsibly connected may not be employed by a licensee for one year in any capacity and may be employed in the second year only when the employing licensee puts up a bond in an amount satisfactory to the Secretary.

For many years the officer, director, partner, shareholder definition was the basis for a *per se* determination of responsible connection. In 1975, the Circuit Court of Appeals for the District of Columbia Circuit issued a decision in a review of a responsibly connected determination in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975). In that case, Mr. Quinn, the vice-president of a small Ohio corporation, challenged the responsibly connected determination of the Department on the grounds that he had throughout the time of his employment been a truck driver and produce salesman and that while he was vice-president of the entity found to have violated the PACA, he was only nominally an officer, as he had allowed the president and 100 percent shareholder of the corporation to use his name as a formality of incorporation and he never attended corporate meetings nor exercised any responsibility of a vice-president. In fact, his status as a truck driver and salesman changed in no way after he was named vice-president. The Circuit Court found the determination of responsible connection to be a rebuttable presumption. The decision states:

Undeniably, the Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the

wrongdoers themselves. But by the Secretary's construction of Section 1(9), it also smites one who was not only unaware of the wrongdoing but also powerless to curb it.

Id. at 755 (Footnotes omitted.).

Further case law indicated that the Agency's determination could be rebutted if the person could show that his title was nominal or that the Company was the *alter ego* of another. *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). In addition, D.C. Circuit case law indicated there must be some "personal fault or a realistic capacity to counteract or obviate the fault of others" for a finding of responsible connection. *Minotto v. United States Dept. of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).

After the *Quinn* decision, the Agency provided a process through which individuals could contest the determination of responsibly connected status. A non-APA proceeding was provided in which the allegedly responsibly connected individual (denominated "Petitioner" in the proceeding) challenged the Agency's determination. While some circuits held to the *per se* standard of the definition of "responsible connection" found in the PACA, the D.C. Circuit continued to adhere to the rationale of the *Quinn* decision.

Section 1(9) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9), defines the term "responsibly connected." The definition was recently amended by section 12 of the Perishable Agricultural Commodities Act Amendments of 1995 (PACAA), Pub. L. 104-48, 109 Stat. 424, Nov 15, 1995, by adding a second sentence. The definition now reads as follows:

(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 percentum 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 Act and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners.

The amended definition provides that an individual determined to be responsibly connected must be provided an opportunity to show by a preponderance of the evidence that he/she (1) was not actively involved in the

violations of the entity and (2) was only nominally an officer, director, partner, or shareholder or was not an owner of an entity that is the *alter ego* of its owner.

This provision provides two (2) ways for a person to demonstrate that he is not responsibly connected: First, by showing that he was not in fact an officer, director or more than 10 percent shareholder; and second, by showing that even though named an officer, director or 10 percent shareholder, he is not responsibly connected because he was not actively involved in the violations, and the positions were nominal or the corporation was really the *alter ego* of others. The first method of avoiding responsible connection has been part of the Act for many years.

To avoid a responsibly connected finding, a person named as an officer, director or ten percent shareholder must first show that he was not "actively involved in the activities resulting in a violation." The legislative history does not supply any specific aid in interpreting this phrase. However, this part of the definition of "responsibly connected" was based on D.C. Circuit case law, and this case law provides some guidance to the meaning of this phrase. *Bell v. Department of Agriculture, supra*. However, the *Bell* decision is not dispositive of such issues as to whether knowledge alone of the violations is sufficient; whether the alleged responsibly connected person had a realistic capacity to counteract or obviate the violations; and, to what extent is "active" involvement in the activities resulting in the violations required. The Petitioners in the instant proceeding argue that more than some tangential activities, that somehow makes the violation possible, is required.

It must be kept in mind that the amendments changed section 1(9) to provide a person with the opportunity to rebut the presumption of responsible connection so long as the person was not "actively involved in the activities resulting in a violation of this Act," and such amendments must be interpreted consistent with the Court's recognition in *Quinn* that the PACA "was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves." *Quinn*, 510 F.2d at 755.

Consequently, any person meeting the definition of "responsibly connected" in the first sentence of section 1(9) may rebut this determination by demonstrating by a preponderance of the evidence that both requirements of the two-prong test have been satisfied. To satisfy the first prong, a Petitioner must demonstrate that he or she was not actively involved in the activities resulting in a violation of the Act. As the test is stated in the conjunctive "and," a Petitioner failing to satisfy the first prong cannot pass the test and does not even reach the second prong. If a Petitioner satisfies the first prong, however, then he or she also must meet at least one of two alternative requirements necessary to satisfy the second prong of the

test. A Petitioner also must prove that he or she either (1) was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or (2) was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners.

Findings of Fact With Respect to All Six Petitioners

The following Findings of Fact, unless otherwise indicated, are applicable to each of the six Petitioners, and are incorporated by reference in the Decisions issued as to each of the six Petitioners without repetition in each Decision.

1. Caito & Mascari, Inc., is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address was 1341 West 29th Street, Indianapolis, Indiana 46208. Pursuant to the licensing provisions of the PACA, license number 133842 was issued to Caito & Mascari, Inc., on May 17, 1951. This license terminated on May 17, 1997, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Caito & Mascari, Inc., failed to pay the required annual renewal fee.

2. On January 16, 1997, Caito & Mascari, Inc., filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*) in the United States Bankruptcy Court for the Southern District of Indiana. This Petition has been designated Case No. 96-12380-FJO-7.

3. On August 27, 1997, I issued a Bench Decision finding that Caito & Mascari, Inc., had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and ordered that this finding be published. Specifically, it was found that (1) during the period September, 1995 through May, 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$997,652.91 of 295 lots of perishable agricultural commodities purchase, received, and accepted in interstate and foreign commerce; (2) as of August 8, 1997, Caito & Mascari, Inc., still had not paid at least \$169,896.92 to 30 of the 77 sellers whose transactions account for \$736,359.20 of the total \$997,652.91 alleged in the disciplinary complaint filed by the Agency against Caito & Mascari, Inc., on November 7, 1996; and (3) Caito & Mascari, Inc., also failed to make full payment promptly to 6 of these 30 sellers for an additional \$116,657.71 in perishable agricultural commodities purchased, received, and accepted after May 1996, and had not paid this amount as of August 8, 1997.

ANTHONY A. CAITO
PACA Docket No. APP-97-0002
Findings of Fact With Respect to Anthony A. Caito

1. Petitioner Anthony A. Caito is an individual whose home address is 310 Woodland East Drive, Greenfield, Indiana 46140. Anthony Caito is the nephew of Petitioners Joseph Caito, Sr., Thomas Caito, and Magdalina Mascari. He is the cousin of Petitioner Joseph Caito, Jr..

2. Petitioner Anthony A. Caito owned 0.31% of Caito & Mascari, Inc.'s stock. (REC-7, pp. 56, 63). He attended Caito & Mascari's annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. Petitioner Anthony A. Caito started working for Caito & Mascari, Inc., in approximately 1962. Beginning in the late 1970s, he worked as salesman and a buyer for Caito & Mascari, Inc., and was responsible for Florida vegetables and citrus, Texas vegetables, local vegetables, and onions. (Tr. 104, 117). He resigned as a salesman and buyer for Caito & Mascari, Inc., on January 5, 1996. (REC-1, p. 6; REC-6, p. 10; Tr. 102).

4. Anthony A. Caito was vice-president of Caito & Mascari, Inc., from March 12, 1995, to January 4, 1996. (Tr. 102-105). In early 1995, there was a change in ownership of the Company. (Tr. 103). Mark Caito and Anthony N. Caito, cousins of Anthony A. Caito and major shareholders in the Company, sold their interest in the Company to Joseph T. Kocot. (Tr. 103). At a meeting of the Board of Directors of the Company on March 12, 1995, the Board of Directors elected Anthony A. Caito as the vice-president. Prior to the appointment as vice-president Anthony A. Caito was a buyer and a salesman for the Company. After his appointment as vice-president, Petitioner Anthony A. Caito's compensation did not increase even though he had been named as vice-president. Corporate documents confirming that he was vice-president include PACA license records (REC-1, pp. 7, 12, 20, 22); Caito & Mascari Inc.'s bankruptcy pleadings and schedules (REC-6, p. 19) and the Agenda for Caito & Mascari Inc.'s Annual Shareholders Meeting. (REC-2, pp. 1-3, 6). Petitioner resigned as corporate vice-president of Caito & Mascari, Inc., on January 5, 1996. (REC-1, p. 6; REC-6, p. 20; Tr. 102).

5. Anthony A. Caito had check writing authority for both the operations and the payroll accounts of Caito & Mascari, Inc. (Tr. 105). After Mark J. Caito and Anthony N. Caito left the Company in January, 1995, he was one of only three persons authorized to sign checks on Caito & Mascari Inc.'s operations and payroll accounts. All checks required at least two signatures. (Tr. 170). Included in Respondent's exhibits are six payroll checks and two checks for PACA License renewal signed by Petitioner Anthony A. Caito. (REC-1, pp. 15, 19; REC-9).

6. Petitioner Anthony A. Caito was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions With Respect to Anthony A. Caito

Petitioner Anthony A. Caito was actively involved in the activities resulting in the PACA violations committed by Caito & Mascari, Inc. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation and that the person either was only nominally a partner, officer, director or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The record in this case reveals that Anthony A. Caito was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected without consideration of the other factors set forth in section 1(9).

Although the legislative history of the 1995 amendments does not define active involvement, nevertheless guidance on this matter may be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm.

Petitioner Anthony A. Caito's attempts to disclaim responsibility for the activities leading to the violations are simply not persuasive. The record evidence does not support his contentions that he did not exercise any control in the Company nor did he have any power over payments made for produce that he purchased. He admits to being a signatory on the checks destined for the sellers of the products he purchased. However, he argues, that he had no control over whether the checks were mailed to the sellers. Moreover, it is contended that he resigned his position and left the Company on January 4, 1996, prior to "most" of the slow pay violations. Anthony A. Caito admits he was vice-president during the entire violations period, but argue he was a nominal officer and he denies that he participated in the management of the Company or that he had the power to do so. A guide to active involvement requires the examination of whether a Petitioner either had personal fault for the violations or if he failed to counteract or obviate the fault of others for the violations.

Personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Anthony A. Caito performed both acts of commission and omission, he was actively involved in the Caito & Mascari, Inc.'s violations of the Act.

Petitioner Anthony A. Caito's attempts to disclaim responsibilities for the activities leading to the violations are not persuasive. As a produce buyer for

Caito & Mascari, Inc., for twenty years for a wide array of produce, Petitioner Anthony A. Caito was closely involved in the Company's purchasing activities. Not only did he buy the produce, but he also had extensive responsibilities for approving invoices and writing checks on both the Company's operations and payroll accounts. (Tr. 105). His involvement covered the entire spectrum of a produce company's activities: - he bought the produce, he approved the invoices, he had the checks processed, and then he signed the checks. (Tr. 106-108). He was involved from the beginning to the end of the process. Although he claims that he had no role in running the Company, an employee and director of Caito & Mascari, Inc., with an affiliation with the Company exceeding fifty years, testified that in his extensive time with the Company, Caito & Mascari, Inc.'s president, vice-president and treasurer ran the Company as long as he could remember. (Tr. 125). The vice-presidency was never a do nothing position at Caito & Mascari, Inc., throughout its history, and contrary to Petitioner Anthony A. Caito's assertions, it was not when he occupied that position.

Petitioner Anthony A. Caito has failed to satisfy the requirements of the first prong of the test, namely he has not rebutted the presumption of responsible connection inasmuch as the record evidence indicates that he was responsibly connected with Caito & Mascari, Inc., during the time of the violations of the Act. His contentions that he was not actively involved or at fault for the violations; that his role as vice-president was merely nominal; and, that Caito & Mascari, Inc., was the *alter ego* of unnamed others are contentions are not supported by case law or the factual records.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term nominal, nevertheless, recourse is again made to the decisions of the Court of Appeals for the District of Columbia Circuit, particularly *Bell v. Department of Agriculture*, 39 F.3d 1199 (D.C. Cir. 1994), wherein the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. It was indicated by the Court that a person may show that he was only a nominal officer, director or shareholder by proving that he lacked an actual significant nexus with the violating Company. Where responsibility was not based on the individuals personal fault, it would have to be based on at least his failure to counteract or obviate the fault of others. Thus, personal fault is not required. Considerable evidence was presented during the hearing showing that Anthony A. Caito had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as corporate vice-president.

Petitioner Anthony A. Caito's explanations and description of his roles and functions with the Company are subject to doubt and have been given less than full

credence, particularly with respect to the degree of his participation in the Company's business decisions. At the hearing, he made the claim that he never discussed business with Caito & Mascari, Inc.'s president, secretary or treasurer. (Tr. 119). It is difficult to accept the premise that a man who has worked as a buyer for twenty years and who was responsible for a wide array of produce from key growing regions - Florida vegetables and citrus, Texas vegetables, local vegetables, and onions, never discussed business matters with the Company's president, secretary, or treasurer and/or director. It would be Petitioner's desire to portray a situation where he conducted the volume and type of business that he did with his suppliers without reference to business activities and conditions elsewhere in the corporation. Given the record evidence, this was an unlikely scenario.

The record evidence is sufficient in this case to establish that Petitioner Anthony A. Caito was aware of the Company's financial difficulties. For instance, his produce suppliers had occasionally mentioned to him that they had not been paid for produce purchased by Caito & Mascari, Inc. (Tr. 108). In a letter to the PACA dated December 17, 1996, Petitioner stated unequivocally that during the violations period, checks were being held for payment by the president, which suggests that he knew of the Company's payment problems. (REC-19, p. 1).

As previously mentioned, Petitioner Anthony A. Caito had extensive check writing responsibilities prior to January 1995, and was one of only three persons at Caito & Mascari, Inc., who was authorized to sign checks on both Caito & Mascari, Inc.'s operations and payroll accounts after that date. Among the checks signed by Petitioner Anthony A. Caito were six payroll checks and two checks for PACA license renewal. Case law has emphasized the importance of writing checks in the determination of responsible connection. *See, In re: Steven J. Rodgers*, PACA- APP Docket No. 96-0002, Slip Decision (August 22, 1997) and *Farley v. United States Dep't of Agric.*, 8 F.3d 26 (9th Cir. 1993). Therefore, Petitioner Anthony A. Caito's check writing and issuance authority for Caito & Mascari, Inc.'s operations and payroll accounts during the first four months of the violations period is sufficient to constitute an actual significant nexus which establishes that his functions and position in Caito & Mascari, Inc., were not nominal.

In his role as vice-president, buyer, and paymaster, Anthony A. Caito had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he was buying the produce, when he knew that he was not paying accounts promptly, and when the responsibility for paying those accounts by check was his. Mr. Caito was an active participant in the operations of Caito & Mascari, Inc. It is improper for him to shirk his responsibilities for the violations of the Company by trying to pass his responsibilities to others who had less day-to-day, hour-to-

hour contact with the business than he did.

Petitioner Anthony A. Caito's suggestion that some unnamed others controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at the hearing and is rejected. No stockholders of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent ownership of the Company's stock Joseph Kocot was the largest stock owner in the Company. No one possessed a majority ownership interest which would have permitted him to control the corporation. Moreover, as noted by the Respondent, the evidence indicates that while the President of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval of major business decisions. Thus, decision making authority was distributed among many different people rather than being concentrated in anyone individual.

In light of the role that Mr. Anthony A. Caito played in the operations and financial affairs of the corporation, his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming arguendo that Mr. Caito was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra*. As a buyer and officer knowledgeable of the Company's financial inability to pay its produce creditors and as a Caito family member with life-long relationships with nearly every director and officer of Caito & Mascari, Inc., Anthony A. Caito had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc.'s directors and officers in the daily operations of the Company and in the board meetings. Through both his acts of commission and omission, Mr. Anthony A. Caito must be considered responsibly connected to Caito & Mascari, Inc.

For the reasons set forth above the Chief's determination that Petitioner Anthony A. Caito was responsibly connected was correct and is upheld and affirmed herein. Accordingly, the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Anthony A. Caito was responsibly connected with Caito & Mascari, Inc. at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Anthony A. Caito is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

JOSEPH A. CAITO, SR.

PACA Docket No. APP-97-0003

Findings of Fact With Respect to Joseph A. Caito, Sr.

1. Joseph A. Caito, Sr., is an individual whose home address is 5310 Channing Road, Indianapolis, Indiana 46226. Petitioner is the brother of Petitioners Thomas Caito and Magdalina Mascari, is the father of Petitioner Joseph A. Caito, Jr., and is the uncle of Petitioner Anthony A. Caito. (Tr. 76, 102). Petitioner began working for Caito & Mascari, Inc., in the 1940s and held a number of positions with the corporation including produce buying and delivery. (Tr. 121, 135). As of the hearing date, he was seventy-one years old. In 1981, he began to have heart problems and in 1991 he had a serious heart attack which involved open heart surgery. (Tr. 121-122). As a result of the surgery, he was unable to work for approximately a year. When he returned to the Company, he was relieved of all duties except those surrounding the processing of bananas which involved him working at the Company for two to four hours per day until the Company closed. From approximately 1992 until the Company stopped operating in 1996, Petitioner was Caito & Mascari, Inc.'s buyer for bananas. (REC-16; Tr. 122). He was also a buyer for Washington and Michigan apples as of the fall of 1996. (REC-15).

2. Petitioner owned nine percent of the stock in Caito & Mascari, Inc. (REC-6, p. 19; REC-7, pp. 56, 63). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. Beginning in March 1995, Petitioner was chairman of Caito & Mascari, Inc.'s Board of Directors through February, 1996. (REC-1, p. 1; REC-2, pp. 1-3, 6-9; REC-6, pp. 19-20; Tr. 124). As Chairman of Caito & Mascari, Inc.'s Board of Directors, Petitioner attended Caito & Mascari Inc.'s board meetings during that time period, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2; Tr. 124-125). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 125, 128-130).

4. At the March 12, 1995, meeting of Caito & Mascari Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a

quarterly basis to review the budgetary progress of the Company; (3) how to cut Company expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the President the authority to suspend or terminate individuals. Petitioner made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9; Tr. 131-132).

7. Joseph A. Caito, Sr., resigned as a director and as Chairman of the Board of Directors in February 1996. (REC-6, pp. 19-20).

8. When Anthony A. Caito resigned as corporate vice-president of Caito & Mascari, Inc., he submitted his letter of resignation to Joseph A. Caito, Sr., as Chairman of the Board of Directors. (REC-1, p. 6).

9. When Caito & Mascari, Inc., needed to borrow money in November 1995, Joseph A. Caito, Sr., loaned the corporation \$5,000.00 of his own money. (REC-10).

10. Petitioner Joseph A. Caito, Sr. was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions With Respect to Joseph A. Caito, Sr.

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May

1996, in the amount of \$997,652.91, while still owing at least \$169,896.92 as of the date of the disciplinary hearing. Mr. Caito denies he was actively involved in the actions resulting in violation and asserts that his role as Chairman of the Board of Directors with Caito & Mascari, Inc., was nominal only. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc.

Joseph A. Caito, Sr., Was the Chairman of the Board of Directors of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one of these categories if he or she is to be considered responsibly connected. Joseph A. Caito, Sr.'s role as the Chairman of Caito & Mascari, Inc.'s Board of Directors during the first six months of the nine-month violations period is uncontested in this matter. Mr. Caito acknowledged at the hearing that he was the Chairman of Caito & Mascari, Inc.'s Board of Directors from March, 1995 through February, 1996. (Tr. 123-124). In addition to the PACA license record that unequivocally designated Petitioner as Chairman during that time period (REC-1, p. 1), numerous other corporate documents conclusively establish his status as Chairman of Caito & Mascari, Inc.'s Board of Directors, including the corporate minutes (REC-2, pp. 1-3, 6-9), bankruptcy documents filed by Caito & Mascari (REC-6, pp. 19-20), and corporate correspondence directed to him as Chairman of the board. (REC-1, p. 6). Accordingly, there is no question that Mr. Joseph A. Caito, Sr. was Chairman of Caito & Mascari, Inc.'s Board of Directors during the first six months of the violations period from September, 1995 through February, 1996.

Joseph A. Caito, Sr., Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person, who meets the initial criteria for responsible connection, with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "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." The record in this case reveals that Joseph A. Caito, Sr., was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected with consideration of the other factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." See H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others. *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975). See also, *Bell v. Department of Agriculture*, 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Joseph A. Caito, Sr., performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

After a career with Caito & Mascari, Inc., that spans over five decades in many positions including produce buyer and ultimately Chairman of the Company's Board of Directors, Petitioner's attempts to absolve himself of responsibility for the activities leading to the PACA violations are futile, premised upon the evidence of record. As a produce buyer for the Company, Mr. Caito was closely involved in the Company's procedures for buying produce and was certainly not innocently unaware of the Company's practices. He testified that he was at Caito & Mascari, Inc.'s business premises at least two to four hours each day after 1992. (Tr. 122). Furthermore, he admitted that he was aware of Caito

& Mascari's financial problems at least by 1993 -- well over a year before he became Chairman of the Company's Board of Directors.

Moreover, in his role as Chairman of the Company's Board of Directors, Mr. Caito attended and actively participated in all of the Company's board meetings from March 1995 through February 1996. The corporate minutes from the Board of Directors meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mr. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Petitioner discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 125, 128-130).

At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, Mr. Joseph A. Caito, Sr., discussed business and financial matters with the other board members including: (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors.

At the July 12, 1995, board meeting, Mr. Joseph A. Caito, Sr., again discussed such matters with the other board members. The business and financial matters discussed by Petitioner Joseph A. Caito, Sr., at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mr. Caito himself made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, specifically addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional

losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9, Tr. 131-132). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately \$20,000.00 to \$30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay its produce creditors. Mr. Caito's act in making the motion himself is especially significant given the scarce financial resources available to the corporation or paying its produce credits.

In his role as Chairman of the Board of Directors, Joseph A. Caito, Sr., had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mr. Caito was an active participant in the management of Caito & Mascari, Inc., and as such was actively involved in the activities resulting in violations of the PACA.

In light of the role that Petitioner played in making corporate financial policy for Caito & Mascari, Inc., as an active participant in the directors' meetings, Mr. Caito's claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that he was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra*. Armed with knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with over fifty years experience with the Company, Petitioner Joseph A. Caito, Sr., had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers. To suggest otherwise is to allow an individual with a half century of experience in the business, an intimate knowledge and understanding of the firm's produce debt, a participatory role in the day-to-day business and decisions of the Company, and a life-long relationship with the other directors and officers of the Company, to abdicate responsibility to ensure that a PACA licensee, abide by the law and deal honorably with produce creditors and others who dealt in good faith with Caito & Mascari, Inc. Through both his acts of commission and omission, Joseph A. Caito, Sr., must be considered responsibly connected to Caito & Mascari, Inc.

Joseph A. Caito, Sr.'s Contentions that He Was a Nominal Chairman of

the Board of Directors and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Joseph A. Caito, Sr.'s failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to his responsibly connected status inasmuch as he was actively involved in the activities resulting in violations of the Act. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his role as Chairman of the Board of Directors was merely nominal or "honorary," and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Joseph A. Caito, Sr.'s Petition for Review, ¶ 3).

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Petitioner's role as board Chairman was not nominal, that he himself was an owner, and that Caito & Mascari, Inc. was not the *alter ego* of any person.

Joseph A. Caito, Sr., Was Not a Nominal Chairman of Caito & Mascari, Inc.'s Board of Directors

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra*, the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d 409. Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established

by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Joseph A. Caito, Sr., had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as Chairman of the Board of Directors.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Petitioner Caito in the instant case.

First, unlike the Petitioner in *Quinn*, Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, he participated in multiple Board of Directors' meetings in which the six board members, including corporate officers Joseph Kocot and Joseph Caito, Jr., discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2). Mr. Caito acknowledged that he actively participated in these meetings by commenting on policy decisions and offering his opinion:

- Q Having been affiliated with the business for 40 years at least and being, as you said, the senior Caito, your opinion would matter for something, would it not? I mean, you have obviously been around a long time with the company.
- A Sometimes it would, and sometimes it wouldn't.
- Q You do not strike me as the kind of man who would hesitate to give his opinion, though.
- A Yes, I would give it. Sometimes -- you know, they don't do things today like they did 40 years ago.

(Tr. 129). Mr. Caito's attendance at these board meetings, discussion of the issues, making motions, and voting on every matter put to a vote forcefully demonstrate that he was not a passive observer in these board meetings.

Second, unlike the Petitioner in *Bell*, Joseph A. Caito, Sr., had full opportunity to gain access to all important corporate records. With his intimate knowledge of

the Company gained from fifty years of working for Caito & Mascari, Inc., and his position as the senior Caito family member, it is inconceivable that Mr. Caito would not have had full access to all corporate documents.

Third, unlike the Petitioner in *Bell*, Mr. Caito was aware of the Company's financial difficulties. The *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at board meetings." *Minotto v. United States Dept. of Agriculture, supra*. Mr. Caito admitted that he was aware that Caito & Mascari, Inc., was having financial difficulties as early as 1993. (Tr. 133). The evidence also showed that there was a shareholders' meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a nine percent stockholder in Caito & Mascari, Inc., Mr. Caito would most certainly have been aware of these problems. (REC-6, pp. 19-20). Finally, it is inconceivable that Joseph A. Caito, Sr., as the senior Caito family member with a life-long career in the Company, would not have knowledge of the financial health of the Company run by his family for generations.

Furthermore, the substantial rather than nominal nature of Petitioner's position as Chairman of the Board of Directors is supported by the recognition of others in the corporation of his authority. When vice-president Anthony A. Caito resigned as corporate vice-president of Caito & Mascari, Inc., he submitted his letter of resignation to Joseph A. Caito, Sr., as Chairman of the Board of Directors. (REC-1, p. 6). Petitioner's perceived role by others in Caito & Mascari, Inc., as a person to whom a personnel matter as serious as a resignation could be directed, further demonstrates that Joseph A. Caito, Sr., was not a nominal Chairman of Caito & Mascari's Board of Directors.

Finally, Mr. Caito's claim that his position as board chairman was nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995, in order to settle a law suit brought against the corporation, he loaned the corporation \$5,000.00 of his own money. (REC-10). As indicated in Mr. Caito's testimony, his personal loan of the \$5,000.00 was made in an effort to protect his interest in Caito & Mascari, Inc.:

Q Finally, in late 1995 you loaned the company \$5,000? Is that correct?

A Yes.

Q \$5,000 is not a small amount of money, is it?

A That's right.

Q Why did you choose to loan the company that much money?

violations of the PACA is a civil penalty of [\$82,500]. . . .

DISCUSSION

The PACA requires produce dealers who buy . . . [perishable agricultural commodities] in interstate commerce to make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had, or face sanction after an administrative hearing by the Secretary for unfair conduct. (7 U.S.C. §§ 499a, 499b, 499f, and 499h.) Until recently, the available sanctions were limited to publication of the facts and circumstances of the violation, suspension of the offender's [PACA] license for a period not to exceed 90 days, and . . . revocation [of the offender's PACA license]. (7 U.S.C. § 499h(a).) However, on November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, which reads as follows:

(e) Alternative civil penalties

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

The plain meaning of this language is to give the Secretary greater flexibility in the sanctions that may be imposed for the various violations of the PACA.

. . . .

Mr. Lon F. Hatamiya, Administrator of [the] Agricultural Marketing Service, [United States Department of Agriculture, the agency] which administers the PACA, testified[, during a hearing conducted on 1995 legislation to amend the PACA, in favor of amendment of the PACA to add] monetary penalty provisions[, as follows]:

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other

A It looked like I could see that would be a small price to pay and looked like success was around the corner. I thought that would be a small price to pay if it became very successful.

Q So you thought your \$5,000 would have a good payoff for the future of the company?

A That's right.

Q So you were protecting an interest in the company going on, right?

A That's right.

(Tr. 135-136). Accordingly, Mr. Caito's personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as a director.

It is evident that Joseph A. Caito, Sr., unlike the Petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that he was only a nominal Chairman of the Company's Board of Directors. The only reasonable conclusion to be drawn from the evidence in the record is that he had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Joseph A. Caito, Sr., has failed to demonstrate that he was a nominal Chairman of Caito & Mascari's Board of Directors.

The Alter Ego Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was No the Alter Ego of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by showing that the sole stockholder of the corporation effectively retained the decision making power in all aspects of corporate decision making. *Bell v. Department of Agriculture, supra*, at 1201 (quoting *Quinn v. Butz, supra*, at 758). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Joseph A. Caito, Sr., Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg*, PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his nine percent ownership interest in Caito & Mascari, Inc.

Joseph A. Caito, Sr.'s allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As Chairman of Caito & Mascari, Inc.'s Board of Directors, Joseph A. Caito, Sr., was responsibly connected to the corporation during the first six months of the nine-month period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his activities in buying produce for the corporation and active participation in the corporation's formal decision making process through the Board of Directors. He was not a nominal chairman of the board as demonstrated by his active involvement in the Company's business and policy decisions, his knowledge of the Company's payment problems, his access to corporate records, his activities in personnel matters, and his personal loan of \$5,000.00 to the corporation. Mr. Caito was actively involved in the activities resulting in the violations.

He was not a nominal director of Caito & Mascari, Inc. He was himself an owner of the Company as a nine percent shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Joseph A. Caito, Sr., was responsibly connected was correct and the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Joseph A. Caito, Sr., was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Joseph A. Caito, Sr., is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

JOSEPH A. CAITO, JR.

PACA Docket No. APP-97-0004

Findings of Fact With Respect to Joseph A. Caito, Jr.

1. Joseph A. Caito, Jr., is an individual whose home address is 20 Forest Ridge Court, Fishers, Indiana 46038. Petitioner is the son of Petitioner Joseph A. Caito, Sr., is the nephew of Petitioners Thomas Caito and Magdalena Mascari, and is the cousin of Petitioner Anthony A. Caito. (Tr. 76, 102). He started working at Caito & Mascari, Inc., on a full-time basis in 1985. (Tr. 139). In 1991, he began calling customers and taking orders on the phone. He temporarily worked as a buyer of bananas for the Company in 1991, and he returned to phone sales as a full-time salesman for the Company in 1992. (Tr. 139-140). After March 1995, he worked as a Company buyer for produce, eggs, and milk. (Tr. 143, 180). Petitioner is listed as Caito & Mascari, Inc.'s contact person for telephone sales in the March, 1996 Red Book Credit Services (REC-16) and the fall 1996 Blue Book (REC-15).

2. Petitioner owned nine percent of Caito & Mascari, Inc.'s stock. (REC-6, p. 19; REC-7, pp. 56, 63). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. In March 1995, Petitioner Joseph A. Caito, Jr., was appointed secretary and treasurer of the Company by the Board of Directors. He received no additional compensation in his capacity as secretary and treasurer. Petitioner was corporate secretary of Caito & Mascari, Inc., from March 1995 to October 15, 1996, and he was treasurer from March 1995 through 1996. (REC-1, pp. 1, 7, 12, 20, 22; REC-2, pp. 1-3, 6-9; Tr. 140, 151). As corporate secretary, he signed the Bill of Sale for the sale of the Brickyard 400 Suite. (REC-5, p. 1). He took the corporate minutes at shareholder and Board of Directors' meetings. (Tr. 140). He

was paid an annual salary ranging from the high \$30,000s to the low \$40,000s by Caito & Mascari, Inc. (Tr. 154). On Caito & Mascari, Inc.'s 1995 U.S. Income Tax Return, Petitioner is listed as Caito & Mascari's Tax Matters Person. (REC-7, p. 2).

4. Joseph A. Caito, Jr., was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts after January 1995. (Tr. 170-171). After one of the three authorized signers for these accounts, Anthony A. Caito, left Caito & Mascari, Inc., on January 5, 1996, Petitioner was one of only two persons authorized to sign checks on behalf of the corporation, and as all checks required two signatures, he signed every check after that date. (Tr. 170-173). Among the checks in evidence that were signed by Petitioner are checks for PACA License renewal (REC-1, pp. 11, 15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-167), at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995, to April 24, 1996. (AX-2; Tr. 177).

5. Joseph A. Caito, Jr., became a member of the Board of Directors in March 1995. (Tr. 141). As a member of Caito & Mascari, Inc.'s Board of Directors, Petitioner attended board meetings from March 1995 to 1996, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2; Tr. 148, 160). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 160-161, 179-180).

6. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner made two motions and seconded another motion at this meeting. (REC-2, p. 7; Tr. 161).

7. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 162).

8. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to sell corporate assets to raise money for the corporation. (REC-2, p. 9; Tr. 162).

9. When Caito & Mascari, Inc., needed to borrow money in November 1995, Joseph A. Caito, Jr., loaned the corporation \$5,000.00 of his own money. (REC-11; Tr. 148, 168).

10. Joseph A. Caito, Jr., was the Caito & Mascari, Inc., representative who called the Illinois PACA office to discuss the payment problems facing the Company. (Tr. 197, 218).

11. Although Petitioner resigned as both a member of the Board of Directors and a corporate officer on October 15, 1996, he remained an employee of Caito & Mascari, Inc. (REC-1, pp. 2-4; REC-6, p. 20; Tr. 155).

12. Petitioner Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions With Respect to Joseph A. Caito, Jr.

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of \$997,652.91, while still owing at least \$169,896.92 as of the date of the disciplinary hearing. Mr. Caito denies he was actively involved in the actions resulting in violations and asserts that his roles as corporate secretary, treasurer, and director with Caito & Mascari, Inc., were nominal only. He maintains that from March 1995 forward, Petitioner was purchasing eggs and milk and not produce, that he made no credit decisions and was not involved in the finances of the Company. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc.

Mr. Joseph A. Caito Jr.'s own written and oral words demonstrate that he is responsibly connected. In a letter dated October 21, 1996, he wrote to the PACA Licensing Section to request that his name be removed from Caito & Mascari, Inc.'s PACA license. (REC-1, p. 2). At the hearing, Mr. Caito testified as follows:

- Q Now, you resigned as a corporate officer and director because you did not want to be responsibly connected to Caito & Mascari, did you not?
- A Correct.
- Q Let's take a look at this letter again. Could you please read the first sentence of this letter to Mr. Clancy on Page 2 of Exhibit 1?
- A "Accept this letter as request for removal of my name as board of director and officer of Caito & Mascari, Inc., responsibly connected, effective October 15, 1996, as I have resigned from the office of secretary of the corporation and board of directors, giving my signed resignation to Joseph Kocot, president of Caito & Mascari."
- Q So in this letter to the PACA, you indicate that you re resigning because you do not want to be responsibly connected after that time, correct?
- A Right.
- Q You do know that the period of violation for Caito & Mascari runs from September of 1995 through May of 1996, correct?
- A Repeat that.
- Q The period of violation at issue in the disciplinary complaint is September of 1995 through May of 1996.
- A Right. Okay.
- Q And that was at least four to five months prior to the time of your resignation of October 15, correct?
- A Right.

(Tr. 155-156). It is apparent that at the time Mr. Caito wrote the letter dated October 21, 1996, he was operating with the understanding that while he had been responsibly connected up to that point, the removal of his name from Caito & Mascari, Inc.,'s PACA license would end his responsible connection to the Company.

Joseph A. Caito, Jr., Was the Secretary, Treasurer, and Director of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one

of these categories if he or she is to be considered responsibly connected. Joseph A. Caito, Jr.'s role as the secretary, treasurer, and director of Caito & Mascari, Inc. during the entire violations period is uncontested in this matter. He acknowledged at the hearing that he was the secretary, treasurer, and director of Caito & Mascari, Inc., from March 1995 through October 1996. (Tr. 141, 148, 160). In addition to the PACA license record that unequivocally designated Petitioner as the corporate secretary and treasurer during that time period (REC-1, pp. 1, 7, 12, 20), numerous other corporate documents conclusively establish his status as an officer and director of Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9), bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, pp. 19-20), and corporate correspondence to the PACA. (REC-1, p. 22). Accordingly, there is no question that Joseph A. Caito, Jr., was secretary, treasurer, and director of Caito & Mascari, Inc., during the entire nine-month violations period from September 1995 through May 1996.

Joseph A. Caito, Jr., Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "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." (emphasis added). The record in this case reveals that Joseph A. Caito, Jr., was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, he must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." See H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either

personal fault or a realistic capacity to counteract or obviate the fault of others." *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975). See also, *Bell v. Department of Agriculture*, 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that Petitioner was actively involved. Given that Joseph A. Caito, Jr., performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

Mr. Caito's attempts to disclaim responsibility for the activities leading to the violations are not realistic and do not comport with the evidence of record. As one of the few persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts after January 1995, Mr. Caito signed dozens of checks on these two accounts during the violations period up until January 5, 1996 when he began signing every check for both these checking accounts. (Tr. 171-173). He also signed corporate documents in his capacity as an officer of the corporation (REC-5, p. 1) and actively participated in the Company's formal decision making process. Not only did Mr. Caito participate in quarterly Board of Directors' meetings at which high-level corporate business decisions and policies were made, but he also worked as a Company buyer for produce, eggs, and milk. (Tr. 143, 160-161, 179-180). With this participation in management decisions and extensive responsibility for payment of accounts, Mr. Caito possessed knowledge of the financial problems facing the Company and its inability to pay its produce creditors. (Tr. 145-146, 179).

Joseph A. Caito, Jr., was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts. (Tr. 170-171). After one of the three authorized signers for these accounts, Anthony A. Caito left Caito & Mascari, Inc., on January 5, 1996, Petitioner was one of only two persons authorized to sign checks on behalf of the corporation, and as all checks required two signatures, he signed every check after that date. (Tr. 170-173). Among the checks in evidence that were signed by Mr. Caito are checks for PACA License renewal (REC-1, pp. 11, 15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-177), and at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995, to April 24, 1996. (AX-2; Tr. 177). Petitioner acknowledges that he did sign checks but argues that he would "return

them to the bookkeeper" and he made no decision as to whether or not the checks should be sent to the payee.

Case precedent underscores the importance of writing checks in the determination of responsible connection. The fact that a person signs checks is reflective of that person's association with the financial affairs of a business. In *Bell v. Department of Agriculture, supra*, the Court stated that an important factor indicating that the appellant was nominal was the fact that he "never signed checks or agreements." 39 F.3d at 1200. In *Farley v. United States Dep't of Agric.*, 8 F.3d 26 (9th Cir. 1993), the Court ruled that the appellant was responsibly connected under the rebuttable presumption standard of the District of Columbia Circuit. In citing the factors which led to this decision, the Court noted that the appellant "had check writing and borrowing authority, both of which were exercised at least once."

Moreover, in his role as a member of Caito & Mascari, Inc.'s Board of Directors, Mr. Caito attended and actively participated in all of the Company's board meetings from March 1995 through October 1996. The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mr. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Petitioner discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 160-161, 179-180).

At the March 12, 1995, board meeting, Mr. Caito, discussed business and financial matters with the other board members including (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mr. Caito made two motions and seconded another motion at this meeting. (REC-2, p. 7; Tr. 161).

At the July 12, 1995, board meeting, Mr. Caito again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mr. Caito himself

made the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow the corporation to take out loans. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately \$20,000.00 to \$30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. Mr. Caito's seconding the motion to sell corporate assets to raise money for the corporation is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

In his role as director, corporate officer, buyer, and paymaster, Joseph A. Caito, Jr., had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that he was not paying accounts promptly and when the responsibility for paying those accounts by check was his. Mr. Caito was an active participant in the management of Caito & Mascari, Inc. He may not deny his responsibilities for the violations of the Company by trying to pass his responsibilities to others who had less day-to-day, hour-to-hour contact with the business than he did.

In light of the integral role that Mr. Caito played in the financial affairs of the corporation and his extensive participation in its decision making process as an officer and as the sole remaining family member, his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that Mr. Caito was considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra*, at 1201. Possessing the knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with life-long relationships with nearly every other director and officer of Caito & Mascari, Inc., Joseph A. Caito, Jr., had not only the capacity, but the

duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers in the daily operation of the Company and in the board meetings. Through both his acts of commission and omission, Mr. Caito must be considered responsibly connected to Caito & Mascari, Inc.

Joseph A. Caito, Jr.'s Contentions That He Was a Nominal Secretary, Treasurer, and Director and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Petitioner Joseph A. Caito, Jr.'s failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to his responsibly connected status as he was actively involved in the activities resulting in violations of the Act and was an officer, and director, of the corporation. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his roles as secretary, treasurer, and director were merely nominal, and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Joseph A. Caito, Jr.'s Petition for Review, ¶ 3). However, this contention is not pursued by Petitioner on brief and does not have merit.

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Joseph A. Caito, Jr.'s role as director and officer was not nominal, that he himself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Joseph A. Caito, Jr., Was Not a Nominal Secretary, Treasurer, or Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra*, the Court of Appeals for

the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture*, 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Joseph A. Caito, Jr., had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions as corporate secretary, treasurer, and director.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Joseph A. Caito, Jr.

First, unlike the Petitioner in *Quinn*, Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. He admitted that he participated in Board of Directors' meetings in which other directors and officers made high-level decisions and policies regarding corporate finance from March 1995 through October 1996. (REC-2; Tr. 148, 160). Mr. Caito acknowledged that he actively participated in these meetings by interjecting suggestions and ideas (Tr. 142), and corporate records indicate that he made motions, seconded the motions of other directors, and voted on each motion put to a vote. (Tr. 160-161, 179-180).

Second, unlike the Petitioner in *Bell*, Mr. Caito had full knowledge of the Company's financial difficulties. The *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connection decision.

In that case, however, the petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dept. of Agriculture, supra*. Mr. Caito admitted that he was aware that the firm was having financial problems in early 1994 when Caito & Mascari, Inc., held a shareholders meeting at which the Company's financials were reviewed with the shareholders, showing a "substantial loss," and he also admitted that at some time thereafter he became aware that creditors were not being paid on time. (Tr. 145-146, 179). As discussed above, Mr. Caito participated in the Board of Directors' meetings at which officers and directors discussed all aspects of the Company's operations, including its failing financial health (REC-2), and he was the Company's representative who called the PACA Branch prior to the investigation in May, 1996 to discuss the Company's payment problems. (Tr. 197, 218).

The circumstances surrounding his meeting with PACA investigator Wes Hammond in May 1996, also strongly support the fact that Mr. Caito had full knowledge of the Company's problems. When Mr. Hammond inquired about the Company's bookkeeping practices with regard to writing a check for an invoice, giving it a date, but then not mailing it in an attempt to make the Company's books look as if invoices were being paid on time, Mr. Caito was the representative from Caito & Mascari, Inc., who assisted Mr. Hammond and explained how the system was set up. (Tr. 239). Additionally, when Mr. Hammond met with Mr. Caito and Joseph Kocot at the end of the PACA investigation to discuss the results of the investigation, Mr. Caito acknowledged that the amounts found in the investigation were indeed past due, that there had been problems with payment, and that the Company was making efforts to pay off the debts. (Tr. 240-241).

Third, unlike the Petitioner in *Bell*, Mr. Caito had full access to a wide array of corporate documents as secretary and treasurer of Caito & Mascari, Inc. During the investigation of Caito & Mascari, Inc., Mr. Caito and Joseph Kocot provided PACA investigator Wes Hammond with all the necessary cooperate financial documents and these documents were located in the office shared by Mr. Caito and Company president Joseph Kocot. (Tr. 237). Furthermore, as discussed above, when Mr. Hammond requested clarification during his investigation with regard to the manner in which the Company's accounts payable ledgers were setup, it was Mr. Caito who was able to provide him with a detailed understanding of the substance and design of these financial records. (Tr. 239).

In *Bell*, the Court stated that another important factor indicating that the appellant was nominal was the fact that he "never signed checks or agreements." *Id.* at 1200. As discussed above, Joseph A. Caito, Jr., was one of only three

persons at Caito & Mascari, Inc., who were authorized to sign checks on both Caito & Mascari, Inc.'s operations and payroll accounts. After Anthony A. Caito left Caito & Mascari, Inc., on January 5, 1996, he was one of only two persons authorized to sign checks on behalf of the corporation, meaning that he signed every check after that date because both accounts required two signatures. (Tr. 171-173). Among the checks signed by Mr. Caito are checks for PACA License renewal (REC-1, pp. 11,15; Tr. 157), at least eighteen payroll checks signed between September 14, 1995, and February 1, 1996 (REC-9; Tr. 166-167), and at least eighty-one checks on Caito & Mascari, Inc.'s operations account to produce creditors from November 29, 1995 to April 24, 1996. (AX-2; Tr. 177).

As discussed above, case precedent strongly underscores the importance of writing checks in the determination of responsible connection. Joseph A. Caito, Jr.'s issuance of many of the checks for Caito & Mascari, Inc.'s operations and payroll checking accounts during the first four months of the violations period and all the checks on these accounts for the remaining five months of the violations period alone is sufficient to constitute an "actual, significant nexus" which establishes that his positions in Caito & Mascari Inc., were not nominal.

That Mr. Caito was not a nominal corporate officer is also demonstrated by his signing corporate documents such as the Bill of Sale for the sale of the Brickyard 400 Suite as an officer and taking the corporate minutes at both shareholder and Board of Directors' meetings. (REC-5, p. 1; Tr. 140). In its 1995 U.S. Income Tax Return, Caito & Mascari, Inc., listed Mr. Caito as the Company's "Tax Matters Person." (REC-7, p. 2). Furthermore, Joseph A. Caito, Jr., was by no means an unskilled or untrained employee and officer. He has a bachelor's degree in Business Marketing and an associate's degree in Computer Technology, and his annual compensation from Caito & Mascari ranged from the high \$30,000s to the low \$40,000s. (Tr. 153-154).

Finally, Mr. Caito's claim that his positions as officer and director were nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995, in order to settle a law suit brought against the corporation, he loaned the corporation \$5,000.00 of his own money. (REC-11). Mr. Caito's personal loan of the \$5,000.00 was made in an effort to protect his interest in Caito & Mascari, Inc. Accordingly, Mr. Caito's personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as an officer and director.

It is evident that Joseph A. Caito, Jr., unlike the Petitioner in *Quinn*, was closely involved in important corporate business functions, which precludes a finding that he was only nominally an officer or director of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that Mr. Caito had "an actual, significant nexus" with Caito & Mascari, Inc.,

committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Joseph A. Caito, Jr., has failed to demonstrate that he was a nominal officer or director.

The Alter Ego Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the Alter Ego of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra*, at 1201 (quoting *Quinn v. Butz, supra*, at 758). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Joseph A. Caito, Jr., Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg*, PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because

of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his nine percent ownership interest in Caito & Mascari, Inc.

Joseph A. Caito, Jr.'s allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As director, secretary, and treasurer of Caito & Mascari, Inc., Joseph A. Caito, Jr., was responsibly connected to the corporation during the entire period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his activities as a buyer of produce for the corporation, his activities writing checks on both the Company's operations and payroll accounts, and his active participation in the formal decision making process of the Company through the Board of Directors. He was not a nominal director, secretary, and treasurer as demonstrated by his active involvement in the Company's business and policy decisions; his knowledge of the Company's payment problems; his extensive check writing activities; his signing corporate documents; his designation as the corporation's "Tax Matters Person"; his substantial educational background and his salary; and, his personal loan of \$5,000.00 to the corporation.

Mr. Caito was actively involved in the activities resulting in the violations. He was not a nominal officer or director of Caito & Mascari, Inc. He was himself an owner of the Company as a nine percent shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Joseph A. Caito, Jr., was responsibly connected was correct and is hereby affirmed and upheld.

Accordingly, premised upon the record as a whole the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Joseph A. Caito, Jr., was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Joseph A. Caito, Jr., is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

THOMAS A. CAITO
PACA Docket No. APP-97-0005
Findings of Fact With Respect to Thomas A. Caito

1. Thomas A. Caito is an individual whose home address is 4116 Winding Way, Indianapolis, Indiana 46220. Thomas A. Caito is the brother of Petitioners Joseph Caito, Sr., and Magdalina Mascari, and is the uncle of Petitioners Joseph A. Caito, Jr., and Anthony A. Caito (Tr. 76, 102). Thomas A. Caito began working at Caito & Mascari, Inc., when he was eighteen years old and continued to work there until the mid-1970s when he purchased a restaurant and left to start work in the restaurant business. He never worked at the Company thereafter, but, he continued to buy produce from Caito & Mascari, Inc., for his restaurant after he left until the Company ceased operations in 1996. (Tr. 77, 79).

2. Thomas A. Caito is a 5.66% shareholder in Caito & Mascari, Inc. (REC-6, pp. 19-20; REC-7, pp. 56, 63; Tr. 78, 97). He attended Caito & Mascari, Inc.'s annual shareholder's meeting held on March 12, 1995. (REC-2, pp. 1-3, 6).

3. As a member of Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito attended board meetings over a thirty-year period beginning in the 1960s and continuing until the Company ceased operations in 1996. (REC-1, pp. 16-24; REC-2, pp. 1-3, 6-9; Tr. 88). These board meetings included those held on March 12, 1995, July 12, 1995, October 25, 1995, and at least one more thereafter. (REC-2; Tr. 81, 96). At these board meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 86, 90-93).

4. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner made one motion at this meeting. (REC-2, p. 7; Tr. 82, 91-92).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or

terminate individuals. (REC-2, p. 8; Tr. 92-93).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion to sell Connersville Property and Brickyard 400 Suite to raise money for the corporation. (REC-2, p. 9; Tr. 84, 94-95).

7. When Caito & Mascari, Inc., needed to borrow money in November 1995, Thomas A. Caito loaned the corporation \$5,000.00 of his own money. (REC-12; Tr. 85).

8. Petitioner Thomas A. Caito was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA.

Conclusions With Respect to Thomas A. Caito

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Thomas A. Caito, was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of \$997,652.91, while still owing at least \$169,896.92 as of the date of the disciplinary hearing. Thomas A. Caito denies he was actively involved in the actions resulting in violations and asserts that his role as director with Caito & Mascari, Inc., was an honorary position derived from his stock ownership. He further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Mr. Caito was actively involved in the activities resulting in the corporation's violations, that his positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Thomas A. Caito was responsibly connected with Caito & Mascari, Inc.

Thomas A. Caito Was a Director of Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one of these categories if he or she is to be considered responsibly connected. Thomas A. Caito's role as a member of Caito & Mascari, Inc.'s Board of Directors

during the entire violations period is uncontested in this matter. He acknowledged at the hearing that he had been a director of Caito & Mascari, Inc., for over thirty years, including the time period from March 1995 through May 1996. (Tr. 88). In addition to the PACA license record that shows him as a director (REC-1, p. 1), numerous other corporate documents conclusively establish Petitioner's status as a director of Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9) and bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, p. 19). Accordingly, there is no question that Thomas A. Caito was a member of Caito & Mascari, Inc.'s Board of Directors for the violations period from September 1995 through May 1996.

Thomas A. Caito Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "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." The record in this case reveals that Petitioner was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, Petitioner must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." See H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others." *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975). See also, *Bell v. Department of Agriculture*, 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture*, 832 F.2d

601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dept. of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that Petitioner was actively involved. Given that Thomas A. Caito performed both acts of commission and omission, he was actively involved in Caito & Mascari, Inc.'s violations of the Act.

Having spent thirty years on Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito's attempts to absolve himself of responsibility for the activities leading to the PACA violations are not persuasive. In his role as a corporate director, Mr. Caito participated in the Company's board meetings beginning in the 1960s, and his participation as a director continued during the period from September 1995 through May 1996 and thereafter. (Tr. 88). The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Petitioner Thomas A. Caito actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, Mr. Caito discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, and voted on all business decisions that were brought to a vote. (Tr. 86, 90-93).

At the March 12, 1995, board meeting, Mr. Caito, discussed business and financial matters with the other board members including (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mr. Caito made one motion during this meeting (REC-2, p. 7) and he testified that he did make suggestions to the board regarding the need to cut expenses. (Tr. 91-92).

At the July 12, 1995, board meeting, Mr. Caito again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would address

its financial problems. Mr. Caito voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mr. Caito again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow the corporation to take out loans to settle a law suit brought against Caito & Mascari, Inc. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately \$20,000.00 to \$30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. The fact that Mr. Caito made the motion to sell corporate assets for this purpose is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

Thomas A. Caito's contention that his role was merely to "fill the board" and that he had no role whatsoever as a director in directing the way the Company should operate (Tr. 83) is directly contradicted by his own testimony:

Q You also testified that you had no role in the board's decision making process, correct?

A Not that I know of, no. I don't recall.

Q You voted, did you not, Mr. Caito?

A Yes, I voted.

Q And you made motions?

A Right.

Q And you discussed financial issues and business issues, correct?

A Yes.

Q If someone at one of these board meetings was to make a motion for something that you did not agree with, would you just sit silent, or would you say something?

A I would probably say something.

Q Would you be afraid that nobody would listen to you?

A No.

Q Do you felt[sic] that your opinion would be listened to by others, right?

A Yes.

(Tr. 90-91). Accordingly, Thomas A. Caito was not a passive director, but rather was one who was actively involved in making business and financial decisions for the corporation for over three decades -- including the nine months that comprise the violations period.

In his role as director, Thomas A. Caito had every opportunity to take action to bring the corporation into compliance with the Act. He may not credibly contend that he was not actively involved in violations when he knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mr. Caito was an active participant in the management of Caito & Mascari, Inc.

In light of the role that Thomas A. Caito played in making corporate financial policy for Caito & Mascari, Inc., his claim that he was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that he be considered not to be personally at fault for the activities resulting in the violations, he certainly had a "realistic capacity to counteract or obviate the fault of others" which he failed to exercise. *Bell v. Department of Agriculture, supra*, at 1201. Armed with the knowledge of the Company's financial inability to pay its produce creditors and as a Caito family member with over 30 years involvement in the Company's Board of Directors, Mr. Caito had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers. Through both his acts of commission and omission, Thomas A. Caito must be considered responsibly connected to Caito & Mascari, Inc.

Thomas A. Caito's Contentions That He Was a Nominal Director and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Thomas A. Caito's failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to Petitioner's responsibly connected status as he was a director and actively involved in the activities resulting in violations of the Act. Mr. Caito, contending that he was not actively involved or at fault in the violations, goes on to assert that his role on the Board of Directors was merely nominal or "honorary," and he suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Thomas A. Caito's Petition for Review, ¶ 3).

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Mr. Caito's role as a board director was not nominal, that he himself was an owner, and that Caito & Mascari, Inc. was not the *alter ego* of any person.

Thomas A. Caito Was Not a Nominal Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra*, the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture*, 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Thomas A. Caito had a significant nexus with Caito & Mascari, Inc., as he performed important business and policy functions on the Board of Directors.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202,

1204. This is not the case, however, with Thomas A. Caito.

First, unlike the Petitioner in *Quinn*, Mr. Caito was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, he participated in multiple Board of Directors' meetings in which the six board members, including corporate officers Joseph Kocot and Joseph Caito, Jr., discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2).

Second, unlike the Petitioner in *Bell*, Mr. Caito had full opportunity to gain access to all important corporate records. With his life-long relationships with most every member of the corporation's directors and officers, it is unlikely that Mr. Caito would not have had full access to all corporate documents that he wished to see.

Third, unlike the Petitioner in *Bell*, Mr. Caito was aware of the Company's financial difficulties. Like the *Bell* Court, the *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dep't of Agriculture, supra*. As evidenced by the testimony of multiple witnesses as well as the corporate minutes, the Company's financial problems were certainly well known to Caito & Mascari, Inc.'s shareholders, directors, and officers and were discussed at the board meetings. (REC-2, p. 7-9; Tr. 86, 90-93, 125, 128-130, 160-161, 179-180). The evidence also showed that there was a shareholders meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a 5.66% stockholder in Caito & Mascari, Inc., Mr. Caito would most certainly have been aware of these problems by at least that time. (Rec.-6, p. 19).

Finally, Mr. Caito's claim that his position as director was nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995 in order to settle a law suit brought against the corporation, he loaned the corporation \$5,000.00 of his own money. (REC-13). Accordingly, Mr. Caito's personal commitment toward financially assisting the corporation is further evidence that his involvement as a director of Caito & Mascari, Inc., was not nominal.

It is evident that Thomas A. Caito, unlike the Petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that he was only nominally a director of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that Mr. Caito had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the

Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Thomas A. Caito has failed to demonstrate that he was a nominal director of Caito & Mascari, Inc.

The *Alter Ego* Defense is Unavailable to Petitioner Because He Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the *Alter Ego* of Any Other Person.

Again, assuming *arguendo* that Mr. Caito was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the *alter ego* of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra, at 758*). Mr. Caito's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Thomas A, Caito's Petition for Review, ¶ 3). It was not a contention that was pursued on brief.

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mr. Caito is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg*, PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34.

As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mr. Caito with his 5.66% ownership interest in Caito & Mascari, Inc.

Thomas A. Caito's allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to him as an owner of the corporation. Accordingly, Mr. Caito's claim to this defense must be rejected.

As director on Caito & Mascari, Inc.'s Board of Directors, Thomas A. Caito was responsibly connected to the corporation during the entire period of violations. He was actively involved in the activities resulting in the violations of the Act by virtue of his thirty-year involvement on the Board of Directors and his active participation in the formal decision making process of the Company through the Board of Directors. He was not a nominal director as demonstrated by his active involvement in the Company's business and policy decisions, his access to corporate documents, his knowledge of the Company's payment problems, and his personal loan of \$5,000.00 to the corporation.

Mr. Caito was actively involved in the activities resulting in the violations. He was not a nominal director of Caito & Mascari, Inc. He was himself an owner of the Company as a 5.66% shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Thomas A. Caito was responsibly connected was correct and is affirmed and upheld herein. Accordingly, the following Order is issued.

Order

The finding of the Chief of the Agency that Petitioner Thomas A. Caito was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and hereby upheld and affirmed.

Accordingly, Petitioner Thomas A. Caito is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

MAGDALINA M. MASCARI PACA Docket No. APP-97-0007

Findings of Fact With Respect to Magdalena M. Mascari

1. Magdalena M. Mascari is an individual whose home address is 255 E.

Edgewood Avenue, Indianapolis, Indiana 46227. She is the sister of Petitioners Thomas Caito and Joseph Caito, Sr., and is the aunt of Petitioners Joseph Caito, Jr., and Anthony A. Caito. (Tr. 76, 102). Mrs. Mascari has been a member of Caito & Mascari, Inc.'s Board of Directors and an 18.5% shareholder in the Company since October 19, 1992. (REC-1, pp. 1, 7, 12, 16, 20, 24, 26; REC-2, pp. 1-3, 6-9; REC-7, pp. 56, 63; Tr. 70). In 1938, she married Cosmos Mascari, an original co-owner of the firm. (Tr. 61). She inherited her husband's stock after his death. She assumed her directorship and acquired her ownership interest in the corporation following the death of her husband. Cosmos Mascari, in 1992. (Tr. 65).

2. Petitioner Magdalena M. Mascari never worked in the Company and at the time of Mr. Mascari's death she was seventy-eight years old. At the time of the hearing Mrs. Mascari was eighty-three years old.

3. As a member of Caito & Mascari, Inc.'s Board of Directors, Mrs. Mascari attended board meetings from 1992 through 1996, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995. (REC-2, Tr. 71). At these board meetings, she discussed business and financial matters affecting Caito & Mascari, Inc., made motions and seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 73).

4. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) amending the corporation's Articles of Incorporation and Code of By-laws; (2) convening the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (3) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (4) cash flows and ways to improve the balance sheet; and (5) the effect of the interest on shareholder loans on the Company's balance sheet. Petitioner seconded motions in this meeting on three occasions. (REC-2, p. 7).

5. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. Petitioner seconded the motion to give the president the right to suspend or terminate individuals. (REC-2, p. 8).

6. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s Board of Directors, the board members, including Petitioner, discussed business and financial matters including: (1) the decision to deny the debt but to settle a claim

brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc. from additional losses" and seconded the motion to allow the corporation to take out loans. (REC-2, p. 9).

7. When Caito & Mascari, Inc., needed to borrow money in November 1995, Magdalena M. Mascari loaned the corporation \$10,000.00 of her own money. (REC-12; Tr. 85).

8. Although Petitioner Magdalena M. Mascari testified she did not remember attending shareholder or board meetings or signing documents, such lack of memory as a witness at the oral hearing does not mean she did not do such activities. Having heard the witness testify, I find that any lack of memory is overcome by other evidence of record. Moreover, I am not convinced there was the lack of memory Petitioner would have us believe.

Conclusions With Respect to Magdalena M. Mascari

The Chief of the PACA Branch, Mr. Frazier, has determined that Petitioner, Magdalena M. Mascari, was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly for produce purchases from September 1995 through May 1996, in the amount of \$997,652.91, while still owing at least \$169,896.92 as of the date of the disciplinary hearing. Mrs. Mascari denies she was actively involved in the actions resulting in violations and asserts that her role as director and 18.5% shareholder in Caito & Mascari, Inc., was nominal only. She further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. However, the record indicates that Petitioner was actively involved in the activities resulting in the corporation's violations, that Petitioner's positions were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Therefore, Magdalena M. Mascari was responsibly connected with Caito & Mascari, Inc.

Magdalena M. Mascari Was a Director and 18.5 Percent Shareholder of
Caito & Mascari, Inc.

Section 1(9) of the PACA provides that "responsibly connected" persons include an "officer, director, or holder of more than ten per centum of the outstanding stock of a corporation or association." A person must fit at least one

of these categories if he or she is to be considered responsibly connected. Magdalena M. Mascari's role as a director and 18.5% shareholder of Caito & Mascari from October 19, 1992, through the present is uncontested in this matter. Mrs. Mascari acknowledged at the hearing that she has been a director and shareholder in Caito & Mascari, Inc., during that time period. (Tr. 62, 70). In addition to the PACA license record that unequivocally designated her as a director and 18.5% shareholder during that time period (REC-1, pp. 1, 7, 12, 16, 20, 24, 26), numerous other corporate documents conclusively establish her roles in Caito & Mascari, Inc., including the corporate minutes (REC-2, pp. 1-3, 6-9) and bankruptcy documents filed by Caito & Mascari, Inc. (REC-6, p. 19). Accordingly, there is no question that Magdalena M. Mascari was a director and 18.5% shareholder in Caito & Mascari, Inc., during the entire violations period from September 1995, through May 1996.

Magdalena M. Mascari Was Actively Involved in the Activities Resulting in the PACA Violations Committed by Caito & Mascari, Inc.

Following the 1995 amendments to the PACA, section 1(9) provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "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." The record in this case reveals that Petitioner Magdalena M. Mascari was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, Mrs. Mascari must be considered responsibly connected without consideration of the others factors set forth in section 1(9).

The legislative history of the 1995 amendments does not define "active involvement." See H.R. Rep. No. 104-207, 104th Cong., 1st Sess. (1995). However, guidance on this matter can be found in the decisions issued by the Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his position with the violating firm. While not using the "active involvement" language that appears in the statute, these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he was "without either personal fault or a realistic capacity to counteract or obviate the fault of others."

Quinn v. Butz, 510 F.2d 743, 756 (D.C. Cir. 1975). See also, *Bell v. Department of Agriculture*, 39 F.3d 1199 (D.C. Cir. 1994); *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dep't of Agriculture*, 711 F.2d 406, 408 (D.C. Cir. 1983).

One guide to active involvement, therefore, is examining whether a Petitioner either had "personal fault" for the violations or failed to "counteract or obviate the fault of others" for the violations. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved. Given that Magdalena M. Mascari performed both acts of commission and omission, she was actively involved in Caito & Mascari, Inc.'s violations of the Act.

In her role as a member of Caito & Mascari, Inc.'s Board of Directors, Mrs. Mascari began attending the Company's board meetings from 1993 onward. (Tr. 70). The corporate minutes from the Board of Directors' meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that Mrs. Mascari actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making process. (REC-2). At these board meetings, she discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., seconded the motions of other board members, and voted on all business decisions that were brought to a vote. (Tr. 73).

At the March 12, 1995, board meeting, Mrs. Mascari, discussed business and financial matters with the other board members including: (1) whether to convene the Board of Directors on a quarterly basis to review the budgetary progress of the Company; (2) how to cut Company's expenses (including salaries, equipment, personnel, services, and customers); (3) cash flows and ways to improve the balance sheet; and (4) the effect of the interest on shareholder loans on the Company's balance sheet. (REC-2, p. 7). Each of these subjects relates to crucial issues regarding Caito & Mascari, Inc.'s financial viability and ultimately on its ability to pay its creditors. Mrs. Mascari seconded the motions of other directors on three instances during this meeting. (REC-2, p. 7).

At the July 12, 1995, board meeting, Mrs. Mascari again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower the Company's expenses; and (3) giving the president the authority to suspend or terminate individuals. (REC-2, p. 8; Tr. 130-131). Mrs. Mascari seconded the motion to give the president the right to suspend or terminate individuals. These discussions once again address the fundamental issues of corporate financial and management policy that determined the manner

in which Caito & Mascari, Inc., would address its financial problems. Mrs. Mascari voted in all three of the votes taken. (REC-2, p. 8).

At the October 25, 1995, board meeting, Mrs. Mascari again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for the corporation by borrowing money, signing notes, and selling some corporate assets. Mrs. Mascari seconded the motions "to deny we owe but will settle with [Bob] Ramsier to keep Caito & Mascari, Inc., from additional losses" and to allow the corporation to take out loans to pay the settlement. (REC-2, p. 9). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that the Company owed him approximately \$20,000.00 to \$30,000.00 for work he had allegedly performed years earlier. (Tr. 94, 131, 148-149, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, Petitioner consciously chose to divert the financial resources available to the Company to pay produce creditors. Mrs. Mascari's seconding the motion is especially significant given the scarce financial resources available to the corporation for paying its produce creditors.

As an 18.5% shareholder, Magdalena M. Mascari also cannot credibly maintain that she was not actively involved in the activities that resulted in the Company's violations of the PACA. As set forth in the recent decision in the case of *In re: Steven J. Rodgers*, PACA APP Docket No. 96-0002, Slip Decision (August 22, 1997), stock ownership of twenty percent or greater is sufficient to establish that a Petitioner is responsibly connected. In *Martino v. United States Dep't of Agriculture*, 801 F.2d 1410 (D.C. Cir. 1986), the Court held that Petitioner's ownership of 22.2% of the Company's stock together with the fact that the Petitioner was neither enticed or coerced into the position at issue formed a sufficient nexus to establish that Petitioner was responsibly connected. The Court affirmed this holding in *Veg-Mix, Inc. v. United States Dep't of Agriculture*, *supra*, when it stated that "[i]n *Martino* we found that ownership of 22.2 per cent of the violating company's stock was enough support for a finding of responsible connection." The Court once again reaffirmed its position in *Siegel v. Lyng*, *supra*, when it stated that "[m]ost clearly in *Martino*, this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management." *See also, Bell v. Department of Agriculture*, *supra*. Accordingly, Petitioner Magdalena M. Mascari's ownership of 18.5% of Caito & Mascari, Inc.'s stock by itself would establish that she was responsibly connected. However, when her substantial stock

ownership is considered together with her position as a member of the Company's Board of Directors, her responsibly connected status is conclusively ascertained.

In her role as director, and 18.5% shareholder, Magdalena M. Mascari had every opportunity to take action to bring the corporation into compliance with the Act. She may not credibly contend that she was not actively involved in violations when she knew that the Company was not paying its accounts promptly and when the Board of Directors was setting all major financial policy for Caito & Mascari, Inc. Mrs. Mascari was an active participant in the management of Caito & Mascari, Inc.

In light of the role that she played in making corporate financial policy for Caito & Mascari, Inc., as an active participant in the directors' meetings and her substantial ownership of stock in the corporation, Magdalena M. Mascari's claim that she was not actively involved in the activities resulting in the violations is not credible. However, assuming *arguendo* that she were considered not to be personally at fault for the activities resulting in the violations, she certainly had a "realistic capacity to counteract or obviate the fault of others" which she failed to exercise. *Bell v. Department of Agriculture, supra*, at 1201. Armed with knowledge of the Company's financial inability to pay its produce creditors and as a family member whose husband, father, and brothers had built the Company, she had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari directors and officers. Through both her acts of commission and omission, Magdalena M. Mascari must be considered responsibly connected to Caito & Mascari, Inc. On brief, Petitioner points out that Mrs. Mascari testified that she did not remember on occasion. Petitioner's supposed lack of memory at the oral hearing was not convincing. Whether or not Mrs. Mascari remembered her corporate activities at the time of her testimony at the oral hearing, the documentary data of record reveals her participation in the Company's affairs. Moreover, her testimony on cross-examination indicates she "supposed" or "guessed" that she had been a member of the Board of Directors since 1993 (Tr. 70); that she attended Board of Directors' meetings after the death of her husband in 1992 (Tr. 70); that "regular business" was discussed at the three different board meetings (Tr. 71); that she remembered motions which she seconded (Tr. 73); that she remembered discussion concerning the financial status of the Company; and, that she loaned the Company \$10,000.00 because she wanted to see the Company stay in business (Tr. 74-75).

Magdalena M. Mascari's Contentions That She Was a Nominal Director and Shareholder and That Caito & Mascari, Inc., Was the *Alter Ego* of Others Are Not Supported by Case Law or the Factual Record.

Magdalena M. Mascari's failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to her responsibly connected status as she was actively involved in the activities resulting in a violation of the Act and was an officer, director, and owner of more than ten percent of the stock of the corporation. Mrs. Mascari, contending that she was not actively involved or at fault in the violations, goes on to assert that her role as director and shareholder of Caito & Mascari, Inc., was merely nominal, and she suggests that Caito & Mascari, Inc., was the *alter ego* of unnamed "others." (Magdalena M. Mascari's Petition for Review, ¶ 3). This argument was not pursued on brief and is not supported by the record herein.

The 1995 amendments to section 1(9) of the PACA require a Petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "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(9) (emphasis added). It is evident from case law and the factual record that Magdalena M. Mascari's roles as director and shareholder were not nominal, that she herself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Magdalena M. Mascari Was Not a Nominal Shareholder or Director of Caito & Mascari, Inc.

Although the legislative history of the 1995 amendments does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the Court of Appeals for the District of Columbia Circuit. As discussed in detail above, there is strong case precedent that approximately twenty percent stock ownership in a violating Company is sufficient to establish responsible connection. *See, Bell v. Department of Agriculture, supra*, at 1199; *Siegel v. Lyng, supra*; *Veg-Mix, Inc. v. United States Dep't of Agriculture, supra*; *Martino v. United States Dep't of Agriculture, supra*; and *In re: Steven J. Rodgers, supra*. Without more, Mrs. Mascari's ownership of 18.5% of Caito & Mascari, Inc., is sufficient to establish that she is responsibly connected to Caito & Mascari, Inc. While her substantial stock ownership alone is enough to prove the point, Mrs. Mascari was also an active shareholder as indicated by her attendance at the March 12, 1995, shareholders meeting. (REC-2, p. 1-3, 6).

The Court of Appeals has also examined what is meant by "nominal" in ways

unrelated to stock ownership. In its most recent decision interpreting the PACA responsibly connected proceedings, *Bell v. Department of Agriculture, supra*, the Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The Court stated that a person may show that he was only a nominal officer, director, or shareholder:

by proving that he lacked "an actual, significant nexus with the violating company." *Minotto v. United States Dept. of Agriculture*, 711 F.2d 409 (D.C. Cir. 1983). Where responsibility was not based on the individual's "personal fault," *id.* at 408, it would have to be based on at least on his "failure to 'counteract or obviate the fault of others,'" *id.*

Bell v. Department of Agriculture, supra. As indicated by the *Bell* Court, the more than nominal nature of a Petitioner's corporate position may be established by evidence showing that Petitioner either had "personal fault" or had failed to "counteract or obviate the fault of others" for the violations of the Act. In order to show that a position is more than nominal, personal fault is not required, although it certainly is sufficient. Considerable evidence was presented showing that Mrs. Mascari had a significant nexus with Caito & Mascari, Inc., as she performed important business and policy functions.

In applying this general standard, the *Bell* Court considered several important factors articulated in its earlier *Quinn* decision that led the Court to determine that the individual in question in that case, Carl Quinn, was only a nominal officer. Specifically, the Court considered that Mr. Quinn never had anything to do with policy or business decisions, he never had participated in the formal decision making structure of the company, he did not have access to company records, and he did not have any knowledge of the company's financial difficulties. *Id.* at 1202, 1204. This is not the case, however, with Petitioner Magdalena M. Mascari.

First, unlike the Petitioner in *Quinn*, Mrs. Magdalena M. Mascari was active in policy and business decisions and participated in the Company's formal decision making process. As discussed in detail above, she participated in multiple Board of Directors' meetings in which the six board members, discussed crucial business and financial issues, made motions, and voted on those motions to create corporate policy. (REC-2).

Second, unlike the Petitioner in *Bell*, Mrs. Mascari had full opportunity to gain access to all important corporate records. With her life-long relationships with most every member of the corporation's directors and officers, it is unlikely that Mrs. Mascari would not have had full access to all corporate documents that she wished to see.

Third, unlike the Petitioner in *Bell*, Mrs. Mascari was aware of the Company's financial difficulties. Like the *Bell* Court, the *Minotto* Court also weighed the Petitioner's knowledge of the Company's wrongdoings in the responsibly connected decision. In that case, however, the Petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dep't of Agriculture, supra*. As evidenced by the testimony of multiple witnesses as well as the corporate minutes themselves, Caito & Mascari, Inc.'s financial problems were certainly well known to Caito & Mascari, Inc.'s shareholders, directors, and officers and were discussed at the board meetings. (REC-2, p. 7-9; Tr. 86, 90-93, 125, 128-130, 160-161, 179-180). The evidence also showed that there was a shareholders meeting in 1994 at which the Company's shareholders were informed of financial problems resulting from a "substantial loss." (Tr. 145-146). As a 18.5% stockholder in Caito & Mascari, Inc., Magdalena M. Mascari, would most certainly have been aware of these problems. (Rec.-6, p. 19).

Finally, Petitioner Magdalena M. Mascari's claim that her positions as director and shareholder were nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995 in order to settle a law suit brought against the corporation, she loaned the corporation \$10,000.00 of her own money. (REC-13). As indicated in Mrs. Mascari's testimony, her personal loan of \$10,000.00 was made in an effort to help the Company stay in business. (Tr. 75). Accordingly, Mrs. Mascari's personal commitment toward financially assisting the corporation is further evidence that her involvement as a director and shareholder of Caito & Mascari, Inc., was not nominal.

It is evident that Petitioner Magdalena M. Mascari, unlike the Petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that she was only nominally a director or shareholder of the Company. The only reasonable conclusion to be drawn from the evidence in the record is that she had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission in participating in the Company's violations of the Act, and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, Petitioner Magdalena M. Mascari has failed to demonstrate that she was a nominal director or shareholder.

The Alter Ego Defense is Unavailable to Petitioner Because She Is An Owner of the Company and Because Caito & Mascari, Inc., Was Not the Alter Ego of Any Other Person.

Again, assuming *arguendo* that Petitioner Magdalena M. Mascari was not actively involved or at fault in the violations of Caito & Mascari, Inc., section 1(9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The Court in *Bell* stated that a person might show that a corporation was the alter ego of its owners by "showing that the sole stockholder of the corporation 'effectively retained the decision making power in all aspects of corporate decision making.'" *Bell v. Department of Agriculture, supra, at 1201* (quoting *Quinn v. Butz, supra, at 758*). Mrs. Mascari's suggestion that some unnamed "others" controlled the corporation by retaining the decision making power in all aspects is completely unsupported by the evidence adduced at hearing. (Magdalena M. Mascari's Petition for Review, ¶ 3).

First, no stockholder of Caito & Mascari, Inc., owned over fifty percent of the Company's stock. With thirty-eight percent of the Company's stock, Joseph Kocot was the largest stock owner in the Company. (REC-1; REC-3). No one possessed a majority ownership interest which would have permitted him or her to control the corporation.

Second, the evidence demonstrates that while the president of the Company was given a great deal of autonomy in running the Company's day-to-day operations, the Board of Directors retained final approval on major business decisions. (REC-2; Tr. 129-130, 134). Decision making authority was distributed among many different people rather than being concentrated in any one individual.

Third, Mrs. Mascari is barred from raising the *alter ego* defense due to her ownership of stock in Caito & Mascari, Inc. In *In re: Michael Norinsberg*, PACA-APP Docket No. 96-0009, Slip Decision (Oct. 21, 1997), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 34. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the Company's outstanding stock, it is similarly unavailable to Mrs. Mascari with her 18.5% ownership interest in Caito & Mascari, Inc.

Magdalena M. Mascari's allegation of Caito & Mascari, Inc., being the *alter ego* of "others" is both unsubstantiated and unavailable to her as an owner of the corporation. Accordingly, her claim to this defense must be rejected.

As director and 18.5% shareholder of Caito & Mascari, Inc., Magdalena M. Mascari was responsibly connected to the corporation during the entire period of violations. She was actively involved in the activities resulting in the violations

of the Act by virtue of her active participation in the formal decision making process of the Company through the Board of Directors and her extensive stockholdings in the corporation. She was not a nominal director as demonstrated by her ownership of 18.5% of the Company's stock, and her active involvement in the Company's business and policy decisions through the Board of Directors, her access to corporate documents, her knowledge of the Company's payment problems, and her personal loan of \$10,000.00 to the corporation.

Mrs. Mascari was actively involved in the activities resulting in the violations. She was not a nominal director or shareholder of Caito & Mascari, Inc. She was herself an owner of the Company as a 18.5% shareholder, and the Company was not the *alter ego* of any other person. For these reasons, the Chief's determination that Magdalena M. Mascari was responsibly connected was correct and is upheld and affirmed.

Order

The finding of the Chief of the Agency that Petitioner Magdalena M. Mascari was responsibly connected with Caito & Mascari, Inc., at the time it was found to have violated the Perishable Agricultural Commodities Act due to its failure to make full payment promptly for produce purchases, for which a Bench Decision was issued on August 26, 1997, ordering publication of this failure, is supported by the record and is hereby upheld.

Accordingly, Petitioner Magdalena M. Mascari is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499d(4) and 499h(b)).

Summary

In each of the six* Decisions and Orders set forth herein, the individual Petitioner has been found to have been responsibly connected to Caito & Mascari, Inc., during the period it was found to have violated the PACA. Such results are established by the evidence of record. Caito & Mascari, Inc., was a closely held corporation, doing millions of dollars of business. The owners, officers, and directors of the corporation were closely related, mostly as family members. Each would disclaim responsibility for the corporate violations when realistically none can do this. They each participated in the management, direction, and financial affairs of the Company and they worked closely together with full knowledge of the corporate activities.

Copies of these Decisions and Orders are to be served upon the parties.

*On April 30, 1998, Joseph T. Kocot, PACA Docket No. APP-97-0006, filed an appeal for review of the decision.

[These Decisions and Orders became final April 7, 1998, as to Anthony A. Caito, PACA Docket No. APP-97-0002; Joseph A. Caito, Sr., PACA Docket No. APP-97-0003; Joseph A. Caito, Jr., PACA Docket No. APP-97-0004; Thomas A. Caito, PACA Docket No. APP-97-0005; and Magdalena M. Mascari, PACA Docket No. APP-97-0007.-Editor]

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.

PACA Docket No. D-94-0508.

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.

PACA Docket No. D-94-0526.

Decision and Order filed March 2, 1998.

Commercial bribery — Burden of proof — Preponderance of the evidence — Substantial evidence — Credibility determinations — Deference to ALJ's findings — Jencks Act — ALJ bias — License revocation — Willful, flagrant, and repeated violations.

The Judicial Officer affirmed the decision of Judge Bernstein (ALJ): (1) revoking JSG's PACA license for payments to the buying agents of its customers, in violation of 7 U.S.C. § 499b(4); (2) publishing the facts and circumstances of G&T's and Mr. Gentile's willful, flagrant, and repeated violations of the PACA; and (3) denying Mr. Gentile's PACA license application for engaging in practices of a character prohibited by the PACA. The legal standard for commercial bribery under the PACA is set forth in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). The relevant facts in *Goodman* and *Tipco* are similar to the facts in *JSG Trading Corp.* The standard of proof applicable to administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence and Complainant proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by engaging in commercial bribery. The Judicial Officer is not bound by an administrative law judge's credibility determinations. However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify and the record does not support reversal of the ALJ's credibility determinations. Section 9(b)(3) of the Perishable Agricultural Commodities Act Amendments of 1995 does not allow the payment of bribes by sellers of perishable agricultural commodities to employees or agents of purchasers of perishable agricultural commodities. Instead, section 9(b)(3) and the applicable legislative history make clear that section 9(b)(3) relates to promotional payments or volume discounts by sellers of perishable agricultural commodities to purchasers of perishable agricultural commodities. Cryptic notes taken of a telephone conversation are not Jencks Act statements and are not required to be produced in accordance with 7 C.F.R. § 1.141(h)(1)(iii).

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. There is no basis for JSG's allegation that the ALJ was biased toward or against any litigant.

Andrew Y. Stanton, for Complainant.

John V. Esposito and Mel Cottone, Hilton Head Island, SC, and Mark C.H. Mandell, Annandale, NJ, for Respondent JSG Trading Corp.

Sherylee F. Bauer, New York, NY, for Respondents Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

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

The proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are related disciplinary proceedings brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-48) [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].

PACA Docket No. D-94-0508 was instituted by a Complaint filed on November 8, 1993, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], and amended on April 8, 1994. The Amended Complaint alleges that Respondents, JSG Trading Corp. [hereinafter JSG], Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, the Amended Complainant alleges that: (1) during the period from January 3, 1992, through February 24, 1993, JSG, G&T, and Mr. Gentile engaged in a scheme in which JSG made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from JSG on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, JSG and Mr. Lomoriello engaged in a scheme whereby JSG made payments to Mr. Lomoriello to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of JSG's PACA license and publication of the violations committed by G&T and Messrs. Gentile and Lomoriello.

PACA Docket No. D-94-0526 was instituted by a Notice to Show Cause filed on February 8, 1994, by Complainant, challenging the PACA license applications of G&T and Mr. Gentile, based on their commission of the violations of the PACA

alleged in the Complaint filed in PACA Docket No. D-94-0508. The Notice to Show Cause requests that a finding be made that G&T and Mr. Gentile are unfit to be licensed under the PACA as commission merchants, dealers, or brokers because they have engaged in practices of a character prohibited by the PACA, and that G&T and Mr. Gentile should be refused a PACA license.

JSG, G&T, Mr. Gentile, and Mr. Lomoriello filed answers denying the material allegations in the Complaint and the Amended Complaint in the disciplinary proceeding captioned PACA Docket No. D-94-0508, as follows: (1) on November 18, 1993, JSG filed Answer of Respondent JSG Trading Corp; (2) on November 29, 1993, G&T filed Answer of Respondent Gloria and Tony Enterprises; (3) on December 20, 1993, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation; (4) on June 6, 1994, JSG filed Answer of Respondent JSG Trading Corp. to Amended Complaint; (5) on June 6, 1994, Mr. Gentile filed Answer of Respondent Anthony Gentile to Amended Complaint; (6) on June 6, 1994, G&T filed Answer of Respondent Gloria and Tony Enterprises to Amended Complaint; and (7) on July 6, 1994, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation Co. In the disciplinary proceeding captioned PACA Docket No. D-94-0526, G&T and Mr. Gentile filed a Joint Answer of Respondents Gloria and Tony Enterprises, Inc., and Anthony Gentile on February 18, 1994, denying the allegations in the Notice to Show Cause.

On February 23, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] determined that the factual issues in PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are similar and that consolidation would not prejudice JSG, G&T, Mr. Gentile, or Mr. Lomoriello [hereinafter Respondents] and granted Complainant's request for consolidation of the proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526.¹

On May 2, 1995, G&T filed a letter addressed to the ALJ stating that it wished to withdraw its PACA license application.² G&T, through counsel, confirmed it was withdrawing its license application during a May 8, 1995, telephone conference with the ALJ.³ On May 11, 1995, Complainant filed Complainant's

¹Summary of Telephone Conference, filed February 25, 1994.

²Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995.

³Summary of Telephone Conference--Rescheduling of Hearing, filed May 8, 1995.

Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and on May 12, 1995, the ALJ issued an Order Granting Complainant's Motion to Withdraw Notice to Show Cause. Mr. Gentile did not withdraw his PACA license application and the Order Granting Complainant's Motion to Withdraw Notice to Show Cause does not relate to or affect the Notice to Show Cause challenging the PACA license application filed by Mr. Gentile.⁴

The ALJ presided over an oral hearing in New York, New York, on December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Mark C.H. Mandell, Esq., Annandale, New Jersey, represented JSG.⁵ Sherylee F. Bauer, Esq., of Gersen, Baker & Wood LLP, New York, New York, represented G&T and Mr. Gentile. Mr. Lomoriello represented himself.

On October 31, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; Mr. Lomoriello filed Post Hearing Brief of Respondent Albert Lomoriello, Jr.; Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Brief; and JSG filed Post Hearing Brief on Behalf of Respondent JSG Trading Corp. On November 27, 1996, Complainant filed Complainant's Reply Brief. On December 2, 1996, Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Reply Brief; and JSG filed Reply to Complainant's Post Hearing Brief on Behalf of JSG Trading Corp.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which he: (1) found that payments made by JSG to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) revoked JSG's PACA license; (4) ordered

⁴The Order Granting Complainant's Motion to Withdraw Notice to Show Cause, filed May 12, 1995, specifically states:

By letter, filed May 2, 1995, Sherylee F. Bauer, attorney for respondents, stated that Gloria & Tony Enterprises, Inc., d/b/a G&T Enterprises wish to withdraw their license application of January 7, 1994. In view of this, on May 11, 1995, Complainant filed a Motion to Withdraw Notice to Show Cause with Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises. Complainant noted that its Notice to Show Cause with respect to the license application of Anthony Gentile remains in effect.

⁵On July 11, 1997, Mr. John V. Esposito, Esq., and Mr. Mel Cottone, Esq., of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of JSG.

that the finding that G&T, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) be published; and (5) denied Mr. Gentile's application for a PACA license (Initial Decision and Order at 18, 46-47).

Mr. Lomoriello did not appeal the Initial Decision and Order, which was served on Mr. Lomoriello on June 30, 1997.⁶ In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 47) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Mr. Lomoriello on August 4, 1997.

On September 23, 1997, G&T, Mr. Gentile, and JSG appealed to,⁷ and requested oral argument before,⁸ the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557

⁶Domestic Return Receipt for Article Number P 093 033 661.

⁷On January 9, 1998, Complainant moved for an order stating that the Initial Decision and Order became final as to G&T based on G&T's failure to appeal the Initial Decision and Order before it became final and effective (Motion for Order that the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed January 9, 1998). On January 28, 1998, G&T filed a response opposing Complainant's Motion for Order that the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and stating that G&T had appealed the Initial Decision and Order on September 23, 1997 (Respondent Gloria & Tony Enterprises d/b/a G&T Enterprises Objection to Complainant's Motion, filed January 28, 1998).

Ms. Sherylee F. Bauer, Esq., counsel for G&T and Mr. Gentile, filed Respondent Anthony Gentile's Petition for Appeal on September 23, 1997. The first sentence of the appeal petition states "Respondent Anthony Gentile (hereinafter referred to as 'Tony'), appeals from the June 17, 1997 Decision & Order of Edward [sic] S. Bernstein, Administrative Law Judge (hereinafter referred to as 'ALJ')." (Respondent Anthony Gentile's Petition for Appeal at 1.) The last page of the appeal petition asks for relief for Mr. Gentile only and states that it is submitted by Gersen, Baker & Wood LLP "Attorneys for Respondent Anthony Gentile" (Respondent Anthony Gentile's Petition for Appeal at 22).

However, page 4 of Respondent Anthony Gentile's Petition for Appeal states "Tony Gentile and G&T request reversal of the ALJ's Decision and Order." Based on this sentence, I find that G&T appealed the Initial Decision and Order. Therefore, Complainant's Motion for Order That the Initial Decision Became Final as to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed January 9, 1998, is denied.

⁸JSG renewed its request for oral argument before the Judicial Officer on January 12, 1998 (Motion for Oral Argument, filed January 12, 1998), and on January 20, 1998, Complainant opposed JSG's renewed request for oral argument, stating that "[t]his is not a case in which there are novel legal issues or where the facts have not adequately been brought out." (Complainant's Opposition to Motion for Oral Argument by Respondent JSG Trading Corp. at 2, filed January 20, 1998.)

(7 C.F.R. § 2.35).⁹ On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,¹⁰ and on November 13, 1997, the case was referred to the Judicial Officer for decision.

G&T's, Mr. Gentile's, and JSG's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), are refused because the parties have thoroughly briefed the issues in this proceeding and the issues are controlled by established precedents. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Complainant's exhibits are designated by the letters "CX"; JSG's, G&T's, and Mr. Gentile's exhibits are designated by the letters "RX"; Mr. Lomoriello's exhibits are designated by the letters "RL"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

⁹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

¹⁰On February 2, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Response to Appeal Petitions and Complainant's Response to Appeal Petitions. Complainant asserts that the only difference between Complainant's Response to Appeal Petitions, filed November 7, 1997, and Complainant's Response to Appeal Petitions, filed February 2, 1998, are transcript citations and that the transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997, are incorrect, and the transcript citations in Complainant's Response to Appeal Petitions, filed February 2, 1998, are correct. References in this Decision and Order to Complainant's Response to Appeal Petitions are to Complainant's Response to Appeal Petitions, filed February 2, 1998.

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

....

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10

per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . , the Secretary may refuse to issue a license to the applicant.

7 U.S.C. §§ 499b(4), 499d(d) (1994 & Supp. I 1995).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

....

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

7 C.F.R. § 46.26.

**ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER
(AS MODIFIED)**

....

Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. JSG's business mailing address is PACA Hosing Building, Suite A, 33 Newman Springs Road, Tinton Falls, New Jersey 07724. PACA license number 880547 was issued to JSG on January 19, 1988. This license has been renewed annually. . . . Since January 1992, Steve Goodman has been president, treasurer, and a holder of 75 per centum of the stock of JSG and his wife, Jill Goodman, has been vice-president, secretary, and a holder of 25 per centum of the stock of JSG. Prior to January 1992, Jill Goodman was the sole officer and shareholder of JSG. [(CX 1B.)]

2. Mr. Goodman began JSG in 1988 (Tr. 2154). As of February 1993, JSG had \$36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with JSG by which they earn a percentage of the profits derived from their sales (Tr. 2080-81). Mr. Goodman is JSG's only tomato buyer and seller (Tr. 77). Mr. Goodman earns 50 per centum of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 per centum of JSG's business (Tr. 78).

3. Respondent, Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA, but, at all times material [to this proceeding], was

operating subject to the PACA. [(Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)]

4. On January 12, 1994, Complainant received an application for a PACA license from Mr. Gentile (CX 2). Complainant determined that, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Mr. Gentile should be refused a license because Complainant concluded that Mr. Gentile engaged in practices [of a character] prohibited by the PACA [(Notice to Show Cause ¶ V)].

5. Respondent, Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. G&T's business mailing address is 119 Third Avenue, Hadley, New York 12835. PACA license number 890233 was issued to G&T on November 14, 1988. [(Answer of Respondent Gloria and Tony Enterprises to Amended Complaint ¶ 4.)] This license expired on November 11, 1990, when G&T advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1). [Gloria] Gentile[, Mr. Gentile's wife,] owns 100 per centum of G&T's stock (CX 1). At all times material [to this proceeding], G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

6. On January 12, 1994, Complainant . . . received an application for a PACA license from G&T (CX 1). G&T withdrew its license application . . . [(Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995)]. Subsequently, Complainant moved to withdraw its Notice to Show Cause [challenging the PACA license application filed by G&T (Complainant's Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, filed May 11, 1995) and Complainant's challenge to G&T's PACA license application was dismissed (Order Granting Complainant's Motion to Withdraw Notice to Show Cause)].

7. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160[61]). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman[, managed the sales operation, and was the tomato buyer] at L&P, a [produce] dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). . . . Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street

(Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by [many at] the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

8. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 217[0-]71).

9. Mr. Gentile left "the walk" late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing [in this proceeding], Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left "the walk," he continued to be compensated on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

10. Dirtbag Trucking Corporation [hereinafter Dirtbag] was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-90). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-03). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag \$40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loans, [Messrs. Goodman and Gentile each] obtained a security interest in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans (Tr. 2130, 2499). Dirtbag never had its own office, but was operated from JSG's office (Tr. 2047). Dirtbag always had a cash flow problem. JSG . . . advanced money to Dirtbag [on a number of occasions] (CX 55 at 1-[3]; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2495-96). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not making money, and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

11. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to [Mrs. Gentile] (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for \$80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with JSG's attorney, Mr. Mandell, and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next two years. After each \$25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of \$30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to

Dirtbag would be released or assigned to Mr. Goodman. [(RX 3.)] Mrs. Gentile was paid the \$80,000 by either Mr. Goodman or JSG, and she authorized [three] releases of [25] shares of stock [each] on December 30, 1991, February 14, 1993, and February 2, 1994 (RX [3] at 3-3b; Tr. 2942-43).

12. Respondent, Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is 219 Eden Road, Stamford, Connecticut 06907 [(Letter from Albert Lomoriello to Ms. Favors, filed November 29, 1993; Tr. 1244-45)]. Mr. Lomoriello is not licensed under the PACA, but, at all times material [to this proceeding], was operating subject to the PACA.

13. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256). Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business [(Tr. 313-16)]. Mr. Lomoriello was to receive 40 per centum of the profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from JSG for American Banana (Tr. 1263).

14. In approximately January 1993, the United States Department of Agriculture [hereinafter USDA] received a telephone complaint about JSG (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Ms. Joan Colson[, an auditor for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service,] and Mr. David Nielson[, a PACA Branch employee under Ms. Colson's supervision,] were assigned to audit JSG for Complainant [(Tr. 69-70)]. On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided JSG's records (Tr. 78).

15. JSG maintains a file jacket for each [produce] transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials. All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the [file] jacket. (Tr. 80.)

16. . . . Ms. Colson and Mr. Nielson [examined JSG's file jackets relating to JSG's sales to L&P and] found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). [All 81 of these] file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers [on each of these file jackets are] prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions [to which the file jacket relates] (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from JSG to "A. Gentile" (Tr. 111-13). The reverse side of the checks

[are endorsed] "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, JSG's bookkeeper (Tr. 1705).

17. The [top portion of the] back cover of [each of] the 81 file jackets show revenues [from the produce transactions to which the file jacket relates] and the [bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates]. The expenses sections list checks issued to "A. Gentile." The notations regarding these checks correspond to actual checks . . . payable to "A. Gentile" [or the check skirts applicable to checks payable to "A. Gentile"] which were found in the file jackets. (Tr. 127-30.)

18. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that ["A. Gentile" was a fictitious name and that he] (Mr. Goodman) would give receipts to Ms. Levine for various functions, such as having his car washed, and she would expense them to the files [using the name, or notation, "A. Gentile"] (Tr. 129, 1038-39). . . . [Mr. Goodman] later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that JSG utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

19. Mr. Goodman told Ms. Colson . . . that the use of checks to "A. Gentile," which were redeposited into JSG's account, was his method of keeping track of, or making up, losses that he incurred from sales to L&P. [Mr. Goodman] also told [Ms. Colson] that if a file contained checks to Mr. Gentile that were not redeposited into JSG's account, that money was for services that Mr. Gentile had provided to him. (Tr. 242.)

20. Some of the file jackets reflecting JSG's sales to L&P contain a slip of paper on which the check to "A. Gentile" is noted (e.g., CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate JSG's expense for the file jacket (Tr. 137).

21. Ms. Colson prepared a table reflecting the numbers of the JSG files that she randomly selected, the numbers of the checks issued by JSG that they contain, and the total amounts that each file shows as payments to "A. Gentile" (CX 7; Tr. 110).

22. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony \$2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense

relating to "A. Gentile" (Tr. 145-46).

23. JSG maintains a Closed File Journal (CX 53). Each week, after a JSG file was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in JSG's file jackets are noted in JSG's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in JSG's Closed File Journal are set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-35).

24. JSG also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-07). This computer-generated record lists accounts contained in JSG's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "LOANS & EXCHANGES" [(CX 6)]. This account records loans made by JSG (Tr. 2053-54).

25. JSG also maintains a General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146). This computer-generated document describes how JSG's financial transactions are maintained in JSG's general ledger (Tr. 1765). JSG's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in JSG's loans and exchanges account as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3).

26. Ms. Colson obtained a spreadsheet from Ms. Levine or from JSG's accountant, Mr. Daily, which details the 1992 transactions in JSG's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns, reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-56). [The eight] "A. Gentile" checks [issued in 1992 which are] described in the General Ledger Journal Entry Edit Report as "L/E Tony" and a \$38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P," and reflect a reduction of Mr. Gentile's [debt] payable to JSG (CX 55 at 1-3; Tr. 161, 215-16).

27. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took . . . notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in JSG's records refers to JSG's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with JSG (CX 76; Tr. 158) and that Mr.

Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159 . . .). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at [4]-6; Tr. 166).

28. JSG maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of JSG's accounts receivable for its customers on a monthly basis. . . . (CX 51; Tr. 252). The report indicates that when L&P was rebilled for a product (such as on CX 25B at 1, where L&P was rebilled from \$5,001.35 to \$3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51 at 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Journal Entry Edit Report as "L/E Tony" are listed in JSG's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25B at 1 for \$129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-57).

29. JSG's General Ledger Journal Entry Edit Reports for 1992 and 1993 show that JSG issued checks as payments to Mr. Gentile (Tr. 171-93). These checks are described in the General Ledger Journal Entry Edit Reports as follows: check number 3941 for \$467.59 as "Steve's Loan, Tony's Boat" (CX 54 at 1-[2]); check number 1847 for \$38,475.30 as "L/E Tony" (CX 54 at [3-5]); check number 3899 for \$806.51 as "Steve's Loan Tony's Car" (CX 54 at [6-9]); check number 3975 for \$806.51 as "Steve's Loan Tony's Car" (CX 54 at [10-14]); check number 4051 for \$800 as "L/E Dirtbag for Tony's Car" (CX 54 at [14]-17); and check number 2151 for \$3,317 as "Steve's Loan Tony's Watch" (CX 54 at 18). [JSG's General Ledger Journal Entry Edit Reports also show] a JSG payment of \$6,400 as "L/E Tony" (CX 54 at 19).

30. JSG's records show that JSG check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for \$38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for \$10,000 (CX 57). The boat

needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, [secretary-treasurer] of L&P . . . , that he was getting a very good price for the boat (Tr. 2888).

31. JSG's records contain check numbers 3899 [and] 3975 . . . issued to Mercedes-Benz Credit Corporation [and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car"] (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly payments of \$798.99, for a total of \$38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838[-39]).

32. JSG check number 2151, dated July 28, 1992, for \$3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-[80].)

33. JSG's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 26[5]-66). [Two of the] check stubs . . . for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

34. [After] Ms. Colson [left JSG's premises and] returned to Washington, D.C., she found that several JSG file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements [from G&T] also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which [reflect] amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5¢ per package (Tr. 272-8[3]). File jacket [number SG 4222] in which [a G&T] statement was found shows a payment to "A. Gentile" which corresponds to the [total] . . . on the adding machine tape ([CX 44B at 1-2;] Tr. 281). The "A. Gentile" notation also corresponds to the [amount of the] check [payable] to Mrs. Gentile [found in the file and the amount] noted in JSG's payroll records [as wages paid to Mrs. Gentile] ([CX 44A at 1, CX 50 at 1;] Tr. 281-82). Many of JSG's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

35. JSG's records also contain 22 file jackets concerning JSG's sales of

tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 5[49]-51). The notations indicate that payments per box were made to "AI" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file jackets contain seven JSG checks totaling \$9,733.45 made payable to Hunts Point Produce Co. . . . (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

36. These 22 JSG file jackets also contain several invoices from Hunts Point Produce Co. to JSG in amounts that correspond to the amounts of the checks [issued to Hunts Point Produce Co.] The [Hunts Point Produce Co.] invoices contain JSG file numbers which correspond to the file numbers that were written on checks [payable to Hunts Point Produce Co. or check skirts applicable to checks payable to Hunts Point Produce Co. that were found in the file jackets] (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5; Tr. 554-59). Ms. Colson prepared a table that summarizes this information (CX 62).

37. Ms. Colson recognized that the address of Hunts Point Produce Co. [was also] Mr. Lomoriello's [address] (Tr. 559-60). In answer to Ms. Colson's question as to why Mr. Lomoriello was receiving money from JSG, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. [559-]60).

38. JSG's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by JSG to Hunts Point Produce Co. (CX 53; Tr. 604-05). Ms. Colson prepared a table showing the references in JSG's Closed File Journal for the payments to Hunts Point Produce Co. (CX 71; Tr. 629-30).

39. Ms. Colson and another PACA official interviewed Mr. Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was compensated by receiving 40 per centum of the profits on his transactions (Tr. 607). Mr. Contos [stated that if] Mr. Lomoriello [was receiving payments from JSG for produce sold to American Banana, he (Mr. Contos) expected Mr. Lomoriello] to repay American Banana 60 per centum of the money that he had received from JSG (Tr. 607).

40. Ms. Colson and her associate, Mr. Summers, also interviewed Patrick Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that JSG's payments to Mr. Gentile were being recorded in JSG's files associated with JSG's sales to L&P (Tr. 458[-64]).

Conclusions and Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (May 29, 1929). Passage of the PACA was in response to the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 71-1041[, at 1] (1930). The PACA's primary purpose is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers is declared to be unlawful." *O'Day, supra*, 536 F.2d at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. Rep. No. 71-1041, [at 3] (1930). See also *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

The issue presented is whether Respondents have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in commercial bribery.

While the PACA does not expressly prohibit commercial bribery, two decisions by the Judicial Officer of the Department of Agriculture in 1990 and 1991 held that commercial bribery violates section 2(4) of the PACA (7 U.S.C. § 499b(4)). Both cases were affirmed by the [United States] Court of Appeals [for the Fourth Circuit] and appealed to the Supreme Court of the United States, which denied certiorari. The decisions are *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). Since the issuance of these decisions, the produce industry has been on notice that commercial bribery is prohibited by the PACA.

In both *Goodman* and *Tipco*, the respondents, produce dealers, entered into an arrangement with the produce buyer for a supermarket chain to pay the buyer 25 cents for each box of produce that he purchased from the [respondents]. The supermarket chain had no knowledge of this arrangement. The Judicial Officer found these actions to be willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and ordered the respondents' licenses revoked, explaining:

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

' . . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

In re Sid Goodman & Co., *supra*, 49 Agric. Dec. at 1185-86; *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 884-85 (citing *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979)).

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to bribery by many firms, in an effort to compete. He stated:

Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

In re Sid Goodman & Co., *supra*, 49 Agric. Dec. at 1186; *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 885 (citing *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 619 (1992)).

The Judicial Officer provided the following guidelines:

The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another-- a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (*e.g.*, more than a pen, calendar or lighter).

In re Tipco, Inc., *supra*, 50 Agric. Dec. at 882-83 (footnotes and citations omitted).

The present case is in all material respects similar to *Goodman and Tipco*. That Mr. Gentile and Mr. Lomoriello were not "employees" of their principals is not a material distinction. As in *Goodman and Tipco*, JSG was obligated to refrain from making payments to Mr. Gentile and Mr. Lomoriello since such payments would encourage Mr. Gentile and Mr. Lomoriello to purchase tomatoes from JSG. JSG could only make such payments with its customers' permission. Even if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. The payments [made by JSG to Messrs. Gentile and Lomoriello] were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions Regarding Credibility

USDA obtained and carefully analyzed JSG's records. These records support [Complainant's] contentions that JSG bribed Mr. Gentile, a buyer of tomatoes for L&P, and that JSG bribed Mr. Lomoriello, a buyer of tomatoes for American Banana. . . . JSG's file jackets, accounts, checks, and other records fully document and support [Complainant's] allegations of bribery.

I find Complainant's lead investigator and principal witness, Ms. Joan Colson, to be completely credible. She had no motive to be untruthful, her testimony is consistent, and her testimony is supported by her written notes, as well as by

Respondents' records.

I find Complainant's other witnesses to be truthful. I find Carlos Valencia to be a truthful witness and where his testimony conflicts with Mr. Lomoriello's testimony, I find Mr. Valencia to be the more believable witness.

Respondents' witnesses are not very believable. JSG's bookkeeper/office manager, Marsha Levine, and JSG's accountant, Thomas Daily, tried to explain away the overwhelming documentary evidence that supports Complainant's allegations, but their explanations are not convincing. They seemed to be suffering as they testified and strained to show that their records did not support the conclusion that JSG bribed Mr. Gentile and Mr. Lomoriello. Although I could not conclude from their demeanor that either Mr. or Mrs. Gentile were being untruthful, their testimonies seem illogical and, therefore, are not believable. By his demeanor, Al Lomoriello was not believable. I also conclude that he manufactured documents after the fact.

However, the pivotal witness for Respondents was Steve Goodman. Mr. Goodman is an articulate, personable, and persuasive individual. These are traits that have enabled him to become an effective and extremely successful salesman. He is rarely at a loss for explanations. Just listening to Mr. Goodman, one wants to believe him. However, an analysis of the evidence and the application of logic render many of Mr. Goodman's critical explanations unbelievable.

I believe Mr. Goodman's testimony that he is meticulous about his record keeping. He testified:

There were so many files. . . . All I can say is all my notations are identical . . . the notations - my paperwork, like I said, it's kind of like the McDonalds of the produce business, it's always the same

Tr. 2268.

Mr. Goodman later reiterated this theme, stating:

. . . What I'll do a lot of times is I write everything on my files so this way when I come back to them 15 days later, 20 days later, 30 days later, it's very important for me to keep a good accurate account of everything I've done

Tr. 2368.

I believe this testimony that Mr. Goodman's notations on his file jackets were meticulous and accurate. Mr. Goodman was constantly making oral agreements,

mostly by telephone, talking to many people about various lots of tomatoes each day. Thus, he realized that to be successful and effective he needed to write down his prices, his costs and all data relevant to transactions on the file jackets, including the amounts that he paid to Mr. Gentile and to Mr. Lomoriello for each transaction.

Mr. Goodman's careful record keeping supports [Complainant's] allegations of bribery.

In attempting to rebut [Complainant's] allegations, Mr. Goodman adopted an opposite tact, trying to explain that things were vague and imprecise in other respects. I found this testimony, which conflicted with his meticulous record keeping, to be unbelievable.

Thus, Mr. Goodman testified that money that was paid to Mr. Lomoriello was for various jobs, but Mr. Goodman did not know which [jobs]. He testified:

... It was not my policy that I would write down what Al did for me.
I knew what Al did.

Tr. 2196.

Talking about "clips," [Mr. Goodman's] explanation for some of the payments, Mr. Goodman stated:

The way that was kept track of and how much it worked out to Gloria stock and a clip balance and things like that and the circular checks, I only -- I bought and sold the produce. I really don't have a clear understanding -- I think Marsha could explain that better or already has explained it for the time being better than I am.

Tr. 2279.

He further testified about "clips":

I never asked Marshal [sic] how she was doing it but obviously I am not dumb. I knew we were doing it. We were keeping a running balance some place. I never knew of any journals or ledgers, or how she was doing it, but I knew that she was keeping track of this for me. . . .

Tr. 2180.

[Mr. Goodman's portrayal of his understanding of jobs for which JSG paid Mr. Lomoriello and the manner of keeping accounting for "clips"] is totally inconsistent with Mr. Goodman's meticulous record keeping style, as well as his style of being an effective, controlling, "hands on" manager.

Discussion of the Evidence

I. JSG's Payments to Mr. Gentile.

Complainant has provided extensive evidence that in 1992 and early 1993, JSG made numerous payments to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from JSG for L&P (Tr. [2170-]71).

JSG's payments to Mr. Gentile included: (1) The use and eventual purchase of Mr. Goodman's boat at a price substantially below its value; (2) Mr. Gentile's use of a valuable Mercedes automobile paid for by JSG; (3) a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and (5) payments to Mr. Gentile in the form of 35 JSG checks.

A. The Boat.

The boat that was loaned and then sold to Mr. Gentile was purchased in 1987 by Mr. Goodman for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). Mrs. Gentile testified that, although the boat needed work, it was "nicely laid out" (Tr. 2930).

While Mr. Gentile was using the boat, JSG's records indicate that JSG considered it to be Mr. Gentile's boat. JSG's General Ledger Journal Entry Edit Report for 1992 and 1993, and the check stubs of the JSG checks noted in the report, show that check number 3941 for \$467.59 was issued on [January 24,] 1992, for "Steve's Loan Tony's Boat" (CX 54 at 1-2). When Mr. Daily, JSG's accountant, was asked about this entry at the hearing, he explained that "Tony" referred to Tony Gentile (Tr. 1559).

[On June 5,] 1992, JSG issued check number 1847 for \$38,475.30 to Midlantic National Bank (CX 54 at 3; Tr. 182) in final payment for a loan made to Mr. Goodman to purchase the boat (CX 73 [at 11]; Tr. [185-]86). At that time, the record owner of the boat was Jill Goodman, Steve Goodman's wife (CX 73). Soon

after JSG satisfied the boat's \$38,475.30 loan balance, Mr. Goodman sold the boat to Mr. Gentile for \$10,000 (CX 57). Mr. Gentile told Louis Beni, [secretary-treasurer] of L&P, that he was getting a very good price on the boat (Tr. 2888). . . . By permitting Mr. Gentile to use Mr. Goodman's boat, which cost \$45,000 to \$50,000 in 1987, since 1990, and then selling it to [Mr. Gentile] for a mere \$10,000 in 1992, immediately after having satisfied a bank loan balance of \$38,475.30, JSG and Mr. Goodman made a substantial unlawful payment to Mr. Gentile.

B. The Mercedes.

On May 11, 1990, a new Mercedes automobile was leased to Mr. Gentile (CX 56 at 3-5; Tr. 198-99). The lease was for 48 months, with monthly payments of \$798.99, for a total of \$38,351.52 (CX 56 at 5). Mr. Gentile was authorized to lease the car by Dirtbag Trucking, a corporation which Mr. Goodman and Mr. Gentile jointly owned (RX 2; Tr. 2102-03).

Dirtbag never had its own offices, but was operated from JSG's office (Tr. 2047). [While JSG's records only show three checks issued by JSG that are directly linked to payment of the lease for the Mercedes (CX 54 at 6, 10, 14-15; Tr. 198),] Dirtbag constantly experienced cash flow problems and JSG . . . advanced money to [Dirtbag on a number of occasions] (CX 55 at 1-[3]; Tr. 2049). JSG often paid Dirtbag's creditors directly (Tr. 1585). When Mr. Daily discovered these advances, he was concerned that Dirtbag's independence for tax purposes would be compromised (Tr. [1593-]94). Mr. Goodman called Dirtbag "a loser" (Tr. 2149).

However, despite Dirtbag's constant financial problems and dependence upon JSG for financial support, Mr. Goodman, on behalf of Dirtbag, presented Mr. Gentile with the leased Mercedes in 1990. . . . When asked at the hearing why a less expensive car was not leased, Mr. Goodman explained:

[BY MR. STANTON:]

Q. Any particular reason why a Mercedes was the car that was leased rather than a Chevy, a Ford?

[BY MR. GOODMAN:]

A. Yes, we work hard and we like the best.

Tr. 2787.

It is . . . doubtful that Mr. Gentile ever used the Mercedes for Dirtbag's business. Mr. Gentile testified that he drove the Mercedes to work at the Hunts Point Market (Tr. 2838). Mrs. Gentile testified that she did not know for what aspects of Dirtbag's business Mr. Gentile could have used the Mercedes (Tr. 2936). Additionally, when Mr. Goodman presented the Mercedes to Mr. Gentile, he placed a large red ribbon on it (Tr. 2828, 2838[-39]). [Mr. Goodman's act of adorning the car with a ribbon] also implies that the car was a gift.

Thus, the payments of approximately \$38,000 made by JSG to provide Mr. Gentile with the Mercedes also were unlawful.

C. The Rolex Watch.

[JSG check number 2151, dated July 28, 1992, for \$3,317, was issued to a jewelry store in payment for a Rolex watch.] In approximately August 1992, Mr. Goodman gave the Rolex watch to Mr. Gentile (RX 40; Tr. 2478). Mr. Goodman admitted that he gave the watch to Mr. Gentile as a gift (Tr. 2479). Although Mr. Goodman said he was motivated by his friendship with Mr. Gentile, the [act of] bestowing such an expensive present upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P also was unlawful.

D. The Payments to Mrs. Gentile and to G&T.

JSG's payroll records for 1992 indicate that Mrs. Gentile was receiving . . . wages from JSG (CX 50 at 1-2; Tr. [265-]66). [Two of] the check stubs [relating to checks issued to Mrs. Gentile] indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268). Ms. Levine explained that Mrs. Gentile was paid for providing services to JSG as an informant (Tr. [270-]71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5¢ [for each] box . . . of tomatoes sold by JSG to L&P. In several JSG file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total [number of packages] by 5¢ per package (Tr. 272-8[3]). Ms. Colson also noticed that file jacket [number SG 4222] in which [a G&T] statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape ([CX 44B at 1-2;] Tr. 281). The amounts of the

"A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in JSG's payroll records (Tr. 281-82). Ms. Colson further noticed that many of JSG's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44[B at 1-2]; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to Ms. Levine, Mr. Goodman ordered JSG's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for his purchase of her stock in Dirtbag (Tr. 1715).

However, JSG's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks are listed in JSG's payroll records as [wages and the fact that two of the check stubs indicate that the checks issued to pay Mrs. Gentile were for] commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on JSG's payroll records . . . was an error (Tr. 1941). However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992, based upon his assumption that she was a salaried employee of JSG (Tr. 1541-42, 1595). In mid-1993, after Mr. Daily [submitted] JSG's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-62). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-02).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "[wages]" in JSG's [payroll] records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as [wages], . . . Ms. Levine was aware that Mr. Lomoriello could not be entered in JSG's books as a wage earning employee, or else JSG would [be required] to send a 1099 tax form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX [2 at 7-9a]; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for \$80,000 ([RX 3 at 1;] Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with JSG's attorney and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly

installments for the next 2 years. After the payment of each \$25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of \$30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized [three] releases of [2]5 shares of stock [each] on December 30, 1991, February 14, 1993, and February 2, 1994 (RX [3] at 3-3b; Tr. 2942-43).

However, Respondents presented no evidence that Dirtbag was worth \$80,000 during the period from 1991 through 1994. To the contrary, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984[-85], 2049, [2148-]49, [2495-]96). Even if the JSG checks to Mrs. Gentile, calculated by deducting 5¢ for each box of tomatoes sold to L&P, did amount to \$80,000, the payment was still unlawful. Mr. Gentile had only loaned Dirtbag \$40,000 and had invested [approximately] \$7,000 in a new truck (Tr. [2782-]83). JSG's payments, therefore, would have included a profit of approximately \$33,000, which would have been unjustified, given Dirtbag's unprofitable status.

The payment of \$80,000 was also improper because, as Mr. Goodman acknowledged, if JSG [sold] more [tomatoes to] L&P during the period that the 5¢ per box deductions were to be made, Mrs. Gentile would receive the \$80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of JSG's tomatoes as possible. In addition, Mr. Goodman stated that Mrs. Gentile's final 25 shares of Dirtbag stock would not be released from escrow until 1994, to coincide with the end of Mr. Gentile's lease of the Mercedes (Tr. [2494-]95). [The coincidence of the release of the stock and the end of the lease] would permit Mr. Gentile's continued use of the car, since it would remain deductible by Dirtbag as a business expense as long as Mrs. Gentile retained ownership of some of the stock (Tr. 1680).

Further evidence of unlawful payments to Mr. Gentile is a January 30, 1992, JSG check made payable to G&T in the amount of \$5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to JSG and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the \$5,600 was for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 293[2]-34). No documentation was ever provided to justify the \$5,600 payment. I conclude that this \$5,600 payment also was a bribe.

E. The 35 Checks to "A. Gentile."

JSG's unlawful payments to Mr. Gentile also include 35 checks, totaling \$62,535.60 (CX 7), which JSG issued to "A. Gentile." JSG refers to these checks as "circular checks" because they were redeposited to JSG's bank account. However, JSG's records show that the 35 checks were treated as if Mr. Goodman was sharing his profit with Mr. Gentile. Further, 16 of the checks were shown in JSG's records as reducing [the debt] that Mr. Gentile owed to JSG.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8-CX 42; Tr. 109-13). All of the file jackets concern sales of tomatoes by JSG to L&P. Mr. Goodman represented JSG in all of the transactions since all of the file numbers contain the prefix "SG" (Tr. 80). Each file jacket contains handwritten notations and supporting documents ([CX 8-CX 42;] Tr. 132). The reverse sides of the 35 checks contain the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contain a slip of paper on which the payment to "A. Gentile" is noted (CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this information to indicate JSG's expenses for the file jacket (Tr. 137).

[The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates] (Tr. 127). The revenues sections show the amounts that JSG's customer was billed for the produce and how much the customer paid (Tr. [127-]28). The expenses sections show from whom JSG purchased the produce, the date of purchase, the seller's invoice number, the date that JSG made payment, JSG's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question show payments to "A. Gentile" in the same amounts as the [checks to] "A. Gentile" found by Ms. Colson (Tr. 128[-30]).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense them to the files and that "A. Gentile" was a fictitious name (Tr. 129, [1038-]39). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039).

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into JSG's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr.

Gentile were not deposited into JSG's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets . . . (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145[-46]).

1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to JSG.

JSG's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile. Further, 16 of the 35 checks were shown in JSG's records as reducing [the debt owed by] Mr. Gentile [to JSG].

JSG's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in JSG's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence [establishes] that JSG was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in JSG's records as payments to reduce a [debt] that Mr. Gentile owed to JSG. In JSG's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how JSG's financial transactions are recorded in JSG's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into a JSG account described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account [under which the 16 checks were entered] is "108," which is identified in JSG's [General Ledger] Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in JSG's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160[-01], 1617-21). Ms.

Colson found that [the eight checks issued in 1992 to] "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the \$38,475.30 boat payment to Midlantic Bank, are noted in the [1992] spreadsheet as a reduction of Mr. Gentile's [debt] payable to JSG (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about JSG's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-[3]). Ms. Colson took . . . notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to JSG's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to JSG (CX 76; Tr. 158). The references to "L/E Tony" contained in JSG's general ledger were set forth in the column in the spreadsheet under the heading "L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes 'L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule. - That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532[, 1656-57]). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did JSG ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of [debts] that Mr. Gentile owed to JSG.

It is clear that 16 of the 35 "A. Gentile" checks were treated by JSG as reductions of Mr. Gentile's [debt] payable to JSG. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales [of tomatoes] to L&P. All of these checks evidence unlawful payments by JSG to Mr. Gentile.

2. JSG's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

JSG contends that the checks payable to "A. Gentile" relate to an arrangement

with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by JSG as part of a system to adjust L&P's files because of L&P's "clipping" of JSG invoices. A "clip" would result in L&P paying less than JSG's invoice price. Ms. Levine testified as follows:

[BY MR. MANDELL:]

Q. Would you tell us what clips are in your understanding.

[BY MS. LEVINE:]

A. Okay.

Q. With regard to L&P.

A. Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q. Miss Levine, why were you doing this with checks?

A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up \$320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when a customer of JSG had a problem with a load and "clips" an invoice, and JSG did not object to the "clip," JSG would rebill the

customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second journal became wet when JSG's basement was flooded early in 1995 (Tr. 1706, 179[3]-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, JSG's attorney, said the information was needed, but she was unable to [reconstruct the second journal] (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed, and she had been told by JSG's attorney that such a journal would be important evidence (Tr. 1772, 180[3]-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, \$10,092.65, and worked backward in time (RX 20 at 27; Tr. [1808-]09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809[-13]). Without any tangible written evidence that JSG maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

[BY MR. STANTON:]

Q. Well, this file, [CX] 13[B at 1], indicates a \$3200 circular check to A. Gentile under the expenses portion of the file[,] correct?

[BY MR. GOODMAN:]

A. Okay.

Q. It looks like from the file jacket, that this \$3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A. Pretty close to it, yes.

Q. That this \$3200 is being taken away from your commissions?

A. Yes.

Q. Well, if that's the case, then how does this --

A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into JSG's account could have affected the balance owed between JSG and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.

Q. That is a make up for what 3120?

A. Yes, that is correct.

Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?

A. That is correct.

Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now --

A. It is not that we gained. We got back money that they had ---

Q. That had lost on other ---

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase -- yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to

confuse the witness.

Tr. 3129-3[2].

[The] credibility of this [arrangement] is also seriously compromised by [Mr. Goodman's] admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, JSG introduced into evidence copies of hundreds of JSG file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of JSG's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip" on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, . . . 4314, . . . 4399, 471[8], 48[7]6, [5115, 5128, and 5145]), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

BY MR. MANDELL:

Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?

[BY MR. GOODMAN:]

A. Yes. I wrote the word clip.

Q. When did you do it and why did you do it. I realize it is a compound question.

A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I ---

JUDGE BERNSTEIN: In preparing for the hearing?

THE WITNESS: In preparing for the hearing.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. [3168-70].

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut JSG's contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from JSG's credibility in general.

As I have stated [in this Decision and Order, *supra*], Mr. Goodman's testimony about the "clips" also is unbelievable. His lack of specific knowledge [of how "clips" worked is] inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

I also found unbelievable Mr. Goodman's testimony as to why 5¢ per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

. . . Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the \$3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he sad [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269[-70].

I, therefore, conclude that all of these 35 checks payable to "A. Gentile"

constitute illegal payments to Mr. Gentile.

II. JSG's Payments to Mr. Lomoriello.

From December 1992 through February 1993, JSG issued seven checks to Mr. Lomoriello totaling \$9,733.45 at a time when Mr. Lomoriello was [an agent for] American Banana, responsible for buying tomatoes from JSG. Mr. Contos, vice-president and co-owner of American Banana, was unaware that any payments to Mr. Lomoriello were being linked directly to the number of boxes of tomatoes which American Banana was purchasing from JSG (Tr. 322-23). [JSG's] payments [to Mr. Lomoriello] also constitute bribes, in violation of the PACA.

Mr. Lomoriello became employed by American Banana in December 1991 and left its employ in 1993 (Tr. 315). Mr. Contos wanted Mr. Lomoriello to expand [American Banana's] business. Mr. Lomoriello was to receive 40 per centum of the profit on the produce he purchased, and be liable for 40 per centum of any losses (Tr. [314,] 1245-46).

Mr. Lomoriello received seven checks from JSG totaling \$9,733.45 from December 1992 through February 1993. JSG and Mr. Lomoriello claim that these checks were for work done by Mr. Lomoriello not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or JSG to earn these sums. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets [that relate to JSG's sales of tomatoes to American Banana] which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). . . . The notations indicate that payments per box were being made to "A1," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found [Hunts Point Produce Co.] invoices . . . in the file jackets for amounts corresponding to the payments [to "A1," "HPT," or "Hunts Point Produce"] listed on the file jackets. She also found seven JSG checks totaling \$9,733.45, made payable to Hunts Point Produce Co. . . . (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4 . . .). [The amounts on the Hunts Point Produce Co. invoices also correspond] to the amounts of the checks [made payable to Hunts Point Produce Co. and the Hunts Point Produce Co. invoices contain JSG file numbers which correspond to the file numbers written on the checks payable to

Hunts Point Produce Co. or written on the check skirts applicable to checks payable to Hunts Point Produce Co.] (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest [Hunts Point Produce Co. invoice], dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined JSG's Closed File Journal, [she found] the amounts of the checks written by JSG to Hunts Point Produce Co. . . . listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to JSG (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not an employee of JSG (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on . . . American Banana files, and completed a [Hunts Point Produce Co.] invoice to reflect [the amounts to be paid to Mr. Lomoriello] (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording bribes, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice [(CX 63B at 4)], since it appeared to him as if he was receiving a "kickback." She testified:

When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr. 2036). After being made aware that Mr. Lomoriello was upset that JSG's payments to him were documented in a way that suggested that the payments were bribes, JSG did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

JSG and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Mr. Goodman. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated

they were at his home and that he would provide them to her on the following day (Tr. [608-]09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets [(CX 70)], supposedly reflecting his deposit of the funds received from JSG (Tr. [630-]31).

However, at the hearing, Mr. Lomoriello . . . disclosed what he alleged were notes that he had written in 1992 [and 1993] in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 11[79]-81). These [notes] appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL -- RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written [(RL 19-25)] from the desk of American Banana's bookkeeper, Carlos Valencia:

[BY MR. STANTON:]

Q. The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?

[BY MR. LOMORIELLO:]

A. The blank documents, that's American Banana stuff, yeah -- yes.

Q. Now, explain again where you -- actually in American Banana you obtained them from?

A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- they're are [sic] pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead [found on] . . . notes [in JSG's files] (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know the facts about this (Tr. [1225-]28).

However, Mr. Valencia testified that the letterhead used for the alleged notes [(RL 19-25)] was identical to the [letterhead] used for American Banana's invoices (e.g., RL 1), and that the only letterhead that American Banana used for correspondence was th[e letterhead on notes found] in JSG's files [(CX 65G at 7; CX 66B at 14)].

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads --

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

....

JUDGE BERNSTEIN: And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. [1485]-86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any [paper with] such letterheads were ever left outside his locked filing cabinet (Tr. 1490-92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred -- that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from JSG were not bribes.

JSG also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for JSG in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "Al" in [(RX 50 at 18)] (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for JSG in other matters. Yet there was no reliable evidence that the moneys paid to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr.

Goodman's notations of expenses on associated files, it is also unbelievable that these fees would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that these payments from JSG to Mr. Lomoriello totaling \$9,733.45 were bribes, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

**Respondents' Violations Were Willful, Flagrant, and
Repeated Violations of Section 2(4) of the PACA
Which Warrant the Maximum Sanctions.**

As in the *Goodman* and *Tipco* cases, Respondents have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondents knew, or should have known, that the payments made by JSG to Mr. Gentile and Mr. Lomoriello to influence their buying practices and to induce them to make purchases of tomatoes for L&P and American Banana, respectively, were unlawful, and Respondents should have known that they were violating the law. *In re Tipco, Inc., supra*, 50 Agric. Dec. at 887-88.

This case is, in all material respects, similar to *Goodman* and *Tipco*. JSG made payments to Mr. Gentile and to Mr. Lomoriello to induce them to buy tomatoes for L&P and American Banana, respectively. Respondents' alternative explanations for these payments are not believable. JSG's . . . payments . . . to Mr. Gentile . . . [and] Mr. Lomoriello warrant the most severe sanctions.

As in *Goodman* and *Tipco*, the extremely serious violations in this case mandate no lesser sanctions than a license revocation for JSG; findings that Gloria and Tony Enterprises, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and the denial of Mr. Gentile's license application. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent JSG raises eight issues in Appeal Petition of JSG Trading Corp. and Brief of JSG Trading Corp. in Support of Their [sic] Appeal Petition [hereinafter JSG's Appeal Petition].

First, JSG contends that the standard of proof by which Complainant must prove its case is "clear and convincing evidence" or "beyond a reasonable doubt," as follows:

It is also important to note that the Department must prove their [sic] allegations against JSG, based upon the concept of "substantial" evidence

which burden of proof is analogous to the concept of "the preponderance" of the evidence. This concept amounts to a higher standard than the "greater weight" of the evidence and is equivalent to the standard of "clear and convincing." Also, whereas the term "substantial" evidence has never been fully defined, in the Agricultural setting, the Appellant respectfully submits that, based upon the fact that the sanctions which can be imposed are so severe, that standard of proof actually should be, proof "beyond a reasonable doubt." In any event, even under the current concept of "substantial" evidence, this Judicial Officer must certainly require a very high standard of proof before authorizing the severe sanction of the Revocation of the Licensure of JSG and branding individuals as being "corrupt."

JSG's Appeal Petition at 16-17.

I disagree with JSG's contention that the standard of proof applicable in this proceeding is "clear and convincing" evidence or "beyond a reasonable doubt."

The Administrative Procedure Act provides, with respect to burden of proof, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof.* . . .

5 U.S.C. § 556(d) (emphasis added).

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.¹¹ The burden of proof does not,

¹¹*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). See also *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going

however, require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,¹² and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.¹³ Based upon a careful consideration of the record in this proceeding, I find that Complainant has proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, JSG contends that the Judicial Officer must reverse the ALJ, unless the ALJ's decision is based on substantial evidence. (JSG's Appeal Petition at 17-18.)

I agree with JSG's contention that the conclusion that JSG willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) must be

forward"); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

¹²*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

¹³*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 10-11 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, No. 97-4053 (2d Cir. Dec. 19, 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

based on substantial evidence.

The Administrative Procedure Act provides, with respect to substantial evidence, that:

§ 556. Hearings; presiding employees; powers and burden of proof; evidence; record as basis of decision

....

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*.

5 U.S.C. § 556(d) (emphasis added).

"Substantial evidence" denotes quantity,¹⁴ and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.¹⁵ I find the record contains substantial evidence of JSG's, G&T's, and Mr. Gentile's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which substantial evidence is fully discussed in this Decision and Order, *supra*.

Third, JSG contends that "the Judicial Officer is not required to accept the Administrative Law Judge's Findings of Fact, even if those findings are based on [credibility] determinations" and "the Administrative Law Judge's findings of fact are not entitled to any special deference from the Judicial Officer, who is free to, independently, weigh the evidence and draw his own inferences and conclusions and has an obligation to do so." (JSG's Appeal Petition at 18-19.)

I agree with JSG's contention that I am not bound by an administrative law

¹⁴*Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 974 (10th Cir. 1983); *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130, 134 n.8 (9th Cir. 1974).

¹⁵*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Havana Potatoes of New York Corp. v. United States*, No. 97-4053 (2d Cir. Dec. 19, 1997); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995); *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 144 (4th Cir.), cert. denied, 510 U.S. 867 (1993); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), cert. denied, 502 U.S. 860 (1991).

judge's findings of fact. The Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved;¹⁶ (2) the record is sufficiently strong to compel a reversal as to the facts;¹⁷ or (3) an administrative law judge's findings of fact are hopelessly incredible.¹⁸ Moreover, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).¹⁹

¹⁶*In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

¹⁷*In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

¹⁸*Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

¹⁹*See also In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading*

However, I disagree with JSG's contention that an administrative law judge's findings are not entitled to any deference. The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.²⁰ I find nothing on this record sufficient to support reversal of the ALJ's credibility determinations.

Further, JSG contends that the evidence does not adequately support the ALJ's findings of fact. However, an examination of the record reveals that, with the exception of Finding of Fact No. 26 in the Initial Decision and Order, substantial evidence supports the ALJ's findings of fact, which I have adopted with only minor changes.

The ALJ found in Finding of Fact No. 26, as follows:

26. Ms. Colson obtained a spreadsheet from Ms. Levine or from JSG's accountant, Mr. Daily, which detailed the 1992 transactions in JSG's "loans and exchanges" account (CX 55, pp. 1 and 2; Tr. 158, 1605). The spreadsheet contained 13 columns, reflecting various individuals or firms to whom JSG had loaned money (Tr. 2054-2056). All 16 of the "A.

Comm'n, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

²⁰*In re Jerry Goetz*, 56 Agric. Dec. ____, slip op. at 52 (Nov. 3, 1997); *In re Fred Hodgins*, 56 Agric. Dec. ____, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

Gentile" checks described in the General Ledger Entry Edit report as "L/E Tony" and a \$38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P", and reflect a reduction of Mr. Gentile's loan payable to JSG (CX 55, p[p]. 1-3; Tr. 161, 215-216).

Initial Decision and Order at 11.

JSG contends that the ALJ's finding that 16 "A. Gentile" checks are noted on the spreadsheet (CX 55) is error and that only eight of the "A. Gentile" checks appear on the spreadsheet (JSG's Appeal Petition at 50-53). I agree with JSG and I have modified the ALJ's Initial Decision and Order to reflect the fact that eight of the "A. Gentile" checks appear on the spreadsheet (CX 55).

The spreadsheet (CX 55) reflects JSG's 1992 loan and exchanges account. Therefore, the only "A. Gentile" checks entered on the spreadsheet are those checks issued in 1992; the 1992 spreadsheet does not reflect the eight "A. Gentile" checks issued in 1993.

However, the ALJ's error is harmless. The record clearly establishes that the 35 checks payable to Mr. Gentile, found in JSG's file jackets (CX 8-CX 42) relating to Mr. Goodman's sales of tomatoes to L&P reflect profit split between Messrs. Goodman and Gentile. Further, 16 of the 35 checks are shown in JSG records as reducing Mr. Gentile's debt to JSG. The fact that the ALJ mistakenly found that all 16 of the checks reducing Mr. Gentile's debt to JSG were reflected on the 1992 spreadsheet (CX 55), instead of the eight checks issued in 1992, is harmless error.

Fourth, JSG contends that before there can be a finding of a violation of the PACA, there must be proof by substantial evidence of willfulness (JSG's Appeal Petition at 20).

I disagree with JSG's contention that a necessary prerequisite to finding a violation of the PACA is proof by substantial evidence that the violation is willful.

While Complainant proved by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)),²¹ it is not necessary to prove that JSG's, G&T's, and

²¹A 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. See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op.

Mr. Gentile's violations were willful in order to prove that they violated the PACA.

Fifth, JSG contends that the PACA was amended by adding a sentence at the end of section 2(4) "in order to make it possible for friends and individuals to do business with each other without fear of violating the law." (JSG's Appeal Petition at 7.)

I disagree with JSG's contention that PACA was amended to make it possible for friends and individuals to do business with each other without fear of violating the law.

As initial matter, the PACA has never prohibited an individual from selling perishable agricultural commodities to, or purchasing perishable agricultural commodities from, another individual or a friend. Moreover, section 9(b)(3) of the

at 27 (Dec. 5, 1997); *In re Tolar Farms*, 56 Agric. Dec. ____, slip op. at 18 (Nov. 6, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, No. 97-4053 (2d Cir. Dec. 19, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent.).

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

Willfulness is reflected by: (1) JSG's intentional multiple payments to Mr. Gentile (directly and indirectly through G&T and Mrs. Gentile) which were designed to induce Mr. Gentile to purchase tomatoes on behalf of L&P; (2) JSG's intentional multiple payments to Mr. Lomoriello which were designed to induce Mr. Lomoriello to purchase tomatoes on behalf of American Banana; (3) Mr. Gentile's intentional acceptance (directly and indirectly through G&T and Mrs. Gentile) of multiple payments as compensation for purchases of tomatoes on behalf of L&P; and (4) Mr. Lomoriello's intentional acceptance of multiple payments as compensation for purchases of tomatoes on behalf of American Banana. The record establishes that JSG's, G&T's, Mr. Gentile's, and Mr. Lomoriello's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are not merely the result of a careless disregard of statutory requirements or merely a gross neglect of a known duty. Instead, the record reflects JSG's, G&T's, Mr. Gentile's, and Mr. Lomoriello's evil intent to engage in commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995], which amended section 2(4) of the PACA by adding a sentence at the end of section 2(4) of the PACA, does not allow the payment of bribes by sellers of perishable agricultural commodities to employees or agents of purchasers of perishable agricultural commodities. Instead, the PACAA-1995 and the applicable legislative history make clear that section 9(b)(3) of the PACAA-1995 relates to promotional payments or volume discounts by the seller of perishable agricultural commodities to purchasers of perishable agricultural commodities.

Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA:

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 Act.

7 U.S.C. § 499b(4) (Supp. I 1995).

Section 9(a) of the PACAA-1995 amends section 1(b) of the PACA to adding a definition of the term "collateral fees and expenses" to read as follows:

The term "collateral fees and expenses" means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity.

7 U.S.C. § 499a(b)(13) (Supp. I 1995).

Further, the House Report accompanying the legislation, which became PACAA-1995, describes collateral fees and expenses as follows:

Section 9—Consideration of collateral fees and expenses

Section 9 establishes clarification of the status of collateral fees and expenses. Collateral fees refer to promotional allowances, rebates, service or material fees paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities. They are fees considered separate from invoice fees. Section 9 clarifies that a collateral fee is lawful in and of itself.

H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

Moreover, testimony, during the March 16, 1995, legislative hearing to review the PACA which led to the approval of PACAA-1995, indicates that the

lawfulness of volume discounts given by a seller to a purchaser of perishable agricultural commodities was one of the issues before Congress when it considered the amendment of the PACA:

MR. POMBO. . . .

MR. BLOCK, in your opening statement, you talked about extortion. I'd like you to explain that a little further to me as to exactly in what context that statement was made and exactly how that would work.

MR. BLOCK. All right. Here's how it works. We have an industry, wholesalers, food service distributors, that have done a lot of their business on what they call cost plus, the cost of the product, add something to it, and sell it on to the institution or the restaurant or whatever.

And historically they have had contracts with these customers. And also historically the suppliers for volume discounts and some things at the end of the year if they had enough volume, this wholesaler or food service distributor would get a volume discount paid to him by the person who supplied him the product because he had used a lot of it.

Now, PACA comes in and says "Well, that's not quite right. We've got to look at these contracts. If you're going to have cost plus, you've got to add in that rebate that you received." But they never gave us the details on what they expected.

. . . .

But what happened is they never would tell us what the rules were. . . .

In the beginning if PACA had said, "Okay. These contracts have to be written a certain way," then I would have taken this to all of my members, food service operators and wholesalers, and say "Okay. PACA is saying the contract have to be like this. So all of you guys get them straight and get them like this." But they never clarified that.

MR. POMBO. Would you give me the record information, it can be in a letter form or however, as to exactly in this case or in other cases that you or your members are aware of what happened and how it worked?

And also if you have not done so, would you enter into the record the formal request that you held up during your opening statement so that everyone has an opportunity to see that?

MR. BLOCK. Yes, I certainly will.

MR. POMBO. And at the same time as we work through this process, I would greatly appreciate any information that you have on how we would make this program work more efficiently.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 48-49 (1995) (statement of John Block, president, National-American Wholesale Grocers' Association).

The payments made by JSG, which are the subject of this proceeding, were not lawful promotional payments or volume discounts to L&P and American Banana, the entities that purchased perishable agricultural commodities from JSG. Instead, the payments were unlawful commercial bribes paid to agents working for L&P and American Banana to induce those agents to purchase tomatoes on behalf of L&P and American Banana from JSG.

Sixth, JSG states that in *In re Sid Goodman & Co., supra*, and *In re Tipco, Inc., supra*, it was rather obvious that there was commercial bribery, in violation of the PACA. However, JSG contends that the facts in this proceeding are distinguishable from those in *Goodman* and *Tipco*, and that the ALJ's reliance on *Goodman* and *Tipco* is misplaced. (JSG's Appeal Petition at 79-91.)

Goodman and *Tipco* provide the legal standard for bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I disagree with JSG's contention that *Goodman* and *Tipco* are inapposite to this proceeding. I agree with the ALJ that the relevant facts in *Goodman* and *Tipco* are similar to the facts in this proceeding, and I find that the ALJ did not err by relying on *Goodman* and *Tipco*. I have therefore adopted, with only minor changes, the ALJ's discussion of the applicability of *Goodman* and *Tipco* to the facts in this proceeding.

JSG raises two issues which were not directly addressed by the ALJ in his discussion of the applicability of *Goodman* and *Tipco* to this case (Initial Decision and Order at 16-18, 46-47). JSG contends that "in order for there to be 'commercial bribery' in this [c]ase, [Complainant] must prove by substantial evidence that Mr. Gentile and Mr. Lomoriello were influenced by the actions of Mr. Goodman relative to their purchases of tomatoes from JSG." (JSG's Appeal Petition at 84.)

I disagree with JSG. Neither *Goodman* nor *Tipco* require that a bribe actually

influence the recipient of the bribe. Payment to a produce purchaser's agent or employee, in an attempt to induce that agent or employee to purchase produce (from the person making the payment) on behalf of the agent's principal or employee's employer, is sufficient to constitute bribery under the PACA. The evidence in this proceeding clearly establishes that JSG's payments to Mr. Gentile (directly and indirectly through G&T and Mrs. Gentile) and Mr. Lomoriello actually induced Messrs. Gentile and Lomoriello to purchase tomatoes from JSG on behalf of L&P and American Banana, respectively.

JSG also contends that bribery cannot be established in this proceeding because there is no evidence that JSG charged L&P or American Banana any more than L&P and American Banana would have been charged in the absence of payments to Messrs. Gentile and Lomoriello (JSG's Appeal Petition at 86, 88). However, even if JSG could show that it absorbed all of the payments made to Messrs. Gentile and Lomoriello, L&P and American Banana were still damaged by JSG's illicit relationship with Messrs. Gentile and Lomoriello, respectively, because JSG's payments to Messrs. Gentile and Lomoriello indicate that JSG would have been willing to sell produce to L&P and American Banana for less than the invoice price.

Further, even if I found that JSG would have sold tomatoes to L&P and American Banana for the same price, in the absence of payments to Messrs. Gentile and Lomoriello, that finding would not change the outcome of this case. A finding that a person has engaged in commercial bribery is not dependent on a finding that the principal of a bribed agent or the employer of a bribed employee is monetarily harmed. Commercial bribery is unfair conduct under the PACA because of the actual and possible effects on competition. A commission merchant, dealer, or broker that pays an agent or employee of another to influence buying interposes an obstacle to the competitive opportunity of other firms which is not related to any competitive advantage possessed by the commission merchant, dealer, or broker. Commercial bribery destroys the integrity of competition by poisoning the judgment of people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products. Competitors will find it extremely difficult to sell goods based on quality and price alone, and many competitors would resort to similar tactics to procure business. Unchecked, the practice of commercial bribery can spread through the market destroying fair competition.

Moreover, commission merchants, dealers, and brokers have an obligation to deal fairly with one another. Included within this obligation is the duty to refrain from corrupting an agent or employee of a person with whom the commission merchant, dealer, or broker is dealing. A PACA licensee is obligated to avoid

offering a payment to a customer's agent or employee to encourage the agent or employee to purchase produce from the PACA licensee on behalf of the agent's principal or the employee's employer. This obligation exists even when it can be shown that the bribed agent's principal or the bribed employee's employer is not monetarily harmed by purchasing produce from the PACA licensee.

Seventh, JSG contends that, in violation of the Jencks Act, it was denied notes taken by Ms. Colson, as follows:

In the instant [c]ase, during the course of this proceeding, the [i]nvestigating [o]fficer, Ms. Joan Colson, made certain references to her notes, and testified about them, and testifie[d] from them, and from which notes . . . Administrative Law Judge Bernstein drew very serious conclusions. Immediately upon learning that Ms. Colson was testifying from her notes, [c]ounsel for [JSG] requested that he be entitled to see her notes. Counsel for [JSG] brought this point to the attention of . . . Administrative Law Judge Bernstein immediately, and he offered a substantial basis for his request.

In this regard, during the [h]earing on December 22, 1995, relative to [JSG's] request for Ms. Colson's notes, pursuant to the Jencks Act, 18 U.S.C. § 3500, the Court denied JSG's [c]ounsel the right to review the notes from which she was testifying. As [c]ounsel for . . . JSG indicated, an [i]nvestigator's notes have been held to be material, and properly required to be produced, pursuant to the Jencks Act, if the [i]nvestigator appears as a witness and testifies from their notes, as Ms. Colson did in this [c]ase. As such, as a rule of law, Ms. Colson's notes should have been produced and been made available to . . . JSG, at that time, along with the excerpted Report of Investigation, in order that both "statements" could have been compared and used to cross-examine the witness.

JSG's Appeal Petition at 93-94.

As an initial matter, the record reveals that the notes (CX 76) which Ms. Colson made during and immediately after her telephone conversation with JSG's accountant, Mr. Daily, are not Jencks Act statements. Subsection (e) of the Jencks Act defines the term "statement" for the purposes of the Jencks Act, as follows:

§ 3500. Demands for production of statements and reports of witnesses

. . . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

Courts have drawn a distinction between "statements" and "notes" under the Jencks Act and have held that a statement, unlike a note, seeks to transmit information from the declarant to the reader and a note generally does not exhibit sufficient completeness or intent to communicate to qualify as a Jencks Act statement.²² Section 1.141(h)(1)(iii) of the Rules of Practice provides that the definitions and limitations prescribed in the Jencks Act apply to the production of statements in proceedings conducted in accordance with the Rules of Practice, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence.* (1) *In general.* . . .

....

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has

²²*Norinsberg Corp. v. United States Dep't of Agric.*, 47 F.3d 1224, 1228-29 (D.C. Cir. 1995) (stating that cases decided under the Jencks Act have drawn a distinction between "statements" and mere "notes"); *United States v. Griffin*, 659 F.2d 932, 936-37 (9th Cir. 1981) (stating that the Jencks Act narrowly defines "statements" and that an agent's rough notes usually are considered to be too cryptic and incomplete to constitute the full statement envisioned by the Jencks Act), *cert. denied*, 456 U.S. 949 (1982); *United States v. Carrasco*, 537 F.2d 372, 375 (9th Cir. 1976) (stating that a "statement," unlike notes, seeks to transmit information from the declarant to the reader).

testified. *Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).*

7 C.F.R. § 1.141(h)(1)(iii) (emphasis added).

I have examined the notes taken by Ms. Colson (CX 76), and I find that they do not fall within the definition of the term "statement" in the Jencks Act. Therefore, Ms. Colson's notes were not required to be produced in accordance with section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)).

Moreover, even if I found Ms. Colson's notes are Jencks Act statements, I would find that Ms. Colson's notes were provided to JSG in accordance with subsection (b) of the Jencks Act (18 U.S.C. § 3500(b)) and section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)). Both subsection (b) of the Jencks Act (18 U.S.C. § 3500(b)) and section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)) provide that statements under the Jencks Act need only be provided after the witness has given testimony on direct examination, as follows:

§ 3500. Demands for production of statements and reports of witnesses

....

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b).

§ 1.141 Procedure for hearing.

....

(h) *Evidence. (1) In general. . . .*

....

(iii) *After a witness called by the complainant has testified on direct*

examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii) (emphasis added).

The record clearly establishes that the notes which JSG sought (CX 76) were produced during Ms. Colson's direct examination, as follows:

[BY MR. STANTON:]

Q. Ms. [C]olson, during your February and March 1993 investigation of JSG, did you ever speak to Mr. Tom Daily?

[BY MS. COLSON:]

A. Yes.

Q. Was this a face to face conversation?

A. No, I spoke to him over the phone.

Q. What was the conversation about, Ms. Colson?

A. Basically I asked him -- I told him that I saw in the records, I had done check stubs and stuff, where it would say LE Tony and I asked him if that was a loan, if the LE Tony meant a loan and he said yes.

I asked him if Tony meant Tony Gentile and he said yes. I asked him questions about say [sic] the check stubs said LE Tony, would that mean that JSG had loaned Tony money and would that show up on the loan spread sheet and he said yes. He said that Tony's loan and L&P's loan had been grouped together because he had run out of room on the spread sheets so he just grouped them together that way.

....

BY MR. STANTON:

Q. Ms. Colson, when you say spread sheet, you mean Complainant's Exhibits CX-55, 1, 2, and 3?

A. Yes.

Q. Is that the extent of your conversation with Mr. Daily at that time?

A. Yeah, and I asked him if I saw in the general ledger where say a deposit was made and it said LE Tony, would that mean that Tony had been paying down the loan that he had and he said yes.

I asked him if say L&P and Tony took a loan out on the same day, would they be grouped together on the spread sheet as one, like say they were both added in together and it would be listed together as one or it [sic] whether they would be listed separately on the spread sheet and he said Marsha would have entered them on the general ledger separately so they would probably have been listed separately.

I asked him for -- if he had like a description of what all the debits and credits to the loan would have been. He said he didn't have one but that he could probably create an audit trail [sic] for me. He would have had a disc and he could probably do that.

I told him I'd call him back if we needed that.

Q. At the time of your conversation with Mr. Daily, did you make any phone notes?

A. Yes.

Q. When was this conversation, approximately?

A. It was March 11th.

JUDGE BERNSTEIN: Of 1993?

THE WITNESS: Yes.

MR. STANTON: Excuse me, Mr. Reporter, what number is Complainant up to?

COURT REPORTER: I believe CX-75 is your next one.

JUDGE BERNSTEIN: CX-75 was the last one.

MR. STANTON: This would be CX-76?

COURT REPORTER: Yes, sir.

MR. MANDELL: Excuse me, Your Honor, before we start passing these around, are these notes of the investigation, sir?

MR. STANTON: These are phone notes prepared by Ms. Colson.

MR. MANDELL: Excuse me, are these notes of the investigation?

JUDGE BERNSTEIN: One moment, I want to hear his answer.

MR. STANTON: These are phone notes prepared by Ms. Colson in the course of her investigation.

MR. MANDELL: I'd like to see all of the notes of the investigation, sir. If you're going to waive your right to withhold them, then you waive all of them and I would like all of them now, sir, pursuant to Jencks.

MS. BAUER: Your Honor, you just can't pick and choose.

MR. MANDELL: You can't pick and choose. You either do none of them, or you do all of them.

MR. STANTON: Your Honor, this is not subject to Jencks.

MR. MANDELL: That's right, so you're waiving it.

MR. STANTON: Notes are not subject to Jencks.

MR. MANDELL: Then you're waiving it. I want all the notes, please.

JUDGE BERNSTEIN: I'm not sure that that's the law. These notes are being submitted not because they're covered by the Jencks Act, but to contradict an assertion made by Mr. Daily and to support previous testimony of the witness as I understand it.

MR. STANTON: That's correct, Your Honor.

JUDGE BERNSTEIN: And they're suitable for rebuttal and I'm not sure that the offer of notes in this case would operate as a waiver of all notes in general, in fact, I rule that that's not the case.

MR. MANDELL: Your Honor, we note the exception and we want an exception.

JUDGE BERNSTEIN: Yes.

MR. MANDELL: We would also request a ruling, I understand, between now and the time this hearing reconvenes in January, if you would be so kind, Judge, as to issue a brief written decision on this request.

We would like time to appeal this decision to the Judicial Officer and get a ruling there. I'm sorry, Your Honor, this takes us completely by surprise. We asked for this stuff under --

JUDGE BERNSTEIN: I doubt that you'll get an interlocutory ruling, that's generally not the case. However, if you want to submit a written Motion, since we will have time between now and the 29th, I will give you time to submit a Motion with authorities and I will give counsel for Complainant time to submit an opposition document with authorities and then I will decide this in writing.

When will you file your Motion?

MR. MANDELL: Christmas weekend. I will try to get it to your office and to Mr. Stanton no later than Thursday morning by FAX, Your Honor.

JUDGE BERNSTEIN: Thursday, being December 28th.

MR. MANDELL: Monday is Christmas, probably Friday. I've got a

tremendous amount of work to catch up with.

JUDGE BERNSTEIN: Friday, December 29th. Okay. All right, you will serve that Motion either by Express Mail or by FAX so that it will be received during business hours on December 29th.

MR. MANDELL: Yes, Your Honor.

JUDGE BERNSTEIN: Mr. Stanton, when will you submit a written response?

MR. STANTON: Your Honor, if I obtain the document on Friday, the 29th, I will probably be able to file a response -- well, considering that Monday is a holiday, I would probably like to have until Wednesday or Thursday of that week.

JUDGE BERNSTEIN: All right, I'll give you until Thursday, January 4th.

MR. MANDELL: And, Your Honor, I believe not [sic] to speed today's hearing along, I'm going to reserve my right to cross examine the witness at a later date on her testimony today, I'm not prepared to do it today. This catches us completely by surprise. This issue had come up and I think it's outrageous.

JUDGE BERNSTEIN: That's fine. I will allow you to reserve your right to cross examine after I've decided the Motion. You may proceed, Mr. Stanton.

BY MR. STANTON:

Q. Ms. Colson, take a look at the copy in front of you; do you recognize that?

(The document referred to was marked as Complainant's Exhibit CX-76.)

[BY MS. COLSON:]

A. Yes.

Q. What is it?

A. It's a copy of my notes that I made after talking with Mr. Daily.

Q. Looking at this page, can you identify what notes you made at the time of the phone conversation and if applicable, any notes you made after the phone conversation?

A. It looks like the first six bulleted items, I took down while I was talking to him and then after I hung up, it looks like I wrote like additional information on there like the little arrows would be stuff that I wrote after I hung up, and then the questions that are written down below, would have been written afterwards also.

Q. When you say afterwards, how long afterwards, Ms. Colson?

A. Just shortly after.

Q. Weeks afterwards?

A. No, it would have been the same day, like after I hung up the phone, I would have sat down and wrote down the questions.

Q. Where would you have been situated when you wrote down the questions?

A. Well, I remember talking to him from the office I was using at JSG, so it would have been there.

Q. What about when you made the little arrows?

A. That would have been at the same time.

MR. STANTON: I offer CX-76 into evidence, Your Honor.

MS. BAUER: Objection, Your Honor.

MR. MANDELL: Objection.

JUDGE BERNSTEIN: I'll receive it.

(The document referred to, having been marked for identification as Complainant's Exhibit CX-76, was received in evidence.)

....

MR. STANTON: No further questions, Your Honor.

JUDGE BERNSTEIN: Cross examination about these matters?

CROSS EXAMINATION

BY MR. MANDELL:

Q. Ms. Colson, these two documents here, CX-76 and CX-77, can you tell by looking at these, ma'am, other than a handwritten date on them can you tell whether they were, in fact, made on that date by looking at them as documents, ma'am?

[BY MS. COLSON:]

A. No.

Tr. 2846-54, 2858-59.

Eighth, JSG contends that the ALJ was biased and prejudiced against JSG and the other Respondents (JSG's Appeal Petition at 95). JSG cites, as an example of the ALJ's bias and prejudice, the ALJ's adoption of the Complainant's "Findings of Fact and Conclusions of Law in its entirety without even considering [JSG's] position." (JSG's Appeal Petition at 95.)

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.²³

²³*Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating that a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating that essential to a fair administrative hearing

Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

.....

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

... The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding

is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating that bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating that due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating that trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating that a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating that a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating that quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge).

or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.²⁴ I have reviewed the record in this proceeding, and I find no basis for JSG's allegation that the ALJ is biased or prejudiced toward or against any litigant in this proceeding. Further, the ALJ did not adopt Complainant's proposed findings of fact and conclusions of law in their entirety without considering JSG's position, as JSG alleges. Instead, the Initial Decision and Order reveals that the ALJ considered, addressed, and rejected JSG's theory of this case. Moreover, even if the ALJ had adopted Complainant's proposed findings of fact and conclusions of law exactly as set forth in Complainant's Proposed Findings of Fact, Conclusions and Order, such adoption of Complainant's proposed findings and conclusions would not by itself be sufficient to show bias or prejudice on the part of the ALJ.

G&T and Mr. Gentile raise three issues in Respondent Anthony Gentile's Petition for Appeal.

First, G&T and Mr. Gentile contend that the ALJ's findings of fact are not supported by the evidence (Respondent Anthony Gentile's Petition for Appeal at 10-17).

An examination of the record reveals that the ALJ's findings of fact are

²⁴*Akin v. Office of Thrift Supervisor*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating that in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating that in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating that a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating that the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating that in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating that it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

supported by substantial evidence, and with minor changes noted in this Decision and Order, I have adopted the ALJ's findings of fact.

Second, G&T and Mr. Gentile state that this case is not similar to *In re Sid Goodman & Co.*, *supra*, and *In re Tipco, Inc.*, *supra*, and that the ALJ's reliance on *Goodman* and *Tipco* is misplaced (Respondent Anthony Gentile's Petition for Appeal at 17-19).

Goodman and *Tipco* provide the legal standard for bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I disagree with G&T's and Mr. Gentile's contention that the ALJ's reliance on *Goodman* and *Tipco* is misplaced and find that the relevant facts in *Goodman* and *Tipco* are similar to the facts in this proceeding and that the ALJ did not err by relying on *Goodman* and *Tipco*. I have therefore adopted, with only minor changes, the ALJ's discussion of the applicability of *Goodman* and *Tipco* to the facts in this proceeding.

G&T and Mr. Gentile contend that the following facts distinguish this case from *Tipco* and *Goodman*: (1) Mr. Gentile and Mr. Goodman had a relationship totally apart from Mr. Gentile's relationship with L&P and L&P knew of the relationship; (2) Mr. Gentile was not L&P's employee; (3) L&P did not pay more for its produce purchases than others; (4) L&P did not have a written policy about receipt of gifts or gratuities; (5) L&P knew about some of the transactions between JSG and Mr. Gentile; (6) JSG was never the sole provider of tomatoes to L&P; and (7) L&P's purchases from JSG decreased rather than increased (Respondent Anthony Gentile's Petition for Appeal at 18-19).

The present case is in all material respects similar to *Goodman* and *Tipco*. That Mr. Gentile was an agent of, and not an "employee" of, his principal is not a material distinction. As in *Goodman* and *Tipco*, Mr. Gentile was obligated to refrain from accepting payments from JSG since such payments would encourage Mr. Gentile to purchase tomatoes on behalf of his principal, L&P. Mr. Gentile could only accept such payments with his principal's permission. Even if he received permission, Mr. Gentile should not have accepted more than *de minimis* payments from JSG. The payments made by JSG to Mr. Gentile were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Further, the legal standard for bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is established by *Goodman* and *Tipco* and not by L&P's policies. L&P's lack of a written policy concerning the acceptance of gifts and gratuities and prohibiting bribery does not negate the fact that, under the legal standards established by *Goodman* and *Tipco*, Mr. Gentile accepted bribes (directly and indirectly through G&T and Mrs. Gentile) from JSG, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Finally, injury to L&P is not a prerequisite to finding that Mr. Gentile accepted

bribes from JSG. Commercial bribery in connection with a perishable agricultural commodities transaction generally harms the principal of the agent, or employer of the employee, who accepts bribes; but, as discussed in this Decision and Order, *supra*, commercial bribery always destroys the integrity of competition by poisoning the judgment of people who make business decisions. Moreover, when commission merchants, dealers, and brokers are dealing with one another, commercial bribery always breaches the obligation that commission merchants, brokers, and dealers have under the PACA to deal with one another fairly.

Third, G&T and Mr. Gentile contend that Complainant did not meet its burden of proof and Complainant "did NOT introduce one iota of evidence to prove or demonstrate that the Gentiles and Goodman did anything illegal, or immoral, or unethical" (Respondent Anthony Gentile's Petition for Appeal at 21 (emphasis in original)).

Complainant, as proponent of an order in this proceeding, has the burden of proof (5 U.S.C. § 556(d)). Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.²⁵ The burden of proof does not, however, require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,²⁶ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.²⁷ Based upon a careful consideration of the record in this proceeding, I find that Complainant has proven by much more than a preponderance of the evidence that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Administrative Procedure Act provides that a sanction may not be imposed or an order issued unless supported by substantial evidence (5 U.S.C. § 556(d)). I find the record contains substantial evidence of JSG's, G&T's, and Mr. Gentile's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which substantial evidence is fully discussed in this Decision and Order, *supra*.

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

²⁵See note 11.

²⁶See note 12.

²⁷See note 13.

Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile 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 set forth in this Decision and Order shall be published, effective 61 days after service of this Order on Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile.

Anthony Gentile's PACA license application is denied.

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.

PACA Docket No. D-94-0508.

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.

PACA Docket No. D-94-0526.

Order Denying Petition for Reconsideration as to JSG Trading Corp. filed June 1, 1998.

Petition to reopen hearing — Petition for reconsideration — Commercial bribery — Burden of proof — Preponderance of the evidence — Jurisdiction of Secretary of Agriculture — ALJ bias — License revocation — Willful, flagrant, and repeated violations.

The Judicial Officer denied JSG Trading Corp.'s Petition for Reconsideration. JSG's petition to reopen the hearing, which was filed after the issuance of the Decision and Order, was denied as untimely (7 C.F.R. § 1.146(a)(2)). JSG alleges in its Petition for Reconsideration that the ALJ erred; however, the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provide that a party to a proceeding may only seek reconsideration of the decision of the Judicial Officer. The evidence is sufficient to support the conclusion that JSG engaged in commercial bribery in violation of 7 U.S.C. § 499b(4). Complainant, as proponent of an order, has the burden of proof, and there is nothing in the Decision and Order that indicates that the Judicial Officer shifted the burden of proof to Respondents. Since the issuance of *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), the produce industry has been on notice that payments of anything more than a *de minimis* amount can constitute commercial bribery. JSG's act of bestowing a \$3,317 Rolex watch upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P through Mr. Gentile constitutes a commercial bribe in violation of 7 U.S.C. § 499b(4). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence. Due process and the Administrative Procedure Act (5 U.S.C. § 556(b)) require an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality. However, a substantial

showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair. JSG committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by making payments to Mr. Gentile and Mr. Lomoriello to induce them to make purchases of tomatoes for L&P and American Banana, respectively. This case is, in all material respects, similar to *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). JSG's payments to Mr. Gentile and Mr. Lomoriello warrant revocation of JSG's PACA license. The cost of defending a disciplinary action and the impact on a respondent's business of the institution of a disciplinary proceeding are not relevant to the sanction to be imposed on a respondent found to have violated 7 U.S.C. § 499b(4). Collateral effects of a respondent's PACA license revocation are relevant neither to a determination whether a respondent violated 7 U.S.C. § 499b(4) nor to the sanction to be imposed for flagrantly or repeatedly violating 7 U.S.C. § 499b(4).

Andrew Y. Stanton, for Complainant.

John V. Esposito and Mel Cottone, Hilton Head Island, SC, and Mark C.H. Mandell, Annandale, NJ, for Respondent JSG Trading Corp.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are related disciplinary proceedings brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [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].

PACA Docket No. D-94-0508 was instituted by a Complaint filed on November 8, 1993, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], and amended on April 8, 1994. The Amended Complaint alleges that JSG Trading Corp. [hereinafter JSG], Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, JSG, G&T, and Mr. Gentile engaged in a scheme in which JSG made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from JSG on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, JSG and Mr. Lomoriello engaged in a scheme whereby JSG made payments to Mr. Lomoriello to induce him to purchase tomatoes from JSG on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of JSG's PACA license

and publication of the violations committed by G&T and Messrs. Gentile and Lomoriello.

PACA Docket No. D-94-0526 was instituted by a Notice to Show Cause filed on February 8, 1994, by Complainant, challenging the PACA license applications of G&T and Mr. Gentile, based on their commission of the violations of the PACA alleged in the Complaint filed in PACA Docket No. D-94-0508. The Notice to Show Cause requests that a finding be made that G&T and Mr. Gentile are unfit to be licensed under the PACA as commission merchants, dealers, or brokers because they have engaged in practices of a character prohibited by the PACA, and that G&T and Mr. Gentile should be refused a PACA license.

JSG, G&T, Mr. Gentile, and Mr. Lomoriello filed answers denying the material allegations in the Complaint and the Amended Complaint in the disciplinary proceeding captioned PACA Docket No. D-94-0508, as follows: (1) on November 18, 1993, JSG filed Answer of Respondent JSG Trading Corp; (2) on November 29, 1993, G&T filed Answer of Respondent Gloria and Tony Enterprises; (3) on December 20, 1993, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation; (4) on June 6, 1994, JSG filed Answer of Respondent JSG Trading Corp. to Amended Complaint; (5) on June 6, 1994, Mr. Gentile filed Answer of Respondent Anthony Gentile to Amended Complaint; (6) on June 6, 1994, G&T filed Answer of Respondent Gloria and Tony Enterprises to Amended Complaint; and (7) on July 6, 1994, Mr. Lomoriello filed Answer of Respondent Albert Lomoriello, Jr. d/b/a Hunts Point Produce Consultants and Transportation Co. In the disciplinary proceeding captioned PACA Docket No. D-94-0526, G&T and Mr. Gentile filed a Joint Answer of Respondents Gloria and Tony Enterprises, Inc., and Anthony Gentile on February 18, 1994, denying the allegations in the Notice to Show Cause.

On February 23, 1994, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] determined that the factual issues in PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526 are similar and that consolidation would not prejudice JSG, G&T, Mr. Gentile, or Mr. Lomoriello [hereinafter Respondents] and granted Complainant's request for consolidation of the proceedings captioned PACA Docket No. D-94-0508 and PACA Docket No. D-94-0526.¹

On May 2, 1995, G&T filed a letter addressed to the ALJ stating that it wished

¹Summary of Telephone Conference, filed February 25, 1994.

to withdraw its PACA license application.² G&T, through counsel, confirmed it was withdrawing its license application during a May 8, 1995, telephone conference with the ALJ.³ On May 11, 1995, Complainant filed Complainant's Motion to Withdraw Notice to Show Cause With Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises, and on May 12, 1995, the ALJ issued an Order Granting Complainant's Motion to Withdraw Notice to Show Cause. Mr. Gentile did not withdraw his PACA license application, and the Order Granting Complainant's Motion to Withdraw Notice to Show Cause does not relate to or affect the Notice to Show Cause challenging the PACA license application filed by Mr. Gentile.⁴

The ALJ presided over a hearing in New York, New York, on December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Mark C.H. Mandell, Esq., Annandale, New Jersey, represented JSG.⁵ Sherylee F. Bauer, Esq., of Gersen, Baker & Wood LLP, New York, New York, represented G&T and Mr. Gentile. Mr. Lomoriello represented himself.

On October 31, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; Mr. Lomoriello filed Post Hearing Brief of Respondent Albert Lomoriello, Jr.; Mr. Gentile filed Respondent Anthony Gentile's Post-Hearing Brief; and JSG filed Post Hearing Brief on Behalf of Respondent JSG Trading Corp. On November 27, 1996, Complainant filed Complainant's Reply Brief. On December 2, 1996, Mr. Gentile filed Respondent

²Letter dated April 28, 1995, from Sherylee F. Bauer to Edwin S. Bernstein, filed May 2, 1995.

³Summary of Telephone Conference--Rescheduling of Hearing, filed May 8, 1995.

⁴The Order Granting Complainant's Motion to Withdraw Notice to Show Cause, filed May 12, 1995, specifically states:

By letter, filed May 2, 1995, Sherylee F. Bauer, attorney for respondents, stated that Gloria & Tony Enterprises, Inc., d/b/a G&T Enterprises wish to withdraw their license application of January 7, 1994. In view of this, on May 11, 1995, Complainant filed a Motion to Withdraw Notice to Show Cause with Respect to Gloria and Tony Enterprises, d/b/a G&T Enterprises. Complainant noted that its Notice to Show Cause with respect to the license application of Anthony Gentile remains in effect.

⁵On July 11, 1997, Mr. John V. Esposito, Esq., and Mr. Mel Cottone, Esq., of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of JSG.

Anthony Gentile's Post-Hearing Reply Brief; and JSG filed Reply to Complainant's Post Hearing Brief on Behalf of JSG Trading Corp.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which he: (1) found that payments made by JSG to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) revoked JSG's PACA license; (4) ordered that the finding that G&T, Mr. Gentile, and Mr. Lomoriello committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) be published; and (5) denied Mr. Gentile's application for a PACA license (Initial Decision and Order at 18, 46-47).

Mr. Lomoriello did not appeal the Initial Decision and Order, which was served on Mr. Lomoriello on June 30, 1997.⁶ In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 47) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Mr. Lomoriello on August 4, 1997.

On September 23, 1997, G&T, Mr. Gentile, and JSG appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).⁷ On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,⁸ and on November 13, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order]: (1) concluding that JSG, G&T, and Mr. Gentile willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C.

⁶Domestic Return Receipt for Article Number P 093 033 661.

⁷The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

⁸On February 2, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Response to Appeal Petitions and Complainant's Response to Appeal Petitions. Complainant asserts that the only difference between Complainant's Response to Appeal Petitions, filed November 7, 1997, and Complainant's Response to Appeal Petitions, filed February 2, 1998, are transcript citations and that the transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997, are incorrect, and the transcript citations in Complainant's Response to Appeal Petitions, filed February 2, 1998, are correct.

§ 499b(4)); (2) revoking JSG's PACA license; and (3) ordering the publication of the facts and circumstances regarding G&T's and Mr. Gentile's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. ___, slip op. at 95 (Mar. 2, 1998).

On April 28, 1998, JSG filed Petition to Reconsider Decision of the Judicial Officer and/or to Reopen Hearing and/or for Rehearing *On Behalf of* Respondent JSG Trading Corp. [hereinafter Petition for Reconsideration]; on May 14, 1998, Complainant filed Complainant's Reply to Petition to Reconsider Decision of the Judicial Officer and/or to Reopen Hearing and/or for Rehearing by JSG Trading Corp. [hereinafter Complainant's Reply]; and on May 19, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

PERTINENT STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such

commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

....

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . , the Secretary may refuse to issue a license to the applicant.

7 U.S.C. §§ 499b(4), 499d(d) (1994 & Supp. I 1995).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

CHAPTER I—AGRICULTURAL MARKETING SERVICE

....

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

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

....

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

7 C.F.R. § 46.26.

In addition to its request that I reconsider the March 2, 1998, Decision and

Order, JSG makes two requests in its Petition for Reconsideration. First, JSG requests that the hearing be reopened to take further evidence (Pet. for Recons. at 2, 5, 7-8, 12, 15-17). Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer and must include a showing that the evidence to be adduced is not cumulative and a good reason for the failure to adduce the evidence at the hearing, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

. . . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

The Decision and Order in this proceeding was issued March 2, 1998; JSG's petition to reopen the hearing was filed April 28, 1998. Therefore, JSG's petition to reopen is untimely and is denied.⁹

Moreover, even if JSG's petition to reopen the hearing had been timely filed, the petition would be denied. The ALJ conducted a 15-day hearing during the period December 5, 1995, through December 8, 1995, December 11, 1995, through December 15, 1995, December 19, 1995, through December 22, 1995, January 29, 1996, and March 19, 1996. JSG failed to set forth a good reason in its Petition for Reconsideration for its failure to adduce evidence relevant to its defense during the 15-day hearing.

Second, JSG renews the request it made for oral argument before the Judicial Officer in its Appeal Petition of JSG Trading Corp. and Brief of JSG Trading Corp. in Support of Their [sic] Appeal Petition [hereinafter Appeal Petition] (Pet.

⁹See *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing).

for Recons. at 3, 43). Section 1.145(d) of the Rules of Practice provides that the Judicial Officer may grant, refuse, or limit any request for oral argument (7 C.F.R. § 1.145(d)), and I refused the request for oral argument which JSG made in its Appeal Petition because the parties had thoroughly briefed the issues and the issues are controlled by established precedents. *In re JSG Trading Corp., supra*, slip op. at 8. Again, I find that the parties have thoroughly briefed the issues, and the issues are controlled by established precedents. Thus, oral argument would appear to serve no useful purpose, and JSG's renewed request for oral argument is denied.

Prior to addressing the specific issues raised by JSG in its Petition for Reconsideration, there is one general aspect of JSG's Petition for Reconsideration that must be addressed. JSG alleges in its Petition for Reconsideration that the ALJ erred. However, at this stage of the proceeding, error by the ALJ is irrelevant. Section 1.142(c)(4) of the Rules of Practice provides, as follows:

§ 1.142 Post-hearing procedure.

....

(c) *Judge's decision.* . . .

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

On September 23, 1997, JSG filed a timely appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145. Consequently, while the Initial Decision and Order is part of the record,¹⁰ the Initial Decision and Order never became effective as to JSG and no purpose relevant to this proceeding would be served by reconsidering

¹⁰See 5 U.S.C. § 557(c).

the Initial Decision and Order as it relates to JSG.

Further, section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may seek reconsideration of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Thus, petitions for reconsideration filed pursuant to section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) after the Judicial Officer's decision has been issued relate to reconsideration of the Judicial Officer's decision only.¹¹

Therefore, based on the Rules of Practice and JSG's Petition for Reconsideration, I am treating JSG's allegations of error by the ALJ in its Petition for Reconsideration as allegations of error by the Judicial Officer in the March 2, 1998, Decision and Order.

JSG raises seven issues in its Petition for Reconsideration.

First, JSG contends that the evidence is not sufficient to support the conclusion that JSG engaged in commercial bribery in violation of section 2(4) of the PACA

¹¹See generally *In re Peter A. Lang*, 57 Agric. Dec. ____, slip op. at 11 (May 13, 1998) (Order Denying Pet. for Recons.) (stating that petitions for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) relate to reconsideration of the Judicial Officer's decision only); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1435 (1996) (stating that "[p]etitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision"); *In re Lincoln Meat Co.*, 48 Agric. Dec. 937, 938 (1989) (stating that "[t]he Rules of Practice do not provide for a Motion for Reconsideration to the Administrative Law Judge").

(7 U.S.C. § 499b(4)) by: (1) loaning a boat to Mr. Gentile for approximately 2 years and selling the boat to Mr. Gentile for approximately \$35,000 less than the purchase price; (2) making substantial payments to Mrs. Gentile; (3) paying approximately \$38,000 to provide Mr. Gentile with a Mercedes; (4) issuing 35 checks payable to "A. Gentile"; (5) giving a Rolex watch, the purchase price of which was \$3,317, to Mr. Gentile; (6) paying \$9,733.45 to Mr. Albert Lomoriello; and (7) paying \$5,600 to G&T (Pet. for Recons. at 2-38).

I disagree with JSG. The evidence supports the conclusion that JSG engaged in commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the evidence supporting this conclusion is fully discussed in the March 2, 1998, Decision and Order. *In re JSG Trading Corp., supra*, slip op. at 11-95.

Second, JSG contends that the ALJ erred¹² by shifting the burden of proof regarding the value of Dirtbag Trucking Corporation from Complainant to Respondents (Pet. for Recons. at 8).

I disagree with JSG's contention that the ALJ¹³ erroneously shifted the burden of proof regarding the value of Dirtbag Trucking Corporation from Complainant to Respondents. The Administrative Procedure Act provides, with respect to burden of proof, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof.* . . .

5 U.S.C. § 556(d) (emphasis added).

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with

¹²See discussion of the relevancy of alleged ALJ error and my determination to treat JSG's allegations of error by the ALJ as allegations of error by the Judicial Officer, *supra*.

¹³See note 12.

evidence sufficient for a prima facie case.¹⁴ As discussed in *In re JSG Trading Corp.*, *supra*, slip op. at 35-39, Complainant introduced evidence showing JSG's substantial payments to Mrs. Gentile. Respondents attempted to show that the payments were not commercial bribes in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather were payments totalling \$80,000 for 75 shares of stock in Dirtbag Trucking Corporation, which Mrs. Gentile transferred to Mr. Goodman.

I stated with respect to the evidence of the value of Dirtbag Trucking Corporation, as follows:

However, Respondents presented no evidence that Dirtbag was worth \$80,000 during the period from 1991 through 1994. To the contrary, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984[-85], 2049, [2148-]49, [2495-]96). Even if the JSG checks to Mrs. Gentile, calculated by deducting 5¢ for each box of tomatoes sold to L&P, did amount to \$80,000, the payment was still unlawful. Mr. Gentile had only loaned Dirtbag \$40,000 and had invested [approximately] \$7,000 in a new truck (Tr. [2782-]83). JSG's payments, therefore, would have included a profit of approximately \$33,000, which would have been unjustified, given Dirtbag's unprofitable status.

In re JSG Trading Corp., *supra*, slip op. at 38.

These statements regarding the evidence relating to the value of Dirtbag Trucking Corporation do not shift the burden of proof regarding the value of Dirtbag Trucking Corporation to Respondents, as JSG contends, but rather indicate the state of the evidence regarding Dirtbag Trucking Corporation's value.

Third, JSG contends that the Secretary of Agriculture has no jurisdiction to consider whether Mr. Gentile had any business reasons for the use of the Mercedes

¹⁴*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). See also *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); 3 Kenneth C. Davis, *Administrative Law Treatise* § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

(Pet. for Recons. at 18). However, JSG offers no support for its contention. Further, the question regarding the possible business reasons for Mr. Gentile's use of the car relates directly to the issue of whether payments of approximately \$38,000 made by JSG to provide Mr. Gentile with the Mercedes constitute violations of the PACA, a matter over which the Secretary of Agriculture has jurisdiction.

Fourth, JSG contends that given the uncontested personal relationship between Mr. Gentile and Mr. Goodman, the gift of a \$3,317 Rolex watch cannot be held to be a bribe (Pet. for Recons. at 23-24).

I disagree with JSG. The act of bestowing such an expensive gift upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P through Mr. Gentile constitutes a commercial bribe in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Since the issuance of *In re Tipco, Inc.*, in 1991, the produce industry has been on notice that payments of anything more than a *de minimis* amount can constitute commercial bribery, as follows:

The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another-- a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (*e.g.*, more than a pen, calendar or lighter).

In re Tipco, Inc., 50 Agric. Dec. 871, 882-83 (1991) (footnotes and citations omitted), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). Mr. Goodman's alleged personal relationship with Mr. Gentile does not obviate the requirement that JSG refrain from making gifts of substantial value to Mr. Gentile who was working for one of JSG's customers. JSG could only make gifts to Mr. Gentile with L&P's permission. Even if JSG received permission from L&P, JSG should not have made gifts of more than *de minimis* value to Mr. Gentile. The gift of a \$3,371 Rolex watch to Mr. Gentile was more than *de minimis*. Therefore, this gift constitutes commercial bribery in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Fifth, JSG contends that the standard of proof, which should be applied in this proceeding, is "clear and convincing" rather than a "preponderance of the evidence" (Pet. for Recons. at 26-28). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,¹⁵ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA, including those in which the potential sanction is revocation of a PACA license, is preponderance of the evidence.¹⁶ Further, I find no basis for a heightened standard of proof merely because a respondent is alleged to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by engaging in commercial bribery.

Sixth, JSG contends that the ALJ was not impartial (Pet. for Recons. at 8, 25-26, 37). Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.¹⁷ Further, the Administrative Procedure Act requires an impartial

¹⁵*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

¹⁶*In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

¹⁷*Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating that a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp.*

proceeding, as follows:

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....

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (stating that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating that essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating that bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating that due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating that trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating that a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating that a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating that quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating that it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating that trial by a biased judge is not in conformity with due process, and the recognition of this principle is as essential in proceedings before administrative agencies as it is before the courts).

... The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.¹⁸

JSG contends that the ALJ's alleged shift of the burden of proving the value of Dirtbag Trucking Corporation from Complainant to Respondents, the ALJ's alleged erroneous finding regarding the identity of the lessee of the Mercedes, and the ALJ's alleged conclusion that employment agreements must be in writing, evidence the ALJ's bias (Pet. for Recons. at 8, 17-18, 25-26, 37). However, I do not find that the ALJ shifted the burden of proving the value of Dirtbag Trucking Corporation from Complainant to Respondents, concluded that employment contracts must be in writing, or erred with respect to the identity of the lessee of the Mercedes. Moreover, even if I found that the ALJ erred as alleged by JSG,

¹⁸ *Akin v. Office of Thrift Supervisor*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating that in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating that in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating that a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating that the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating that in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating that it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

such a finding would not be sufficient to conclude that the ALJ is biased.¹⁹

I have reviewed the record in this proceeding, and I find no basis for JSG's allegation that the ALJ is biased or prejudiced toward or against any litigant in this proceeding.

Seventh, JSG contends that revocation of JSG's PACA license is not an appropriate sanction based on the facts in the record (Pet. for Recons. at 39-43).

I disagree with JSG. JSG has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). JSG knew, or should have known, that the payments it made to Mr. Gentile and Mr. Lomoriello to influence their buying practices and to induce them to make purchases of tomatoes for L&P and American Banana, respectively, were unlawful, and JSG should have known that it was violating the law.

This case is, in all material respects, similar to *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992). JSG's payments to Mr. Gentile and Mr. Lomoriello warrant the most severe sanctions. As in *Goodman* and *Tipco*, the extremely serious violations in this case mandate no lesser sanction than a revocation of JSG's PACA license.

¹⁹See *Migliorini v. Director, Office of Workers' Compensation Programs*, 898 F.2d 1292, 1294 n.9 (7th Cir.) (stating that for petitioner to succeed on the issue of administrative law judge prejudice, he would have to point to something outside the record indicating prejudgment or to have demonstrated the administrative law judge's factual findings were undermined by his animus toward the petitioner), *cert. denied*, 498 U.S. 958 (1990); *Pearce v. Sullivan*, 871 F.2d 61, 63 (7th Cir. 1989) (stating that prejudgment such as will disqualify a judicial officer (whether judge or hearing examiner) refers to prejudgment based on information obtained outside the courtroom, rather than to rulings, even if hasty or errant, formed on the basis of the record evidence and other admissible materials and considerations); *McLaughlin v. Union Oil Co.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (stating that bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires a showing that the officer had it "in" for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be); *NLRB v. Honaker Mills*, 789 F.2d 262, 266 (4th Cir. 1986) (stating that petitioner may not establish bias merely by questioning the correctness of the administrative law judge's evidentiary rulings; petitioner must make a showing of bias stemming from sources outside the decisional process); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 728 (6th Cir. 1986) (stating that adverse rulings in administrative proceedings are not by themselves sufficient to show bias); *Herbert v. Secretary of HHS*, 758 F.2d 804, 806 (1st Cir. 1985) (*per curiam*) (stating that making an error of law does not constitute bias on the part of an administrative law judge); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 35 (1st Cir. 1981) (stating that even if the administrative law judge's rulings had been erroneous, a judicial ruling made in the ordinary course is not to be translated into bias by disappointed counsel); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating that something more than unfavorable or even unsupported findings must be shown in order to sustain a charge of bias by the body that pronounces judgment in a judicial or quasi-judicial proceeding); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 177 (3d Cir.) (stating that erroneous conclusions by the NLRB do not establish bias by the NLRB), *cert. denied*, 308 U.S. 605 (1939).

Administrative Law Judge James W. Hunt affirmed the agency's decision to deny the applicant's application for a license on the basis that it engaged in the business of a produce dealer without a PACA license, it was affiliated with a person whose bar to employment by or affiliation with a PACA licensee had not been lifted by the Secretary, and it made false or misleading statements on the license application. Judge Hunt rejected the applicant's defenses, reciting the Departmental policy that personal or business misfortunes are never considered excuses for the failure of a dealer to pay for his purchases of produce.

Kimberly D. Hart and Andre Allen Vitale, for Complainant.

John H. McConnell, New York, for Respondent.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding is brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)("PACA"), the regulations issued thereunder (7 C.F.R. Part 46)("Regulations"), and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*)("Rules of Practice").

The proceeding was instituted on July 2, 1997, by a Notice to Show Cause filed by Complainant, the Acting Deputy Director, Fruit & Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Notice states that the application for a PACA license by Applicant, Pete's Tropical Corp., should be denied because it is unfit to receive a license. The Notice directed Applicant to show cause why its license application should not be denied.

A hearing was held on July 11, 1997, in New York, New York. Complainant was represented by Kimberly D. Hart, Esq. and Andre Allen Vitale, Esq. Applicant was represented by John H. McConnell, Esq.

Statement of the Case

Applicant, Pete's Tropical Corp., (referred to as "Pete's Tropical"), a New York corporation, filed its application for a PACA license on June 2, 1997. It was signed by a Roger Almeida who identified himself on the application as the president of Pete's Tropical and its 100 percent stockholder. Almeida responded with a "no" to specific questions on the application form asking whether any officer, director, or owner of more than ten percent of the stock of Pete's Tropical had ever had a license suspended or revoked, or been found to have committed flagrant or repeated violations of the PACA, or against whom there were unpaid reparation awards. However, in the "explanations" section of the application, Almeida referred to a company called "Plantains, Inc."

The reason I failed in Plantains Inc. in 1990-1992. We lost in the Bronx Terminal Market 1.5 million Dollars and all my suppliers took away my credit and everyone wanted me to pay them right away. Which for me was impossible. I paid most of my suppliers but the losses were so big, I could

not satisfy everyone of them. So I was sued by a few creditors who also complained to PACA. Without further information PACA took away Plantains' license. They never knew the losses I suffered in this matter.

At this time my brother Plinio Almeida came into the business and formed PETE'S TROPICAL CORPORATION. Took it upon themselves to revoke PETE'S TROPICAL CORPORATION'S license also. Months later after all the investigation with no further hope of regaining the license Plinio Almeida abandoned the Company and I have continued it ever since.

Roger Almeida had been the sole officer, director, and shareholder of Plantains, Inc. Its license was revoked in 1994 after it was found to have committed repeated and flagrant violations of the PACA by failing to make full payment promptly for \$347,271 in produce purchases. Almeida was then found to have been responsibly connected with Plantains and on April 22, 1994, he was formally notified that:

You are ineligible to be licensed under the PACA until April 29, 1996. You also may not be employed by or affiliated with another licensee, in any capacity, until April 29, 1995. After these dates you may, respectively, be licensed or employed by a PACA licensee, *with the approval of the Secretary of Agriculture and the posting of a suitable surety bond.* (Italics added.)

If you continue to conduct business subject to the PACA while ineligible to be licensed, an action could be filed against you in the U.S. District Court seeking an injunction, plus an initial penalty of \$500 and \$25 for each subsequent day of subject operation.

As for Almeida's reference on his application to the connection of his brother, Plinio, with Pete's Tropical, Plinio was its owner when it filed for a license in June 1995. The application was denied because it was found that Pete's Tropical had a close business relationship with Plantains, which, as noted, had been found to have violated the PACA and which was owned by Roger Almeida. The close relationship was found to constitute an unlawful affiliation between Pete's Tropical and Roger Almeida who was under an employment restriction. Because of this affiliation Pete's Tropical was found to be unfit to receive a license.

Plinio then left Pete's Tropical and Roger Almeida became its sole owner, director, and shareholder in March 1996. However, he had not received approval,

and the record does not show that he ever requested approval, from the Secretary to be licensed or be affiliated with a licensed produce business even though the time limit barring him from the produce industry was due to expire in another month. Despite still being under an employment restriction and despite lacking a license, Almeida began operating as a produce dealer. Between January 1996 and April 1997, he purchased 82 lots of perishable agricultural commodities in commerce which brought him within PACA's regulatory ambit. He made the purchases variously in the name of Pete's Tropical and Plantains and in the name of a business called Diana Produce. One of the suppliers, Pacific Fruit, stated in a July 1997 letter that:

When Pacific Fruit started selling to Mr. Almeida, his company was Plantains, Inc. It is our understanding that Mr. Almeida's company's name subsequently changed to Pete's Tropical and then to Diana Produce. Within the last month, Diana Produce's name was changed back to Pete's Tropical. During the period that the company was named Diana Produce, payments on behalf of Diana Produce were made on Pete's Tropical checks.

After Pete's Tropical filed its application for a license on June 2, 1997, Complainant responded with an order directing Pete's Tropical to show cause why its application should not be denied because its operation as a produce dealer without a PACA license and its affiliation with a person, Roger Almeida, who was barred from such affiliation and who also provided false and misleading statements on the license application by denying past violations of the PACA, constituted practices of a character prohibited by the PACA.

Law

Section 4(d) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499d(d)) provides:

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State

or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Section 3(a) (7 U.S.C. § 499c(a)):

After the expiration of six months after the approval of this Act, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than \$1,000 for each such offense and not more than \$250 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Any person violating this provision may, upon a showing satisfactory to the Secretary of Agriculture, or his authorized representative, that such violation was not willful but was due to inadvertence, be permitted by the Secretary, or such representative, to settle his liability in the matter by the payment of the fees due for the period covered by such violation and an additional sum, not in excess of \$250, to be fixed by the Secretary of Agriculture or his authorized representative. Such payment shall be deposited in the Treasury of the United States in the same manner as regular license fees.

Section 8(b) (7 U.S.C. § 499h(b)):

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

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

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

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

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

Section 1(9) (7 U.S.C. § 499a(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.

Section 1(10) (7 U.S.C. § 499a(b)(10)):

The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

Section 2 (7 U.S.C. § 499b(4)):

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 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 Act.

Discussion

The conduct of Pete's Tropical of engaging in the business of a produce dealer without a PACA license, its affiliation with a person, Roger Almeida, whose bar to employment by or affiliation with a PACA licensee had not been lifted by the Secretary, and Almeida's false and misleading statements on the license application are all unlawful activities under the PACA. They therefore constitute practices of a character prohibited by the PACA.

Roger Almeida's defense is that he had been in the produce business for over thirty years and the troubles he encountered with Plantains were the result of his debtors failing to pay him the money they owed which in turn meant that he was unable to pay his creditors. However, it is the Secretary's unyielding policy that personal or business misfortunes are never considered excuses for the failure of a dealer to pay for his purchases of produce. *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 (1996).

As the practices of Pete's Tropical Corp. were of a character prohibited by the PACA, it is unfit to be licensed. Accordingly, Complainant's determination not to grant Pete's Tropical Corp. a license is affirmed.

Findings of Fact

1. Applicant, Pete's Tropical Corp., does business in the State of New York.
2. Applicant's PACA license terminated on March 9, 1995.
3. On or about March 9, 1996, Roger Almeida became the sole officer, director, and shareholder of Applicant.
4. Roger Almeida was responsibly connected with Plantains, Inc., a produce dealer whose license was revoked because it engaged in repeated and flagrant violations of the PACA.
5. Roger Almeida was barred from obtaining a PACA license and from being employed by a PACA licensee until his employment by or affiliation with a PACA licensee was approved by the Secretary.
6. The Secretary has not given its approval for Roger Almeida's licensing or employment by or affiliation with a PACA licensee at any time relevant to this proceeding.
7. From January 1996 through April 1997, Applicant engaged in the business of being a produce dealer subject to the PACA without having a PACA license.
8. On June 2, 1997, Applicant filed an application for a PACA license.
9. Applicant's license application was prepared by Roger Almeida. Roger Almeida provided false and misleading statements on the license application.
10. Complainant denied Applicant's license on the ground that it was unfit to

receive a license.

Conclusion of Law

Applicant has engaged in practices of a character prohibited by the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*).

Order

Applicant's application for a PACA license is denied.

This Order shall take effect fourteen (14) days after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision became final May 18, 1998.-Editor]

PERISHABLE AGRICULTURAL COMMODITIES ACT**REPARATION DECISIONS**

LINDEMANN PRODUCE, INC. v. ABC FRESH MARKETING, INC.
PACA Docket No. R-95-0089.

ABC FRESH MARKETING, INC. v. FRESH QUEST PRODUCE.
PACA Docket No. R-95-0047.

FRESH QUEST PRODUCE v. ABC FRESH MARKETING, INC.
PACA Docket No. R-95-0049.

Decision and Order filed January 14, 1998.

Accord and Satisfaction - Tender of full payment for undisputed invoices along with partial payment for disputed invoices in one "full satisfaction" check may not be a good faith tender under UCC 3-311.

Debtor tendered payment in one check for six produce transactions. Four of the transactions were undisputed, and the check covered these transactions in their full amount. The remaining two transactions were disputed, and as to these the check tendered only partial payment. The creditor negotiated the check, and then sought to recover the balance alleged due on the disputed transactions. The debtor pled accord and satisfaction. It was held that the good faith tender requirement of UCC 3-311 would not be met by such a check, especially in view of the "full payment promptly" requirement of the Act and Regulations. The situation was distinguished from that in which the parties maintain a running account.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

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

Decision and Order**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). Timely complaints were filed in each case in connection with transactions in interstate commerce involving perishable produce.

Copies of the reports of investigation prepared by the Department were served upon the parties. Copies of the formal complaints were served upon respondents which filed answers thereto denying liability to complainants.

The amount claimed in each of the formal complaints exceeds \$15,000, however the parties waived oral hearing, and therefore the shortened method of

procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in each case as are the Department's reports of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, and an opportunity to file briefs.

In Docket R-95-0089 complainant filed an opening statement and statement in reply. Respondent filed an answering statement. In Docket R-95-0047 complainant filed an opening statement and respondent filed an answering statement. In Docket R-95-0049 respondent filed an answering statement. Briefs were not filed in any of the proceedings.

In Docket R-95-0049 respondent ABC Fresh Marketing, Inc., was ordered, on May 17, 1995, to pay an undisputed amount of \$14,062.33, which represented the difference between the amount it admitted owing in that proceeding, \$31,647.55, and the amount it seeks in R-95-0047, \$17,585.22. The \$14,062.33 was duly paid.

These proceedings have been consolidated for purposes of decision.

Findings of Fact

1. Lindemann Produce, Inc., hereinafter referred to as Lindemann, is a corporation whose address is 300 E. 2nd St., Reno, Nevada.

2. ABC Fresh Marketing, Inc., hereinafter referred to as ABC, is a corporation whose address is P. O. Box 10456, Pittsburgh, Pennsylvania. At the time of the transactions involved herein ABC was licensed under the Act.

3. Fresh Quest Produce, hereinafter referred to as Fresh Quest, is a partnership composed of Northern Produce, Inc., Western Produce, Inc., Latin Produce, Inc., and Eastern Produce, Inc., and has an address of 2008 N. Fine Ave., #102, Fresno, California.

4. On or about April 15, 1994, Lindemann sold to ABC two truckloads of cantaloupes. Each load consisted of 1,064 cartons of size 15 melons at \$9.00, plus cooling and palletizing charges of \$1,436.40, plus \$23.50 for a temperature recorder, or a total of \$11,035.90, f.o.b. The melons were loaded in Miami, Florida, and the agreed destination for both loads was Columbia, South Carolina.

5. On or about April 15, 1995, ABC sold the same cantaloupes to Fresh Quest at \$10.60 per carton, plus \$23.50 for temperature recorders, or \$11,301.90 for each load, f.o.b.

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

6. On April 15, 1994, the two loads were picked up at Lindemann's warehouse in Miami, Florida, by the same truck, sent by Fresh Quest. One load (Lindemann's invoice number 15826; ABC's invoice number 500347A) was picked up at 7:45 p.m., and the other (Lindemann's invoice number 15830; ABC's invoice number 500342A) at 9:15 p.m. The loads were transported to the Fresh Quest warehouse in Pompano Beach, Florida, and unloaded on the evening of April 15, 1994. On April 18, 1994, the two loads were shipped to H. E. B. Grocery Co., in San Antonio, Texas, where they arrived and were unloaded on April 20, 1994.

7. Two federal inspections were conducted of cantaloupes at the H.E.B. warehouse in San Antonio, Texas, on April 20, 1994. Inspection certificates were issued revealing, in relevant part, as follows:

4/20/94 8:00 A.M.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 45 °F	Cantaloupes	"Cynthia" 15's	HD	X	336 Ctns	N
B	43 to 45 °F	Cantaloupes	"Sam Blas" 15's	CR	X	304 Ctns	N
C	43 to 44 °F	Cantaloupes	"Lindy's Delight" 15's	CR	10102 10103	168 Ctns	N
LOT	AVERAGE DEFECTS	including SER DAM	including V. S.DAM	OFFSIZE/DEFECT		OTHER	
A	07	% 02	%	%	Bruising (0 to 13%)	Ripe & firm; ground color generally turning yellow	
to						yellow.	
	30	% 19	%	%	Discolored areas (7 to 60%)		
	00	% 00	%	%	Decay		
	37	% 21	%	%	Checksum		
B	03	% 00	%	%	Bruising	Ripe & firm; ground color light green to yellow	
	18	% 09	%	%	Discolored areas (0 to 47%)		
	00	% 00	%	%	DECAY		
	21	% 10	%	%	CHECKSUM		

C	73	%	50	%	%	Discolored areas (53 to 87%)	Ripe & firm; ground color turning yellow to yellow
	00	%	00	%	%	DECAY	
	73	%	50	%	%	CHECKSUM	

4/20/94 4:05 P.M.

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 44 °F	Cantaloup	"Sam Blas" 15's	CR	X	894 ctns	Y
B	39 to 42 °F	Cantaloup	"Cynthia" 15's	HD	X	168 ctns	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Sunken areas	Stock is ripe, firm. ground color light green to yellow
	13	% 08	%	% Discolored areas (0 to 27%)	
	03	% 01	%	% Bruising	
	00	% 00	%	% Decay	
	19	% 09	%	% Checksum	
B	08	% 02	%	% Bruising	Stock is ripe, firm. ground color generally yellow, few turning. Decay generally early stages
	08	% 00	%	% Sunken areas (0 to 13%)	
	52	% 35	%	% Discolored areas (35 to 67%)	
	02	% 02	%	% Decay	
	64	% 39	%	% Checksum	

8. On May 25, 1994, ABC issued a check to Lindemann in the amount of \$20,908.22. The check stated on its face, after the printed word "MEMO," as follows: "Endorsement constitutes payment in full on the following invoices: 21058, 15826, 15830, 16182, 16052, 15737." In addition, a stub was attached to the check which stated as follows:

ABC#	YOUR#	DESCRIPTION	AMOUNT
118332	21058	CANTALOUPE	2,669.60
500347	15826	"	2,428.16
500342	15830	"	1,957.76
500357	16182	"	1,159.20
500353	16052	"	1,125.90
500340	15737	"	11,567.90

The payments tendered on invoices 21058, 16182, 16052, and 15737 were payments for the full amount on invoices as to which there was no dispute. Only the payments tendered for invoice numbers 15826, and 15830 were for disputed transactions, and for less than the amounts claimed due.

9. On November 9, 1994, Fresh Quest issued a check to ABC for the loads covered by invoices 15826, and 15830, in the total amount of \$5,018.58. Fresh Quest released this check as an undisputed amount.

10. Between December 14, 1993, and April 18, 1994, Fresh Quest sold to ABC, for delivery to Toronto, Canada, seven trucklots of melons as follows:

Shipping Date	Invoice Number	Total
12/14/93	1805	\$10,801.20
01/06/94	2585	8,993.50
03/31/94	5119	6,817.50
04/04/94	5149	5,821.80
04/08/94	5182	5,300.25
04/14/94	5809	6,960.50
04/18/94	5841	<u>6,747.50</u>
	Total	\$51,442.25

11. ABC paid Fresh Quest \$18,680.30 against the invoices listed in finding of fact 10, leaving a balance of \$32,761.95.

12. Informal complaints were filed in each proceeding within nine months after the causes of action alleged therein accrued.

Conclusions

In Docket R-95-0089 Lindemann contends that it is due a balance of \$17,685.88 for the two loads of cantaloupes sold to ABC. ABC accepted the

melons when they were diverted by ABC's customer Fresh Quest from the contract destination agreed to between ABC and Lindemann.² ABC asserts two defenses to Lindemann's claim for the balance of the purchase price.

First, Lindemann's negotiation of the partial payment check tendered by ABC, as set forth in finding of fact 8, is claimed to have resulted in an accord and satisfaction as to the balance claimed due on the two loads of melons. Lindemann's response to this assertion was threefold.

Lindemann first states that it put ABC on notice that the check was being accepted only as a partial payment by a letter sent to ABC nine days after the check was received, and eight days after it was negotiated. Lindemann's representative maintained that, in view of this letter, no accord took place because "[i]n some court rulings, the interpretation of 'Accord and Satisfaction' allows for a creditor to reserve his or her rights to proceed against the debtor for the remaining amount due and owing." The reference is to an interpretation offered by a few courts of UCC section 1-207.³ This interpretation has been espoused by only a small minority of states, and has been explicitly rejected by the vast majority of states that have considered the question. Moreover, proposed revisions to the UCC adopted by the National Conference of Commissioners on Uniform State Laws have laid the question to rest by expressly stating in a new subsection (2) of the revised section 1-207 that "[s]ubsection (1) does not apply to an accord and satisfaction." In any event, Lindemann's letter to ABC, sent eight days after negotiation of the check, would not have amounted to a reservation of its rights even under the old minority interpretation of section 1-207.

Lindemann's representative also asserts that the full payment language on the check was "merely a pre-imprinted computer generated statement that is most likely on every generated check, and, in no way, . . . should be the basis for determining a finalization to this disputed proceeding." Lindemann apparently alludes to UCC section 3-311. Subsection (a) of that section provides:

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

²*Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

³See *A. Sam & Sons Produce Company, Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044 (1991), for a through discussion of the section, and a rejection of the interpretation by this forum.

The official comments state, in relevant part:

4. Subsection (a) states three requirements for application of Section 3-311. "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(4) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. . . . [An] example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

It is evident to us from an examination of the check in question that the pertinent language is not pre-printed. However, even if it were pre-printed, the references to specific invoices serve to particularize the full satisfaction language so as to remove the uncertainty referred to in the Official Comment's example. The attached stub further highlights the intended purpose of the tender, eradicating any possibility of a misunderstanding on the point.

Lindemann next makes the barest allusion to what we consider to be the most formidable reason for not finding an accord and satisfaction as a result of the negotiation of the May 25, 1994, check. Complainant's sales representative, Don Johnston, said in Lindemann's opening statement:

I would like to state for the record that upon receipt of respondent's check located in the report of investigation as exhibit no. 3, page 1, ABC Fresh Marketing, Inc. is paying on six individual trucklot shipments of melons.

As made clear in the findings of fact, the tendered payment was made in one check which paid on six invoices. Only two of these invoices were in dispute. The largest payment tendered on any of the six invoices was payment in the full amount due, or \$11,567.90, on invoice 15737. This amount was more than all of the other payments put together, and was of an invoice that was older than the two in dispute. The two disputed invoices were dated April 15, 1994, and noted at the bottom: "NET DUE IN 10 DAYS." The partial payment on these invoices was not tendered until May 25, 1994. While the dispute relative to these two invoices may

have removed the payment of such invoices from the late payment category⁴, the same cannot be said for invoice 15737. The "full payment promptly" provisions of the Act and Regulations are extremely important, and will not be met by a tendered payment that is contingent on acceptance of a partial payment as to a disputed amount. Moreover, there is a cross contamination here as to the contingent tender. The lumping of full payments on undisputed invoices with partial payments on disputed invoices together in one check requires a creditor to accept the partial payments in order to receive the undisputed full payments in a timely manner.⁵ Such a tender cannot be said to be in good faith, and the negotiation of a check thus tendered will not accomplish an accord and satisfaction.⁶ We hasten to add that in the case of a running account, where the total due on such an account is in question due to the complexities consequent upon multiple payments on account, the allocation of payments, and the like, our conclusions here would not apply⁷. Although technically the parties here may have had a running account, the total due was in question only because of disputes as to two clearly distinguished transactions.

Since no accord was reached between Lindemann and ABC as to the disputed transactions we must examine ABC's remaining defense. ABC asserts that since this was an f.o.b. sale the suitable shipping condition rule applies, and that the degree of deterioration on arrival in San Antonio was so great the melons "could not have been in suitable shipping condition a maximum of 110 hours prior to USDA inspection." ABC admits that the melons did not go to the contract destination of Columbia, South Carolina, but apparently is contending that the degree of deterioration in San Antonio was so great that a breach of the suitable shipping condition warranty is proven anyway. However, the f.o.b. suitable

⁴See the last sentence of 7 C.F.R. § 46.2(aa).

⁵Although one could construct a hypothetical situation where this would not be the case, as where the check is issued with extreme promptness, the conclusion will undoubtedly hold true in almost all situations. If a check is tendered as full satisfaction, combining undisputed and disputed invoices, and payment is not yet due on the undisputed transactions, the creditor should ask for the issuance of a separate check covering the transactions. Otherwise, the negotiation of such a check might be deemed to accomplish an accord and satisfaction.

⁶The subjective intent of a debtor in issuing such a check is not under scrutiny. Objective standards are rather in question, namely "reasonable commercial standards of fair dealing."

⁷Such an account might combine disputed and undisputed transactions, but the amounts due on the undisputed transactions (as well as the disputed transactions) might be in doubt due the way in which past payments have been made and applied.

shipping condition rule is applicable by its express terms only "at the contract destination agreed upon between the parties."⁸ These melons were unloaded in Pompano Beach shortly after shipment on the 15th, and stored under unknown conditions over the weekend. It was not until the 18th that they were shipped to San Antonio, where they were inspected, after unloading, on the 20th. Furthermore, Fresh Quest discarded the temperature tapes on arrival of the loads in Pompano Beach. This failure to supply the temperature tapes must be imputed to ABC vis à vis Lindemann, and we have held that "...the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal."⁹ We conclude that ABC has failed to prove a breach of contract, and, since it accepted the two loads of melons, is liable to Lindemann for the full purchase price thereof, or \$22,071.80, less the \$4,385.92 already paid, or \$17,685.88. ABC's failure to pay this amount to Lindemann is a violation of section 2 of the Act.

In Docket R-95-0047 ABC alleges that Fresh Quest has failed to pay to ABC the combined invoice prices of the same two loads of melons, or \$22,603.80. In this case the issue as to contract destination is somewhat different, with Fresh Quest maintaining that no contract destination was ever discussed. However, our precedents are clear in holding that the warranty of suitable shipping condition is void when a final destination is not agreed upon in the contract.¹⁰ For reasons similar to those related above we find that Fresh Quest is liable to ABC for the full contract price of \$22,603.80, less the \$5,018.58 already paid, or \$17,585.22.

In Docket R-95-0049 Fresh Quest alleges that ABC has failed to pay a balance of \$32,761.95 for seven trucklots of mixed melons having an original invoice total price of \$51,442.25. As related in the preliminary statement ABC has

⁸7 C.F.R. § 46.43(j). See *Sunny Roza Fruit & Produce Co. v. Joseph Northwest*, 20 Agric. Dec. 1193 (1961) where the contract destination was Minneapolis, Minnesota, and the goods were diverted by the buyer to Philadelphia and New York. It was held that the inspection of the goods at the distant points did not show that the goods would have been abnormally deteriorated if delivered directly to Minneapolis. See also, *Rancho Vergeles Inc. v. Richard Shelton d/b/a Midvalley Brokerage Company*, 46 Agric. Dec. 1031 (1987).

⁹*Louis Caric & sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 at 1500-01 (1979). See also *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (1984).

¹⁰*B&L Produce v. Florence Distributing Co.*, 37 Agric. Dec. 78 (1978); *Brannan, Chapman & Edwards, Inc. v. Silverstreak Distr., Inc.*, 26 Agric. Dec. 1152 (1967).

admitted owing \$31,647.55 of the \$32,761.95 claimed, and has paid \$14,062.33 of such amount as an undisputed amount, leaving \$18,699.62 of the claimed \$32,761.95 unpaid. The \$17,585.22 which we have found owing from Fresh Quest to ABC in Docket R-95-0047 should be set off against this amount, leaving \$1,114.40 still in dispute. The basis of the dispute is as follows.

ABC does not deny the receipt and acceptance of the seven loads of mixed melons. However, ABC claims that two of the invoices, number 1805 for \$10,801.20, and 2585 for \$8,993.50, were priced incorrectly, and were adjusted to \$10,353.20, and \$8,327.10. Invoice 1805 was paid by a check dated 1/19/94 in the amount of \$22,693.20 which referenced two invoices, 1805 and 2202. The check had written across its face the words "Endorsement constitutes payment in full on the following invoices: 2202 01, 1805 01." The parties agree that this check paid invoice 1805 \$448.00 short of what had been billed. There is no indication in the record as to whether the check also paid invoice 2202 short of what was billed. Invoice 2585 was paid by a check dated 2/04/94 in the amount of \$8,327.10. This check had written across its face the words "Endorsement constitutes payment in full on the following invoices: 2825." Fresh Quest denies that the adjustments were ever authorized. However, it negotiated the checks, the first on 1/24/94, and the second on 2/9/94.

ABC's answer was signed by its president Stanley Bielski. The answer states, as to these two invoices, "Various items were priced incorrectly and adjustment was approved by Lou Kertesz." Fresh Quest's opening statement consisted of two sworn statements. The first was by Russ Jeans, Fresh Quest's credit manager, who made the following assertions, in relevant part:

I received advice from Fresh Quest salesperson Lou Kertesz, on March 9, 1994, deductions to Fresh Quest invoice numbers 1805-01, and 2585, by ABC Fresh Marketing Inc., were unauthorized.

On March 9, 1994, I spoke with Dave Maravich, of ABC Fresh Marketing Inc. Mr. Maravich confirmed he had spoken with Lou Kertesz. On March 16, I again spoke with Mr. Maravich. Mr. Maravich advised he would be working on short-pay balances due Fresh Quest produce. On April 12, Mr. Maravich advised short pays would be paid per his arrangement with Lou Kertesz. . . .

The second sworn statement was by Lou Kertesz, Fresh Quest's salesperson responsible for sales to ABC. Mr. Kertesz stated, in relevant part, as follows:

On March 9, 1994, I received a written inquiry by fax from Fresh Quest's Credit Manager, Russ Jeans, concerning several short-pays. Included within Russ' fax, was reference to short pays on Fresh Quest invoice #1805-01 and #2585, by ABC Fresh Marketing Inc. Upon receipt of said fax, I spoke with Dave Maravich of ABC Fresh Marketing. He advised ABC Fresh Marketing, would remit payment for both short-pays. . . .

It is noteworthy that ABC failed to submit any affidavit from Dave Maravich, the person who had personal knowledge of the transaction. Instead, ABC's submissions were by its president whose connection with the transactions are unknown. On this basis we conclude that Dave Maravich admitted on behalf of ABC that the amounts paid short were in fact due. Although ABC asserted that an accord and satisfaction was accomplished as to the two transactions in question, we conclude that such was not the case. A good faith dispute is necessary for an accord and satisfaction to take place, and the record is devoid of any indication that the two transactions were disputed at the time the checks were negotiated.¹¹ We conclude that the amount of \$1,114.40 remains due from ABC to Fresh Quest. ABC's failure to pay this amount is a violation of section 2 of the Act.

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.¹² Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.¹³ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order ABC Fresh Marketing, Inc., shall pay to Lindemann Produce, Inc., as reparation, \$17,685.88, with interest thereon at the rate of 10% per annum from May 1, 1994, until paid.

¹¹*Eustis Fruit Company, Inc. v. The Auster Company, Inc.*, 51 Agric. Dec. 865 (1992).

¹²*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹³See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Within 30 days from the date of this order ABC Fresh Marketing, Inc., shall pay to Fresh Quest Produce, as reparation, \$1,114.40, with interest thereon at the rate of 10% per annum from February 1, 1994, until paid.

Copies of this order shall be served upon the parties.

DELANO FARMS COMPANY v. SUMA FRUIT INTERNATIONAL.
PACA Docket No. R-97-0033.
Decision and Order filed January 15, 1998.

Sale by Sample – Express warranty created – Proof of characteristics of sample.

Where complainant tendered six pallets of grapes to respondent's agent for examination, and stated that they were from the lot of grapes subsequently shipped to respondent, the sale was by sample, and amounted to an express warranty that the whole lot of grapes would conform to the sample. The condition or other characteristics disclosed by a sample are subject to subsequent proof in the normal manner.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$25,346.48 in connection with a transaction in interstate commerce, involving loads of table grapes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$30,000, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Delano Farms Company, is a corporation whose address is 10025 Reed Road, Delano, California.

2. Respondent, Suma Fruit International, is a corporation whose address is P.O. Box 577, Sanger, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about July 18, 1995, complainant sold to respondent one load containing 720 21 pound lugs of Flame seedless grapes, Duck's Head brand, for \$13.25 per lug, or \$9,540.00 f.o.b. The load was assigned Delano Farms order number 00001607, and the customer's purchase order number was 86540. The load was shipped on July 20, 1995, in a Lee truck, license number TN 0445578, to respondent in Jacksonville, Florida. Complainant invoiced respondent on July 21, 1995, under its invoice number 803388. Respondent has not paid complainant any part of the purchase price of this shipment.

4. On or about October 19, 1995, complainant sold to respondent, and shipped to respondent in Jakarta, Indonesia, one container load of Calmeria grapes, Duck's Head brand, in 23 pound lugs, at \$11.25 per lug, plus \$100.00 for two temperature recorders, \$63.48 for U.S.D.A. inspection, \$20.50 for phytosanitary certificate, and \$30.00 for three air bags, or a total of \$15,806.48 f.o.b. An U.S.D.A. Export Form Certificate was issued covering the grapes on October 19, 1995, showing that they graded U.S. No. 1 Table, and met the requirements of the Export Grape and Plum Act except for export to destinations in Europe, Greenland, or Japan.

5. The grapes were shipped from Delano, California, on October 19, 1995, by truck, and from Long Beach, California, on October 22, 1995, after being loaded on to four ocean containers (SEAU310102, 346 cartons; SEAU310103, 346 cartons; SEAU310105, 348 cartons; and SEAU310104, 346 cartons) which were placed aboard the vessel Axel Maersk, voyage 9519 to Singapore. At Singapore the grapes were loaded into one container (MAEU 5391950) and transshipped aboard the vessel Kedah, voyage 915, to Jakarta where they arrived at Tanjung Priok port on November 10, 1995. After discharging from the vessel the container was stacked and plugged in at an open storage site, and on November 13, 1995, was transported to the place of business of the consignee P.T. Mekar Citra Abadi, Jakarta, Indonesia, where the grapes were unloaded into the consignee's cold storage on the same day.

6. On November 16, 1995, at the request of P.T. Mekar Citra Abadi, of Jakarta, a survey was performed of grapes in their cold storage by P.T. Aureole,

marine surveyors licensed by the Indonesian Government. A "CERTIFICATE of CONDITION SURVEY" was issued on November 20, 1995, which stated in relevant part as follows:

....

At the time of our attendance the goods were stored in the cold storage with temperature: 0° C.

Findings:

Goods : Fresh Grapes
Quantity : 1,386 lugs
Marks on packing : Duck's Head.
Type of packing : Lugs.

Condition

-Packing : In general sound condition
-Contents : 20 lugs were taken at random and found
as follows:
-Size 15 mm - 20 mm = 90%
-Size 25 mm - 30 mm = 10%
Pulp temperature : +9°C.
Cause of depreciation
of value : Quality is less than the requirements

Reading form (sic) Cox
Recorder Chart : + 34°F

VI. SURVEYOR'S NOTES.

-Condition of goods : has a sour taste, colour too green.
-Based on the verbal statement of consignee : The size of the fruits is not according to the requirements which size was 33 mm.

....

7. Respondent has not paid complainant any part of the purchase price of the grapes shipped to Jakarta.

8. The informal complaint was filed on January 19, 1996, which was within

nine months after the causes of action herein accrued.

Conclusions

The complaint concerns two separate and unrelated transactions, the first of which was shipped to Jacksonville, Florida, and the second which was shipped to Jakarta, Indonesia. Respondent claims that the grapes which were shipped to Jacksonville were not purchased from complainant, but from Cal State Marketing, a firm which in turn purchased them from complainant. Respondent submitted a copy of an invoice (number 23815) from Cal State Marketing to respondent covering a shipment of 720 Flame seedless grapes, lot number DEL005, shipped on July 20, 1995. The invoice states that Cal State's order number was 8300, and that the grapes were shipped to respondent in Jacksonville, Florida, in response to purchase order 86540-S08300. It further states that the price was \$11.50 f.o.b., or a total of \$8,280. Respondent has shown that this invoice was paid by respondent to Cal State on August 16, 1995.

During the informal stages of this proceeding, in response to inquiries from officials of this Department, Cal State submitted a copy of an invoice from complainant to Cal State. This invoice was numbered 803391, referenced "OUR ORDER NO. 00001629," and "CUST. P.O. NO. 8290" [this number was struck through, and "8300" was penciled in], and covered 720 21# Flame Seedless Charlie's Pride grapes at \$11.25, plus \$23.50 for a temperature recorder, or \$8,123.50. The invoice stated that the grapes were to be shipped to Cal State in Greenville, SC, and were to be shipped by Carpet Transport, license No. OK 1FH858. Cal State has shown that it has paid this invoice to complainant on August 25, 1995.

Cal State also submitted a "REVISED" confirmation of sale showing a load of "720 Flame 21LB Duck Head" at \$11.50, shipped 7/20 to "SUMA - Winn Dixie 5276, DESTINATION Jacksonville, PURCHASE ORDER # 86540, TRUCK Carpet Train, LICENSE # OK 1FH858."

It appears to us that Cal State confused two similar grape shipments from complainant. One was a sale from complainant to Cal State, and in turn from Cal State to respondent. The other was a sale (probably through Cal State acting as broker, although the record does not explicitly reveal this) from complainant to respondent. Complainant has submitted two distinct invoices. The first, numbered 803388, shows 720 Duck's Head brand Flame Seedless grapes sold to respondent at \$13.25 per lug f.o.b. against customer purchase order number 86540, shipped on 7/20/95 to respondent in Jacksonville, Florida, on a Lee truck, license No. TN0445578. The second, numbered 803391, shows 720 Charlie's Pride brand Flame Seedless grapes sold to Cal State at \$11.25 per lug f.o.b.

against customer purchase order number 8290, and shipped on 7/20/95 to Cal State in Greenville, South Carolina, on a Carpet Transport truck license No. OK1FH858. More importantly, the record also contains shipping manifests for each load signed by the separate truckers. These shipping manifests are consistent with complainant's invoices.

Respondent has successfully shown that it paid Cal State for the second shipment, and that Cal State paid complainant. But respondent has not shown that it has paid anyone for the first shipment. In view of the signed shipping manifest, the fact that the sale was f.o.b. to respondent, and the absence of any evidence of objection to complainant's invoice, we find that respondent is liable to complainant for the full purchase price of the first load, or \$9,540.00.

Respondent asserts that the second load of grapes was sold as U.S. Fancy grade. However, the invoice does not state a grade, and there is no indication in the record that respondent made any timely objection to the invoice. There is also no other indication in any of the shipping documents that the grapes were sold as any particular grade. We conclude that the grapes were sold without reference as to grade. The second load of grapes was accepted by unloading into the cold storage in Jakarta. Accordingly, respondent became liable to complainant for the full purchase price of the grapes less any damages proven to have resulted from any breach of contract by Complainant.

Respondent asserts that complainant breached the contract by failing to ship the correct size of grapes. In this connection respondent submitted the sworn statement of Michael Missakian, which is quoted below in part:

On October 18, 1995, I went to Delano Farms to perform routine inspections. During this visit I inspected Calmeria grapes for export sales, I asked to see some pallets from various lots. They said they had one lot and it was packed in Duck Head label. The cold storage unit at Delano Farms is quite large, so who knows what they have in back. When I was called to the inspection room I was told there were 6 pallets only to look at and the pallets were located in the hall area of the loading dock. The individual who works at Delano Farms in the cold storage area said these 6 pallets were the same lot they had in the back. There was no way of knowing because I wasn't allowed back there. I looked at random boxes from these 6 pallets and found that the pack was very nice. The bunches were very large & the stems were nice and green and very firm. The berries were a deep green in color and no signs of bleaching whatsoever. The berries were 12/16" - 13/16" in diameter and 1" - 1-1/4" in length. There was no signs of small berries. There was 0-2% scarring, no major

defects whatsoever. In my opinion, based on the 6 pallets I inspected, I saw no reason that the fruit would not meet export requirements. It would last for 21-25 days with no problem overseas.

The inspection of the grapes by respondent's agent at Delano Farms prior to sale and shipment has let complainant to assert that respondent purchased the subject grapes after inspection. However, a "purchase after inspection" is a trade term defined in the Regulations, and must be employed by the parties to be applicable.² Respondent asserts that the inspection recounted above amounted to a sale by sample. The Uniform Commercial Code, section 2 - 313(1)(c) provides that:

Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Complainant has not denied the inspection by respondent's agent, and we conclude that the described tender of samples for inspection, and their inspection and subsequent purchase by respondent, did create a sale by sample which amounted to an express warranty.³ Where a sale is by sample there is obviously the potential for a problem of proof as to the condition of the sample tendered. It would be to the advantage of both seller and buyer to bear this fact in mind, and agree in writing, at the time of the examination of the sample, as to the condition, or other pertinent characteristics, of the sample. However, in this case complainant did not deny the description of the berries given in Missakian's affidavit. But the description must be interpreted in the light of the record as a shoe. Mr. Missakian states that the berries were 12/16" - 13/16" in diameter. However, the same survey used by respondent to show that the berries were smaller than this description also shows that they were larger than this description. Of necessity then, the statement must not be viewed as setting forth the absolute limits of the diameter of the grapes, but rather the general size range. However, Mr. Missakian does offer the further limitation that "[t]here was no signs [sic] of small berries." The question then must be answered whether the load contained any significant number of small berries.

²*Primary Export International v. Blue Anchor, Inc.*, R-95-037 decided February 11, 1997, 56 Agric. Dec. ____ (1997).

³See *Everette Rudolph v. Spuds, Inc.*, 28 Agric. Dec. 254 (1969), and *E. L. Kempf & Son v. Certified Grocers*, 27 Agric. Dec. 799 (1968).

The survey at destination stated that 90 percent of the grapes were 15 mm to 20 mm. Converted into inches the size was 9.45/16 inch to 12.6/16 inch.⁴ The remaining 10 percent of the grapes were larger, namely 25 mm to 30 mm, or 1 inch to 1 3/16 inch. Can the grapes that were 9.45/16 inch be said to have been "small?" We think not. The subject grapes were graded U.S. No. 1 Table grade prior to shipment. While we have not found that this grade was a part of the contract terms, the grade standards for U.S. No. 1 Table Grapes can be taken as an indication of what is considered normal as to size. Such standards provide for a minimum diameter for the subject type grapes of 10/16 inch.⁵ However, a tolerance of 10 percent is allowed for berries which fail to meet the minimum diameter requirement. The minimum diameter described by the surveyor in Jakarta, 15 mm (or 9.45/16 inch), is not likely to have constituted more than 10 percent of the grapes. We find that respondent has failed to prove by a preponderance of the evidence that complainant breached the contract as to size.

We also note that even had respondent proven a breach as to the size of the grapes, it would have completely failed to prove damages resulting from such breach. This is because the resale of the grapes in Indonesia was delayed until the last of December, or the first part of January, and, in addition, respondent failed to submit any accounting of the resale. In the absence of an accounting it would have been impossible, under the circumstances of this case, to calculate, or even estimate, damages.

Since respondent accepted the two loads of grapes, and has not proven any breach of contract on the part of complainant, it became liable to complainant for the full purchase price of the two loads, or \$25,346.48. Respondent's failure to pay complainant this amount 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

⁴The violation of mathematical protocol involved in the expression of the numerator of a fraction in decimal form is necessitated by the fact that the Grade Standards, and Mr. Missakian's affidavit, express size requirements for grapes in sixteenths of an inch, and by the consequent need to convert the metrical size description of the survey to fractional form.

⁵The United States Standards for Grades of Table Grapes (European or Vinifera Type), § 51.884, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at <http://www.ams.usda.gov/standards/stanfrfv.htm>.

consequence of such violations." Such damages include interest.⁶ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.⁷ We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a \$300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$25,346.48, with interest thereon at the rate of 10% per annum from October 1, 1995, until paid, plus the amount of \$300.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

**CHARLES JOHNSON COMPANY v. TIMOTHY HOVERSEN d/b/a
HOVERSEN & SONS.**

PACA Docket No. R-95-0080.

Decision and Order filed January 28, 1998.

Full protection agreement.

Statements from the broker, engaged by respondent, were the deciding factor in determining whether protection or full protection were the terms agreed to following complainant's breach due to short weight. Under the terms of "full protection", the party under a protection agreement is not entitled to a profit, commission, or brokerage costs.

Patrice Harps, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

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

⁶*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

⁷See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Puckle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed with the Department, in which complainant seeks a reparation award against respondent in the amount of \$3,795.50 in connection with one truckload of iceberg type lettuce shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying complainant's allegations.

Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant provided an opening statement and statement in reply. Respondent provided an answering statement and brief.

Findings of Fact

1. Complainant, Charles Johnson Company, hereinafter referred to as Johnson, is a corporation whose post office address is 4130 N. 70th, #223, Scottsdale, Arizona 85251.

2. Respondent, Timothy Hoversen, d/b/a Hoversen & Sons, hereinafter referred to as Hoversen, is an individual whose post office address is 21 South Water Market, Chicago, Illinois 60608. At the time of the transaction involved herein, Hoversen was licensed under the Act.

3. The parties negotiated the transaction through a broker, Alan Bull Produce Co., Fresno, California, who negotiated the transaction on behalf of Hoversen.

4. On May 9, 1994, complainant, through respondent's broker, sold and shipped to respondent 820 cartons of iceberg type lettuce at \$5.10 per carton, for a total f.o.b. price of \$4,205.50.

5. On May 10, 1994, complainant granted respondent a \$.50 adjustment for market decline, from \$5.10 per carton to \$4.60 per carton for an adjusted f.o.b. price of \$3,795.00.

¹Effective November 15, 1995, the threshold for oral hearings was raised to \$30,000 by Public Law 104-48.

6. On May 12, 1994, the lettuce was federally inspected revealing "net weight ranges 41.00 pounds net weight averages 47.90 pounds". The remainder of the lot was found to have no defects.

7. An informal complaint was filed on June 6, 1994, which is within nine months from when the cause of action accrued.

Discussion

On May 9, 1994, complainant and respondent entered into a contract, through respondent's broker, for the sale of 820 cartons of iceberg lettuce with f.o.b. terms. The contract also called for the lettuce to be segregated into two lots with different weight requirements, one lot requiring a weight of 54 pounds and the other 58 pounds per carton, gross. The lettuce was shipped; and received in good transit time. On arrival the lettuce was federally inspected. The inspection revealed that the net weight of the lettuce ranged from 41.00 to 53.50 pounds, average 47.90 pounds, with the tare weight, or carton weight of 2.5 pounds, for an average gross weight of 50.4 pounds. The lot was also found to have defects. The parties agreed that the lettuce was received short of the contracted weights in breach of the contract.

Complainant alleges that, through the broker, it authorized respondent to sell the lettuce with "protection" against short weight. Complainant further states that based on USDA Market News quotations and the results of the USDA inspection, respondent should not have incurred damages.

Respondent raises an affirmative defense, alleging that complainant's salesman authorized respondent to sell the lettuce with "full protection". Respondent claims it made the sales promptly and properly, remitting to complainant the full proceeds resulting from the breach. As the party asserting an affirmative defense, respondent must establish its allegation by a preponderance of the evidence. *Newmiller Farms v. Nicolls*, 36 Agric. Dec. 1230(1979); *Walker & Hagan Packing House v. Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968). With the parties disputing whether the lettuce was to be sold with "protection" or "full protection", we will first discuss the difference between these terms and decide which term was agreed to by the parties.

"Protection" means that the party being protected will be saved harmless from any loss. Such party "would be responsible only for the net proceeds obtained from . . . resale, exclusive of any commission." *Vener Co. v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405 (1956); *David Pepper Co. v. Harris Packing Company*, 14 Agric. Dec. 185 (1955).

"Full protection" means that the one suffering will save the other party

harmless from any loss which may result from the defective condition of the merchandise. The contract . . . as modified . . . is not the same as a consignment transaction. The most the buyer would be obliged to pay would be the f.o.b. contract price. However, if the net returns derived from the resale of the goods were less than the contract price, the protection agreement would take effect and the buyer would be responsible only for the net proceeds obtained from such resale, exclusive of any commission."

See also *Anonymous*, 11 Agric. Dec. 754 (1952); *Northwest Arkansas Produce Company, Inc. v. The Creasy Company*, 27 Agric. Dec. 760 (1968). In certain transactions, "protection" may be intended to apply only to a certain defect. In this case, complainant, is stating it granted "protection", states that it exclusively protected respondent against any loss resulting from light weight. With "full protection", no exclusivity to one type of defect would be distinguished from another when determining losses.

Both parties submit sworn but conflicting affidavits on whether "protection" or "full protection" was agreed to. In order to determine which one of the terms was agreed to, we turn to a letter to the Department from the broker, Alan Bull (ROI Exhibit 3). Mr. Bull states:

Arrival USDA 5/12 showed lettuce to weight 50.4#gross. Full protection for Hoversen was granted by Jamie 5/12 due to light weight. Tim Hoversen also noted additional quality problems not noted on the inspection report, namely heads were misshapen, pack had poor opening, butts were dark red, and it looked like old lettuce . . . I explained all these quality problems to Jamie. Jamie did not disagree with anything I said about the lettuce. Jamie gave Hoversen full protection.

After I faxed Johnson the returns (account sales) from Hoversen 5/25/94 Charles Johnson called me on 5/28. He complained about the returns and stated . . . Charles Johnson again confirmed that they gave Hoversen full protection on 5/12 due to light weight.

The broker also submits copies of its memorandum of sale and corrected memorandum in support of its statement (ROI Exhibit 3A), noting that "full protection" was given by complainant to respondent. The broker's statement would be entitled to great weight if it were to be found to be neutral in the transaction. *Homestead Tomato Packing Co. v. Mim's Produce, Inc.*, 43 Agric. Dec. 173 (1984). In this case, and in most, the broker is not a totally neutral party

but is engaged by the buyer, In § 46.28 of the Regulations under the Act, it states:

After all the parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due. The confirmation or memorandum of sale shall also identify the party who engaged the broker to act in the negotiations. If the confirmation or memorandum of sale does not contain such information, the broker shall be presumed to have been engaged by the buyer. Brokers do not normally act as general agents of either party, and will not be presumed to have so acted. Unless otherwise agreed and confirmed, the broker will be entitled to payment of brokerage fees from the party by whom it was engaged to act as a broker.

The broker's statement must therefore be weighed carefully in the determination of the merits of each party's position. In this instance, even though the broker was engaged by respondent, we find his statement to be credible, and that statement serves to give us the deciding evidence as to the agreed terms for the sale of the lettuce, following the discovery of the breach.

Respondent sold the lettuce and prepared an accounting for complainant as evidence of its loss (Complainant's Exhibit 4). The accounting shows the lot sold for gross proceeds of \$3,715.00. From that amount, respondent deducted \$100.00, inspection fee, \$164.00 for brokerage, \$1,640.00 freight, and 15% commission or \$557.25, for net proceeds of \$1,253.75. Complainant alleges that the proceeds should reflect the full market value since the gross weight of the lettuce was only 1.6 pounds under the contracted weight, and above the weight USDA Market News Service uses to base its quotations. (USDA Market News Service bases its terminal market quotations on a standard pack weighting 40 to 55 pounds, with under 40 pounds considered to be light weight). We agree with complainant that respondent failed to sell the lettuce for the market price, which ranged from \$8.00 to \$8.50 per carton. However, market price would only apply if the terms agreed to were "protection" from losses associated with light weight lettuce. We have decided the evidence shows that the parties agreed to terms of "full protection", and the broker's records show that complainant agreed that respondent had several other condition problems with the lettuce, which would affect its resale. Therefore, we find that respondent's accounting is an accurate reflection of respondent's loss.

In a protection against loss situation the protected party is not getting the goods

on consignment (in which case they would remain the property of the shipper). Rather the protected party is buying and taking title to the goods, and the original contract price remains the base-line price. See *Oshita Marketing v. Tampa Bay Produce*, 50 Agric. Dec. 968 (1991). Following a breach, the party still has the potential to make a profit on the goods. The protected party's protection extends only to protection against loss. The potential for profit is not a right, but only a potential, and still depends upon the protected party reselling for more than the original contract price. Thus the protected party under a protection agreement is not entitled to a profit, or a commission (which is a substitute for profit in a consignment transaction), or a handling fee. In addition, respondent is not entitled to brokerage costs (Since it was respondent who engaged the broker, which cost, was not a result of the breach). See *Vener v. McCaffrey*, 15 Agric. Dec. 1230 (1950).

However, the fundamental object of the protection agreement, which is to protect the buyer against any loss, requires that no monetary loss occur. This means that a buyer who has paid freight must be credited with the freight paid. See *Arthur J. Manzo v. Jarson & Zerrilli Co.*, 9 Agric. Dec. 1230 (1950). In addition, respondent would also be entitled to its incidental expense of the USDA inspection which was used to provide evidence of the breach. (See Uniform Commercial Code § 2 - 714(3)).

Therefore, respondent's proceeds would then amount to \$1,975 (\$3,715 [Gross proceeds] - \$100 [USDA Inspection Fee] - \$1,640 [Freight] = \$1,975). Respondent has paid complainant \$1,253.75, therefore we find respondent liable to complainant \$721.25.

Respondent's failure to pay complainant \$721.25 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 (1979); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963)

Order

Within 30 days from date of order, respondent shall pay complainant as reparation, \$721.25 with interest thereon, at the rate of 10% per annum from June 1, 1994, until paid.

Copies of this order shall be served upon the parties.

SHARYLAND, LP, d/b/a PLANTATION PRODUCE v. LLOYD A. MILLER, d/b/a L & M PRODUCE CO.
PACA Docket No. R-97-0021.
Decision and Order filed February 24, 1998.

Suitable Shipping Condition - Exception to normal transportation Requirement. - Transportation - Failure to Supply Temperature Tape.

A partial truck load of sweet peppers was sold f.o.b., and, after shipment, was filled out with citrus which had not been precooled. A shipping point inspection showed U.S. Grade No. 2, with 80 percent U.S. No. 1. The bill of lading specified that transit temperatures were to be held at 36 to 38 degrees, and noted that a temperature recorder had been placed on board. The peppers were shipped from South Texas, and arrived in Portland, Oregon within normal transit time. A timely federal inspection noted temperatures of 45 to 46 degrees (which was stated to be normal for sweet peppers), and 63 percent average decay. The receiver failed to secure the temperature tape from the recorder, or explain such failure. It was held that, in view of the failure to supply the temperature tape, the buyer had failed to prove that transportation temperatures were normal. Although the decay was stated to be grossly excessive, it was found that it was possible that the decay was caused by abnormal temperatures, and consequently the exception to the rule requiring normal transit conditions in order for the suitable shipping condition warranty to apply could not be invoked.

George S. Whitten, Presiding Officer.

Byron E. White, Arlington, TX, for Complainant.

Respondent, Pro se.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$4,615.50 in connection with a transaction in interstate commerce involving green peppers.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$30,000, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, Sharyland LP, is a partnership composed of Aghoc, Inc., and Agri Management Group, Inc., doing business as Plantation Produce Co., whose address is P. O. Box 1043, Mission, Texas.

2. Respondent, Lloyd A. Miller, is an individual doing business as L & M Produce, whose address is Route 7, Box 206H, Edinburg, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about November 3, 1995, complainant sold to respondent one lot of green peppers consisting of 448 cartons, no grade, at \$9.50 per carton, plus \$.75 for precooling and pallatization, and \$23.50 for a temperature recorder, or a total of \$4,615.50, f.o.b.

4. A Federal-State Inspection Certificate was issued on November 6, 1995, covering the lot of 448 cartons of peppers. The certificate disclosed that the inspection was started 11/02/95 at 9:30 a.m., and completed 11/04/95 at 5:00 p.m. The inspection was noted to have taken place at Mission, Texas, and a box labeled "SUBLOT" was checked. The applicant was stated to be Plantation Produce, and the certificate further revealed, in relevant part, as follows:

PRODUCT/VARIETY	:	Select Pepper
NUMBER AND SIZE OF CONTAINER	:	448 - 1 1/9 BU. CTN.
DESCRIPTION OF PRODUCT	:	Valley Kist (Green)
GRADE	:	U.S. No. 2 Approx. 80% U.S. No.1 Quality
REMARKS	:	Applicant states loaded on Tra. 20R 012 TX.

5. On November 4, 1995, a bill of lading was issued showing that the peppers were loaded on a trailer with license number 20R-012 TX at 12:10 p.m. on November 4, 1995, with instructions to ship to L & M Produce Co., Portland, OR. The bill of lading also showed that "STIRES RECORDER. #674968" was loaded

on the truck. The bill of lading contained the instructions: "MAINTAIN TEMPERATURES AT 36/38. DEGREES," and "DELIVER MON. 11/06/95 A.M. PER BUYERS REPORTING INSTRUCTIONS."

6. The truck proceeded first to a citrus packing shed in the Texas Rio Grande Valley where the load was competed with citrus which had not been precooled. The temperatures on November 4, 1995, in Brownsville, Texas ranged between 50 and 56 degrees.

7. The truck arrived at Albertsons in Portland, Oregon on November 8, 1995, at 3:00 p.m. Albertsons rejected the peppers on the following day, and respondent moved the peppers to the United Salad Warehouse where they were federally inspected at the request of Botsford & Goodfellow, Inc. of Milwaukie, Oregon, at 1:35 p.m. on November 9, 1995, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 46 °F	Sweet Peppers "VALLEY KIST"		TX	11/9 Bu	448 Cartons	N

LOT	AVERAGE DEFECTS	including DAM	SER	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	63	% 63	%	%	Decay (53 to 76%)	Remainder Fresh, (illegible) & Crisp
	63	% 63	%	%	Checksum	Decay is in Mostly Early, Many Moderate, and some advanced stages. Decay Includes 10% affecting stems, remainder affecting walls and calyxes(?) only.

8. Respondent has not paid complainant any part of the purchase price of the peppers.

9. An informal complaint was filed on January 8, 1996, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 448 cartons of green pepper sold to respondent on an f.o.b. basis. Complainant asserts that the peppers were unloaded at Albertsons, in Portland, and thus accepted, but were later rejected by Albertsons. Respondent asserts that the peppers were not unloaded at Albertsons. This dispute is, of course, irrelevant to the issues between complainant and respondent because the peppers were never rejected by respondent to complainant, but were accepted when they were unloaded at the

place of inspection, the Fruit Salad warehouse.

The Regulations,¹ in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,² in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations,³ which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"⁴ are based upon case law predating the adoption of the Regulations.⁵ Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless

¹7 C.F.R. § 46.43(i).

²7 C.F.R. § 46.43(j).

³7 C.F.R. § 46.43(j).

⁴7 C.F.R. § 46.44.

⁵See Williston, *Sales* § 245 (rev. ed. 1948).

make good delivery.⁶ This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.⁷

Complainant does not dispute the results of the inspection at destination, which shows a grossly excessive amount of decay, but asserts that since transportation services and conditions were abnormal the warranty of suitable shipping condition does not apply. Complainant first states that transportation was abnormal in that the bill of lading specified that delivery was to be accomplished by the morning of Monday, November 6, 1995. However, respondent correctly points out that this would require a less than two day transit period which would be, if not impossible, at least illegal. The peppers arrived at Albertsons on November 8, 1995, which was normal for a trip of some 2,400 miles.

Complainant also points out that the bill of lading specified that temperatures were to be maintained at between 36 and 38 degrees, but that in keeping with respondent's directions the truck proceeded to another pickup point in South Texas and loaded citrus which had not been precooled. Complainant asserts that the temperatures of 45 to 46 degrees shown by the federal inspection at destination show that the citrus caused the temperature to be elevated, and show that transportation was abnormal. However, there is nothing abnormal about temperatures in the 45 to 46 degree range for sweet peppers.⁸ Instead, it was complainant's specification of 36 to 38 degrees that was abnormal, since peppers

⁶See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

⁷See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

⁸All recommendations for transportation of Sweet Peppers specify 45 to 55 degrees F. See *Protecting Perishable Foods During Transport by Truck*, Agricultural Handbook Number 669, Office of Transportation, United States Department of Agriculture, p.54 (1987); *Protection of Rail Shipments of Fruits and Vegetables*, Agriculture Handbook No. 195, Agricultural Research Service, United States Department of Agriculture, p.41 (Revised ed. 1969); and *Tropical Products Transport Handbook*, Agricultural Handbook Number 668, Office of Transportation, United States Department of Agriculture, p.117 (revised ed. Sept., 1989).

are subject to chilling injury at such temperatures.⁹

Complainant next asserts that it stamped the bill of lading with the words "THIS LOAD CONTAINS A TEMPERATURE RECORDER. NO CLAIMS HONORED UNLESS RECORDER SECURED AND NOTED ON TRUCKS RECEIPTS." Complainant maintains that this constituted a part of the contract with respondent. This, of course, is not true. A bill of lading is a contract with the trucker, not a contract between the seller and buyer. However, even if the bill of lading had contained no such notation, the failure of respondent to secure the temperature recorder was a serious breach of its duty to complainant, and carries serious consequences. We have stated that:

. . . the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal.¹⁰

There are commonly only two parties with the opportunity, or motive, to wrongly "lose" a temperature recorder or tape, namely the receiver and the trucker. In both cases the only motive would be that the tape disclosed improper transportation. Therefore if a shipper proves by submitting a bill of lading signed by the trucker (as the shipper in this case did) that a temperature recorder was placed on the truck, it is hard to imagine an adequate excuse for a receiver's failure to produce the tape. In this case respondent has offered no excuse. A receiver may, indeed, be entirely innocent, in that the recorder may have been thrown away by the trucker before arrival of the truck. However, since a trucker would thus dispose of a recorder only if transportation was bad, one is inevitably led to the presumption that transportation temperatures were abnormal.

The conclusion that transportation was abnormal does not lead inevitably to the conclusion that the warranty of suitable shipping condition is inapplicable. A judicial exception to the requirement that transportation be normal in order for the warranty to apply has been long recognized. This exception allows a buyer to

⁹There is, however, no indication in the literature that 36 to 38 degrees for only a few days would have had any serious ill effects on the peppers. See *McColloch, Lacy P., Chilling Injury and Alternaria Rot of Bell Peppers*, Marketing Research Report No. 536, Market Quality Research Division, Agricultural Marketing Service, United States Department of Agriculture (August, 1962).

¹⁰*Louis Caric & sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 at 1500-01 (1979). See also *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (1984).

prove a breach of the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation, if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty transportation service. The exception has been explained as follows:

It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal

The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.

Since this is the rationale of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service.

The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.¹¹

The federal inspection at destination did not reveal the type of decay in the peppers. However, one of the most prevalent types of decay is Bacterial Soft Rot. A Department publication states that:

¹¹See *Sharyland Corp. v. Milrose Food Brokers*, 50 Agric. Dec. 994 (1991); *Tony Mista & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1981); and *Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969).

Bacterial soft rot on peppers is characterized by water soaking and rapid softening of the tissues. Infection initiated at the stem end progresses rapidly through stem and calyx lobe tissues . . . into the pod. Under humid conditions and optimum temperatures (75° to 85° F.) The entire pod can be reduced to a soupy mass within 3 to 6 days after infection. . . .¹²

Although the temperatures of the peppers at the time the destination inspection was performed were normal, we do not know to what temperatures the peppers may have been exposed during the days of transit prior to arrival in Portland. In view of the fact that we must assume, as a result of respondent's failure to supply the temperature tape from the Stires recorder, that transportation temperatures were abnormal, we cannot be certain that the 63% average decay present in the peppers at destination was not caused by abnormal temperatures.¹³ Accordingly, we find that the warranty of suitable shipping condition was voided by abnormal transportation, and that respondent has not proven a breach of contract on the part of complainant. Since respondent accepted the peppers, he became liable to complainant for the full purchase price thereof, or \$4,615.50.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.¹⁴ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.¹⁵ We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a \$300 handling fee to file the formal

¹²*Market Diseases of Tomatoes, Peppers, and Eggplants*, Agriculture Handbook No. 28, Agricultural Research Service, United States Department of Agriculture, p. 53 (1968).

¹³See *Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981). The fact that the pathogen that was at the root of the decay was likely in the peppers prior to shipment is inconsequential. See *Lookout Mountain Tomato & Banana Co., Inc. v. Consumer Produce Co., Inc. of Pittsburgh*, 50 Agric. Dec. 960 (1991).

¹⁴*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹⁵See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$4,615.50, with interest thereon at the rate of 10% per annum from December 1, 1995, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

DeBACKER POTATO FARMS, INC. v. PELLERITO FOODS, INC.
PACA Docket No. R-96-0038.
Decision and Order filed March 3, 1998.

Interstate and Foreign Commerce.

Where potatoes were shipped intrastate to a processing plant located near the Canadian border that fact alone was insufficient to show that the resulting processed potatoes were then exported to Canada, or that it was contemplated by the parties that they would be so exported. It was concluded that the transactions were not in interstate or foreign commerce within the meaning of the Act, and the complaint was dismissed.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Mark D. Evans, Bloomfield, MI, for Respondent.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$140,176.19 in connection with transactions involving potatoes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim arising out of the same transactions. This counterclaim was later withdrawn by respondent.

Although the amount claimed in the formal complaint exceeds \$15,000, the parties waived oral hearing. Therefore the shortened method of procedure

provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, DeBacker Potato Farms, Inc., is a corporation whose address is Route 1, Box 163, Cornell, Michigan.

2. Respondent, Pellerito Foods, Inc., is a corporation whose address is 2000 Mack Avenue, Detroit, Michigan. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about January 26, 1995, complainant and respondent entered into a contract in writing calling for the sale and shipment by complainant to respondent of 55 loads of bulk potatoes, each load to contain 60,000 pounds. The potatoes were to be shipped between November 21, 1994, and June 30, 1995. The price was to be \$6 per hundredweight delivered to respondent, and on February 15, 1995, the price was to be raised to \$6.50 per hundredweight. The contract specified the type, quality, and size of potatoes to be shipped. The potatoes were to be produced by complainant, and shipped from complainant's place of business in Cornell, Michigan, to respondent in Detroit, Michigan. The potatoes were to be processed by respondent in the state of Michigan.

4. Pursuant to the contract, between January 12 and February 14, 1996, complainant shipped eight loads of potatoes to respondent.

5. An informal complaint was filed on March 23, 1995, which was within nine months after the causes of action alleged herein accrued.

Conclusions

The record in this proceeding shows that complainant contracted to sell to respondent bulk potatoes of its own production from its farm in Cornell, Michigan, and ship them to respondent in Detroit, Michigan, where they would be processed. The record does not disclose the nature of the processing, except that the potatoes

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

would be fried. There is no indication in the record as to where the potatoes would be distributed following processing.

Jurisdictional issues are raised by this forum *sua sponte*.² Accordingly we will explore the issue of whether interstate or foreign commerce is present in this case. The issue depends upon the meaning of the terminology used in the Act, and such terminology is narrower in scope than the constitutional scope of commerce.³ The Department's report of investigation states that the "complaint involves eight loads of potatoes allegedly sold by complainant to respondent in the course of intrastate commerce . . ." This conclusion of the report of investigation that the subject potatoes were sold in the course of intrastate commerce is apparently correct. There is no indication whatever in the record that the potatoes either moved, or were contemplated to move in the course of interstate, or foreign commerce. The one precedent decision which might be thought to indicate the presence of interstate or foreign commerce in this case is *Troyer v. Blue Star Potato*.⁴ In *Troyer* a load of chipping potatoes was purchased from a Pennsylvania complainant by a respondent who was located in Pennsylvania. A substantial portion of respondent's chips were distributed by Valley Distributing Company, also located in Pennsylvania, but situated near the borders of 3 states. The Judicial Officer found that:

. . . on the basis of evidence of record showing that the Valley Distributing Company shipped respondent's potato chips into the state of Ohio, and the evasive statements by respondent's President upon being questioned about where the products of respondent were sold, including his admission that it is possible respondent's potato chips are shipped into other States, we conclude that this was a transaction contemplating shipment in interstate commerce, and that the Secretary has jurisdiction in the matter.

In this case there is no evidence in the record that the processed potatoes moved into another state or country. While the proximity of Detroit to Canada might be thought to be analogous to the situation in *Troyer*, in fact it is not. The normal barriers to foreign commerce, while they certainly do not exclude the possibility that some of the processed potatoes moved into Canada, make it less than probable

²*Provincial Fruit Company Limited v. Brewster Heights Packing, Inc.* 39 Agric. Dec. 1514 (1980).

³See *Tulelake Potato Distributors, Inc. v. John M. Giustino, d/b/a Grand Slam Produce*, 52 Agric. Dec. 752, at 756-57 (1993).

⁴*Troyer v. Blue Star Potato*, 27 Agric. Dec. 301 (1968).

that they did so. Moreover, the decision in *Troyer* is not based alone on the proximity of the processing plant to the borders of three other states, but also upon the positive evidence in the record that some of the processed potatoes did in fact move into Ohio. We conclude, therefore, that there is insufficient evidence in this record to show that the potatoes sold by complainant to respondent moved, or were contemplated to move, in interstate or foreign commerce.⁵

During the informal stages of this proceeding, in a letter written to complainant by the Regional Director of the PACA Branch of the Fruit and Vegetable Division of AMS, it was stated that:

. . . the Act requires interstate commerce of a perishable agricultural commodity in order to have jurisdiction over a transaction. The exception to this is potatoes for processing and cherries in brine. Therefore, since these potatoes were processed, you should include a statement to that affect in your formal document.

This statement is incorrect. Although no portion of the Act is cited, the only paragraph of the Act that speaks of both potatoes for processing and cherries in brine is section 1(6) which defines the term dealer. There it is stated:

The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section.

⁵Sec *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Chester Ruter v. C. H. Robinson Company and Sol Sieff Produce Company*, 44 Agric. Dec. 2135 (1985); *Mendelson-Zeller Co. v. Pyramid Produce*, 36 Agric. Dec. 941 (1977); *Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423 (1975); *P. C. Kellam v. Virginia Tomato Corporation*, 29 Agric. Dec. 835 (1970); *S. Water Mkt. Credit v. Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1168 (1969); *Miller Farms & Orchards v. C. B. Overby*, 26 Agric. Dec. 299 (1967); *Conway, Inc. v. Ben F. Line*, 16 Agric. Dec. 387 (1957); *E. S. Harper Co. v. B. Osborne*, 8 Agric. Dec. 1027 (1949).

Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer."⁶

Of course this section only deals with the definition of the term dealer. The section excludes respondent from the exception for processors because respondent was buying potatoes, and this exclusion from the exception is operative whether or not the processed product is shipped in interstate or foreign commerce. So it may be taken as settled that respondent was a dealer. Indeed, if there were any doubt as to this question it is enough that respondent paid the fees and elected to be licensed. However, the Act grants jurisdiction over transactions in which a dealer engages only if such transactions are in interstate or foreign commerce. We have before found that the subject transactions were not in either interstate or foreign commerce. Accordingly, the complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

⁶7 U.S.C. § 499a(6).

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.

PACA Docket No. D-96-0530.

Order Denying Petition for Reconsideration filed January 5, 1998.

Willful, flagrant, and repeated violations - Effect of dismissal of reparations actions on disciplinary proceeding - Collateral effects - Mitigating circumstances - Publication of facts and circumstances.

The Judicial Officer denied Respondents' Petition for Reconsideration. Respondents committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' excuse that they violated the payment provisions of the PACA because they had a "bad fall farming season due to weather and markets" is not a defense. Respondents' purported 30-year history of compliance with the PACA is not a relevant circumstance under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA. The adverse impact on Respondents' produce sellers of publication that Respondents have committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and the requests by Respondents' produce sellers that Respondents be allowed to stay in business is irrelevant to this proceeding.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [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], by filing a Complaint on July 29, 1996.

The Complaint alleges, *inter alia*, that: (1) Tolar Farms, during the period July 1995 through September 1995, failed to make full payment promptly to three sellers of the agreed purchase prices in the total amount of \$66,696.06 for 19 lots of perishable agricultural commodities which Tolar Farms purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to four sellers of the agreed purchase prices in the total amount of

\$125,392.97 for 27 lots of perishable agricultural commodities which Tolar Sales, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶ V); and (3) by reason of the facts alleged in paragraphs III and V of the Complaint, Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI). Complainant requests: (1) a finding that Respondents willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) an order revoking Tolar Farms' PACA license; and (3) the publication of the facts and circumstances regarding Tolar Sales, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI(2)-(3)).

Respondents filed an Answer on September 17, 1996, denying that they violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) as alleged in paragraphs III and V of the Complaint (Answer ¶¶ 3, 5). Respondents state in their Answer, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

On July 10, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Proposed Default Decision]. Complainant asserts that "respondents never sent the Department any settlement agreements" and states that "[p]urported partial payment agreements with unpaid sellers does [sic] not excuse the respondent's [sic] failure to make full payment promptly to its [sic] sellers." (Complainant's Motion for Default Decision at 2.) Moreover, Complainant attached to Complainant's Motion for Default Decision copies of promissory notes which Complainant asserts "constitute evidence that of the amount alleged in the complaint as owing, \$192,089.03, at least \$142,052.37 remains unpaid" (Complainant's Motion for Default Decision at 4 and Exhibit B).

Respondents did not file objections to Complainant's Motion for Default Decision within the time provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter ALJ] issued a Decision Without Hearing By Reason of Admissions [hereinafter Default Decision], in which the ALJ: (1) found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2); (2) found that during the period July 1995 through September 1995, Respondents

failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate commerce and that, as of May 20, 1997, at least \$142,052.37 of the amount alleged in the Complaint remained past due and unpaid (Default Decision at 3); (3) concluded that Respondents committed willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) (Default Decision at 3); and (4) ordered the facts and circumstances set forth in the Default Decision be published (Default Decision at 3).

On October 1, 1997, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).¹ On November 3, 1997, Complainant filed Objection to Respondents' Appeal Petition [hereinafter Complainant's Response], and the case was referred to the Judicial Officer for decision.

On November 6, 1997, I issued a Decision and Order in which I: (1) found that Tolar Farms and Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 lots of perishable agricultural commodities in the total amount of \$192,089.03; (2) found that, as of May 20, 1997, at least \$142,052.37 remained past due and unpaid; and (3) concluded that Respondents' failures to make full payment promptly with respect to the 46 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 8-9 (Nov. 6, 1997). Based on these findings and conclusion, I ordered that the facts and circumstances set forth in the Decision and Order be published. *In re Tolar Farms, supra*, slip op. at 21.

On November 25, 1997, Respondents filed a letter [hereinafter Petition for Reconsideration] requesting reconsideration of the November 6, 1997, Decision and Order issued in this proceeding; on December 18, 1997, Complainant filed Objection to Respondent's [sic] Petition for Reconsideration; and on December 19, 1997, the case was referred to the Judicial Officer for reconsideration.

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

PERTINENT STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

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

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

§ 499h. Grounds for suspension or revocation of license**(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . 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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

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

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

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

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a

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

7 C.F.R. § 46.2(aa)(5), (11).

Respondents raise four issues in their Petition for Reconsideration. First, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents' produce creditors have released Respondents from "all PACA action."

There is evidence in this proceeding that Respondents entered into settlement agreements with at least some of their produce creditors and that at least some reparation proceedings instituted under the PACA against Tolar Farms were dismissed.² However, dismissal of reparation proceedings instituted against Tolar Farms by private parties has no bearing on the instant disciplinary proceeding instituted by Complainant against Respondents. Moreover, Respondents' produce creditors lack standing to agree to the dismissal of a disciplinary action brought under the PACA by Complainant against Respondent, and the record contains no evidence that the instant disciplinary proceeding was ever dismissed.

Second, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents' violations of the PACA were not intentional, as follows:

The violations were not done on purpose. We just had a bad fall farming season due to weather and markets.

Petition for Reconsideration.

I disagree with Respondents' contention that their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were not intentional. Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' violations are "repeated" because repeated means

²Complainant filed documents that establish that two reparation proceedings instituted under the PACA against Tolar Farms were dismissed. *Classie Sales Corp. v. Tolar Farms*, PACA Docket No. R-96-140 (Sept. 11, 1996) (Dismissal Order Based on Election of Remedies); *Larry D. Ellerman v. Robert M. Tolar and Tony L. Tolar, d/b/a Tolar Farms*, PACA Docket No. R-96-149 (Dec. 16, 1996) (Order of Dismissal). (See Complainant's Response at 2, 3, Attach. A, B.) Moreover, Complainant filed seven documents entitled "Acknowledgment of Settlement." (See Complainant's Response at 2, 3, Attach. A, B.) Each of the documents entitled "Acknowledgment of Settlement" is a private agreement between Respondents and one of their produce sellers which states that the seller "will receive payment in full for the debt due it from the Tolars." See *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 14-15 (Nov. 6, 1997).

more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.³

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

³See, e.g., *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), cert. denied, 389 U.S. 835 (1967); *In re Allred's Produce*, 56 Agric. Dec. ___ (Dec. 5, 1997) (concluding that respondent's failure to pay 19 sellers \$336,153.40 for 86 lots of perishable agricultural commodities during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

with careless disregard of statutory requirements.⁴ Willfulness is reflected by Respondents' violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and amount of violative transactions involved.⁵ Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period July 1995 through September 1995.

⁴See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27 (Dec. 5, 1997); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917, 925 (1997), appeal docketed, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) (" 'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

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

⁵See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 27-28 (Dec. 5, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

Respondents knew, or should have known, that they could not make prompt payment for the large amount of perishable agricultural commodities they ordered. Nonetheless, Respondents continued over a 3-month period to make purchases knowing they could not pay for the produce as the bills came due. Respondents should have made sure that they had sufficient capitalization with which to operate. Respondents did not, and consequently could not, pay their suppliers of perishable agricultural commodities. Respondents deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondents have both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondents' violations are, therefore, willful.⁶

However, willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondents' violations of 7 U.S.C. § 499b(4) were willful.

Respondents' excuse that they violated the payment provisions of the PACA because they had a "bad fall farming season due to weather and markets" is not a defense. Even if a respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.⁷

⁶See *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 28-29 (Dec. 5 1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

⁷*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279-80 (1996) (holding that an industry-wide crisis that resulted in few purchasers paying for perishable agricultural commodities is not relevant to the sanction to be imposed for violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 (1996) (holding that excuses are not relevant to the sanction to be imposed for violations of section 2 of the PACA), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1443 (1995) (holding that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995) (holding that excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time), *appeal dismissed*, No. 95-70906 (9th Cir. 1996); *In re James D. Milligan & Co.*, 49 Agric. Dec.

573, 576 (1990) (holding that failure to pay for produce results in the revocation of respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with respondent), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990) (holding that failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with respondent), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 615 (1989) (stating that although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (stating that revocation of respondent's PACA license is appropriate even though respondent failed to pay because respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (stating that excuses such as nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2028-30 (1985) (stating that all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that respondent failed to pay because a bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by \$200,000 in losses in 2-year period from theft of produce from respondent's warehouse are irrelevant in a failure to pay case under the PACA), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 129 (1984) (stating that a fire at respondent's business for which respondent was under-insured was not relevant in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1513-26 (1983) (stating that respondent's bankruptcy, caused by failure of a large purchaser from respondent to comply with its contractual agreement, is not relevant in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158-70 (1983) (stating that nonpayment because another firm failed to pay respondent \$248,805.66 is not relevant in a failure to pay case under the PACA); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (stating that nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs are irrelevant in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (stating that revocation of respondent's PACA license is appropriate where nonpayment is caused by respondent's bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (stating that nonpayment because of bankruptcy is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982), (stating that nonpayment because of bankruptcy of another firm owing respondent \$776,459.23 is not relevant in determining whether payment violations occurred or whether violations were willful), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (stating that nonpayment because of financial difficulties is not relevant in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (stating that financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (stating that respondent's sudden and unexpected loss of a major sales account is not relevant in a failure to pay case

Third, Respondents contend that the November 6, 1997, Decision and Order is in error because Respondents have a long history of compliance with the PACA, as follows:

We have been in the produce industry for 30 years and never had any problems or complaints. If this doesn't matter than [sic] something [sic] is wrong. . . .

We feel we have been very good for the produce industry for many years and will continue to be good for it. One mistake was made and we will repay this debt. Therefore, we feel this decision, made based on books that

under the PACA); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 969-70 (1981) (stating that respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (stating that nonpayment because of financial difficulties is not relevant in a failure to pay case under the PACA), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (stating that nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery, is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (stating that a strike and the failure of others to pay respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705, 709-14 (1978) (stating that nonpayment because of failure of others to pay respondent and respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33 (1976) (stating that nonpayment because of financial difficulties is not relevant in determining whether payment violations occurred or whether violations were willful), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (stating that bankruptcy of another firm owing respondent over \$130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (stating that a railroad strike causing respondent's failure to pay is not a defense under section 2 of the PACA), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (stating that financial difficulty is not an excuse for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (stating that respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (stating that the fact that respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (stating that financial difficulties do not condone respondent's repeated failures to pay and revocation of respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (stating that nonpayment because of financial difficulties authorizes revocation of respondent's PACA license and had respondent's license not already terminated, it would have been revoked).

are in Washington, is not the right decision in this case.

Petition for Reconsideration.

Respondents' purported 30-year history of compliance with the PACA is a mitigating circumstance, and mitigating circumstances are not relevant circumstances under the Department's sanction policy regarding flagrant or repeated failures to make full payment under the PACA. Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondents had paid all sellers by the opening of the hearing, and whether Respondents are in compliance with the PACA and the regulations under the PACA. Even if a respondent has been a commission merchant, dealer, or broker for an extended period of time and can demonstrate that the firm has never violated the PACA during that extended period of time, such circumstances are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. Moreover, such circumstances are not relevant to the sanction to be imposed on a respondent who has flagrantly or repeatedly failed to make full payment promptly.⁸

Fourth, Respondents contend that the November 6, 1997, Decision and Order in this proceeding is in error because it fails to take into account the effect on Respondents' produce creditors, as follows:

... We will have [our produce creditors] contact you and let them help make the decision that they might never be paid on these files. This decision will also push us into bankruptcy on these growers.

....

... We can get over 100 people we do business with to sign a petition

⁸*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 24-25 (Dec. 5, 1997) (rejecting respondent's contention that its 30-year "unblemished" record as a produce dealer is relevant to the sanction to be imposed for failure to make full payment promptly); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 (1996) (stating that respondents' excellent payment history relative to others in the perishable commodities industry and respondents' good faith efforts to address their payment problems are not relevant circumstances under the Department's sanction policy), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 1204, 1225 (1996) (stating that previous compliance with the PACA and good faith efforts to pay produce suppliers are not relevant to the sanction to be imposed), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985) (stating that the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, and that respondent was in business for 35 years with no complaints or financial difficulties are not relevant circumstances), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986).

saying they sant [sic] us in the produce business. You can't get 5 people we owe to agree to keep us out.

... We would appreciate it if you would let the people who this decision will affect the most help you make that decision.

Petition for Reconsideration.⁹

Often produce creditors support a respondent in a PACA disciplinary proceeding in hopes that the respondent will remain in business and that they (the produce creditors) will be paid some or all of the money that they are owed for perishable agricultural commodities. However, allowing a PACA licensee that has flagrantly or repeatedly failed to make full payment promptly in accordance with the PACA to remain in business in hopes that the PACA licensee will pay its current produce creditors frequently exposes other produce sellers to the risk of nonpayment. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and even consumers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay.¹⁰ These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities

⁹Four of Respondents' produce creditors did contact me by telephone after I issued the November 6, 1997, Decision and Order in this proceeding. Each of Respondents' produce creditors urged me to dismiss the case against Respondents so that Respondents could remain in the produce business and thereby pay their produce debts. I informed each of Respondents' four produce creditors who contacted me that I could not discuss the merits of the proceeding. These telephone conversations with Respondents' produce creditors are not part of the record in this proceeding and form no part of the basis for this Order Denying Petition for Reconsideration.

¹⁰Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also for the protection of consumers" (H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). See also *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2026 (1985); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169, *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

industry to financially responsible persons, which is one of the primary goals of the PACA.¹¹

Moreover, collateral effects of publication that a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) are not relevant to a determination whether a respondent made full payment promptly or to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly. Also irrelevant are adverse impacts on a respondent's produce sellers of publication that a respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and requests by a respondent's produce sellers that a respondent be allowed to stay in business.¹² This Department routinely denies

¹¹*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), appeal docketed, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216, appeal docketed, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), printed in 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977). See also *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

¹²*In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 20 (Dec. 5, 1997) (stating that the absence of complaints from respondent's produce sellers is not relevant in a failure to pay case under 7 U.S.C. § 499b(4)); *In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (stating that the adverse impact on sellers of perishable agricultural commodities of publication that respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (stating that the adverse impact of revocation of respondent's PACA license on respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (stating that a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if respondent were permitted to remain in business), appeal dismissed, No. 90-1199 (D.C. Cir. Oct. 15, 1990); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (stating that collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that detriment to creditors if respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (stating that the fact that a respondent's creditors will suffer if respondent's PACA license is

requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees.¹³

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 6, 1997, *In re Tolar Farms, supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.¹⁴ Respondents' Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on November 6, 1997. Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 6, 1997, is reinstated, with allowance for time passed.

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

Order

Respondents have committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances

revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (stating that the fact that respondent's creditors will suffer if respondent's PACA license is revoked is irrelevant).

¹³*In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 23 (Dec. 5, 1997) (stating that the effect of the revocation of respondent's PACA license on employment of 30 persons and on small and medium-sized businesses that rely on respondent are collateral effects and are not relevant to the sanction to be imposed); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding that the fact that respondent's 25 employees will suffer harm from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating that hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating that the Department routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

¹⁴*In re Samuel Zimmerman*, 56 Agric. Dec. ____, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

set forth in this Decision and Order shall be published, effective 65 days after service of this Order on Respondents.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Stay Order filed March 5, 1998.

Jane McCavitt, for Complainant.
Respondent, Pro se.

Order issued by William G. Jenson, Judicial Officer.

On November 6, 1997, I issued a Decision and Order concluding that Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and ordered the publication of the facts and circumstances set forth in the Decision and Order. *In re Tolar Farms*, 56 Agric. Dec. ___, slip op. at 21 (Nov. 6, 1997). On November 25, 1997, Respondents filed a petition for reconsideration which I denied. *In re Tolar Farms*, 57 Agric. Dec. ___ (Jan. 5, 1998) (Order Denying Petition for Reconsideration).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter Respondents' Petition for a Stay Order], and the case was referred to the Judicial Officer for a ruling on Respondents' Petition for a Stay Order. On March 4, 1998, Jane McCavitt, attorney for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant does not oppose Respondents' Petition for a Stay Order.

Respondents' Petition for a Stay Order is granted. The Order issued in this proceeding on November 6, 1997, *In re Tolar Farms*, 56 Agric. Dec. ___ (Nov. 6, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Order Denying Petition for Reconsideration filed January 26, 1998.

Argument for first time on appeal — Litigant prohibited from taking inconsistent positions — Litigant prohibited from appealing ruling requested.

The Judicial Officer denied Petitioner's Petition for Reconsideration. Petitioner may not raise a new argument for the first time on appeal to the Judicial Officer. Further, Petitioner's argument that the pre-November 15, 1995, definition of *responsibly connected* should be applied is directly contrary to the position he consistently advanced throughout the proceeding, and the general rule is that a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding. Moreover, even if the definition of *responsibly connected* as amended on November 15, 1995, was erroneously applied to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period April 1991 through February 1992, it was applied at Petitioner's invitation, and Petitioner cannot challenge the application of the definition of *responsibly connected* as amended on November 15, 1995, to determine Petitioner's status, which, until his Petition for Reconsideration, he consistently requested be applied.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA,¹ in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg

¹During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of \$424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and its PACA license was revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995).

Corporation and involved in the daily activities of The Norinsberg Corporation.

On January 2, 1997, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in New York, New York. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner. Mr. Andrew Y. Stanton, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 10, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and a Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, and on February 11, 1997, Respondent filed Respondent's Brief. On February 19, 1997, Petitioner filed Petitioner's Reply Brief and Respondent filed Respondent's Reply Brief.

On May 6, 1997, the ALJ issued an Initial Decision and Order in which the ALJ found that: (1) "The Norinsberg Corporation was the alter ego of Robert Norinsberg"; (2) "Petitioner . . . only nominally was a secretary, a treasurer, a director and a stockholder of The Norinsberg Corporation during the period of violation of the PACA by the corporation"; and (3) "Petitioner . . . was not actively involved in the activities resulting in the violation" (Initial Decision and Order at 8-9). The ALJ concluded that "Michael Norinsberg was not responsibly connected to The Norinsberg Corporation at the time of the corporation's violations of the PACA" (Initial Decision and Order at 4) and reversed the "Order of the Chief, PACA Branch, Fruit and Vegetable Division, USDA, dated August 11, 1993, which found that Michael Norinsberg was 'responsibly connected' to The Norinsberg Corporation" (Initial Decision and Order at 13).

On May 28, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in adjudication proceedings which are subject to the Rules of Practice (7 C.F.R. § 2.35).² On July 21, 1997, Petitioner filed Petitioner's Opposition to Respondent's Appeal Petition, and on July 23, 1997, the case was referred to the Judicial Officer for decision.

On October 21, 1997, I issued a Decision and Order: (1) concluding that Petitioner was only nominally an officer and director of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding that The Norinsberg Corporation was the alter ego of Robert M.

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Norinsberg and that Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the time that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding that Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 15, 33-34 (Oct. 21, 1997).

On December 3, 1997, Petitioner filed Petition for Reconsideration. On January 9, 1998, Respondent filed Response to Petitioner's Petition for Reconsideration, and the case was referred to the Judicial Officer for reconsideration.

Petitioner raises one issue in his Petition for Reconsideration. Petitioner contends that "the amended definition of the term 'responsibly connected' [in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995))], as interpreted by the Judicial Officer, imposes new and detrimental legal consequences on [P]etitioner so that it cannot be applied retroactively to his conduct which occurred before the amendment." (Petition for Reconsideration at 1 (footnote omitted).)

I concluded that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), April 1991 through February 1992. This conclusion is based on a finding that Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). This active involvement in activities resulting in The Norinsberg Corporation's violations consisted of Petitioner's signing 14 checks, totaling \$59,728.60, between May 1991 and February 1992, which were drawn on The Norinsberg Corporation's accounts with Chase Manhattan Bank and the Republic National Bank of New York and which were payable to persons who were not produce creditors of The Norinsberg Corporation.³ *In re Michael Norinsberg, supra*, slip op. at 15, 23-26.

³The checks signed by Petitioner, payable to individuals who were not The Norinsberg Corporation's produce creditors, are as follows: (1) 12 checks made payable to Robert M. Norinsberg in amounts totaling \$51,369.60; (2) one check made payable to Susan Norinsberg in the amount of \$5,359; and (3) one check made payable to Carmela Quito in the amount of \$3,000.

During the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the term *responsibly connected* was defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as follows:

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.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation to rebut his or her status as responsibly connected with a violator.⁴ Specifically, section 12(a) of the PACAA-1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) (Supp. I 1995) by adding a sentence to the definition, which reads as follows:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Neither PACAA-1995 nor the legislative history applicable to PACAA-1995 indicates that Congress intended that the definition of the term *responsibly connected* was to be applied retroactively, and Petitioner's activity on which I based my finding that he was *responsibly connected* with The Norinsberg Corporation during the period that The Norinsberg Corporation violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred prior to the approval of PACAA-1995.

However, until Petitioner filed his Petition for Reconsideration, Petitioner

⁴Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) [hereinafter PACAA-1995].

consistently took the position that the definition of *responsibly connected* in the PACA as amended by PACAA-1995 should be applied in this proceeding to determine whether he was responsibly connected with The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).⁵

As an initial matter, Petitioner's contention that the pre-November 15, 1995, definition of *responsibly connected* is applicable to this proceeding is an argument which Petitioner raises for the first time in Petitioner's Petition for Reconsideration. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.⁶ Petitioner's failure to argue that the pre-November 15, 1995, definition of *responsibly connected* should apply to this proceeding prior to his filing the Petition for Reconsideration is too late. Further, even if I were to find that Petitioner raised the issue of which definition of *responsibly connected* to apply in his filings prior to appeal and on that basis was not too late, I would not consider the argument by Petitioner that I use the definition of *responsibly connected* in the PACA that was in effect at the time of The Norinsberg Corporation's violations of 7 U.S.C. § 499b(4) because, until his

⁵See Petitioner's Prehearing Brief at 1-2, filed December 30, 1996; Petitioner's Proposed Findings of Fact and Conclusions of Law at 11, filed February 10, 1997; Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, at 2-5, filed February 10, 1997; Petitioner's Opposition to Respondent's Appeal Petition at 5, filed July 21, 1997.

⁶*In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 34-35 (Dec. 5, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), appeal docketed, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar.27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Petition for Reconsideration, Petitioner consistently argued that the definition of *responsibly connected* as amended on November 15, 1995, should be applied in this proceeding. The general rule is that a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding.⁷ Moreover, even if I erroneously applied the definition of *responsibly connected* as amended on November 15, 1995, to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period April 1991 through February 1992, I did so at Petitioner's invitation. Petitioner cannot now challenge the application of the definition of *responsibly connected* as amended on November 15, 1995, to determine Petitioner's status, which, until his Petition for Reconsideration, he consistently requested be applied.⁸

⁷See *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624 (2d Cir. 1993) (stating that where a party to litigation repeatedly represented that it would be bound by one interpretation of its insurance contracts, the party could not on appeal attempt to change course and rely on another interpretation of the contracts), *cert. denied*, 513 U.S. 1052 (1994); *EF Operating Corp. v. American Buildings*, 993 F.2d 1046, 1050 (3d Cir.) (stating that one cannot cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so and a reviewing court may properly consider the representations made in the appellate brief to be binding and decline to address a new legal argument based on a later repudiation of those representations), *cert. denied*, 510 U.S. 868 (1993); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992) (stating that when a litigant takes an unequivocal position at trial, that litigant cannot on appeal assume a contrary position simply because the position was a tactical mistake or a regretted concession), *cert. denied sub nom., Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1347 (10th Cir. 1986) (stating that the general rule is that a party is not allowed to argue a legal position on appeal contrary to that argued at trial); *Richardson v. Turner*, 716 F.2d 1059, 1061 n.2 (4th Cir. 1983) (stating that appellate courts generally should not decide a case on a legal theory directly contrary to that advanced by appellants at trial); *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 n.1 (8th Cir. 1981) (per curiam) (stating that an appellate court will not consider an issue on which counsel took a contrary position before the trial court); *Alexander v. Town and Country Estates, Inc.*, 535 F.2d 1081, 1082 (8th Cir. 1976) (holding that the court would not consider an issue on appeal where the litigant took a contrary position in district court).

⁸See generally *Hagan v. McNallen*, 62 F.3d 619, 625 (4th Cir. 1995) (concluding that where a defendant conceded willfulness at trial, the defendant could not raise the issue of willfulness on appeal); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995) (stating that ordinarily a party will not be heard to complain about an erroneous ruling that he himself precipitated); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 269 (8th Cir. 1993) (stating that where appellants failed to object to trial court's instruction, they waived any argument of error when they offered a virtually identical instruction; it is fundamental that where the defendant opened the door and invited error there can be no reversible error); *Tel-Phonic Services, Inc. v. TBS International, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992) (holding that where plaintiffs agreed to a court order transferring venue, plaintiffs cannot appeal the propriety of the order to transfer venue); *Morris v. State of California*, 966 F.2d 448, 452 (9th Cir. 1991) (stating that as a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation), *cert. denied*, 506 U.S. 831 (1992); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (stating that plaintiffs' admission of inability to pursue a claim prevents it from appealing that issue, it being a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial court proceeding invited by that party); *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir.

For the foregoing reasons and the reasons set forth in the Decision and Order filed October 21, 1997, *In re Michael Norinsberg, supra*, Petitioner's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.⁹

1984) (per curiam) (stating that a party may not sit idly by, watching error being committed, and then raise the claimed error on appeal without having accorded the trial court the opportunity to correct its action and an appellant may not complain on appeal of errors which he himself induced or invited); *Weise v. United States*, 724 F.2d 587, 590 (7th Cir. 1984) (stating that it is well settled law that a party cannot complain of errors which it has committed, invited, or induced the court to make, or to which it consented); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 15 (1st Cir.) (stating that, in general, a party may not appeal from an error to which he contributed, either by failing to object or by affirmatively presenting to the court the wrong law), cert. dismissed, 463 U.S. 1247 (1983); *International Travelers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215, 224 (7th Cir. 1981) (stating that where plaintiff argued that Bank of America was an indispensable party and the district court dismissed the suit, plaintiff-appellant cannot on appeal argue that Bank of America is not an indispensable party and complain of error which it committed, invited, or induced the court to make or to which it consented); *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) (stating that where the appellants argued the wrong law or theory to the trial court, they may not argue another law or theory on appeal); *United States v. Gonzalez Vargas*, 585 F.2d 546, 547 (1st Cir. 1978) (per curiam) (stating that even though a non-applicable rule regarding peremptory challenges was applied to the case, appellants share the fault for the error and proposed the compromise that was adopted; therefore, there was no reversible error); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1155 (10th Cir.) (stating that appellant may not complain of errors which he himself has invited), cert. denied, 439 U.S. 862 (1978); *Director General of India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972) (stating that where appellant has taken a position in the trial court and induced the trial court to adopt that position, the appellant cannot complain that the trial court erred when it adopted appellant's position), cert. denied, 409 U.S. 1115 (1973); *Sanders v. Buchanan*, 407 F.2d 161, 163 (10th Cir. 1969) (stating that where a trial court's comment was provoked by argument of appellant, the appellant may not complain on appeal that the comment was error); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 716 (4th Cir. 1966) (stating that where the parties consent to the procedure adopted by the lower court for deciding factual issues, they cannot complain of the procedure used by the lower court on appeal); *Garza v. Indiana & Michigan Electric Co.*, 338 F.2d 623, 627 (6th Cir. 1964) (stating that one may not complain of rulings he invited the court to make); *Cranston Print Works Co. v. Public Service Co. of North Carolina, Inc.*, 291 F.2d 638, 649 (4th Cir. 1961) (stating that a party who procures or is responsible for the exclusion of evidence is estopped to assign as error the fact that the record is devoid of such evidence); *Petersen v. Chicago, Great Western Ry. Co.*, 138 F.2d 304, 306-07 (8th Cir. 1943) (stating that where from the institution of an action down to the time of argument to the jury, plaintiff regarded Iowa law as controlling, plaintiff could not claim that the trial court's application of Iowa law was in error).

⁹*In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.);

Petitioner's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on October 21, 1997. Therefore, since Petitioner's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed October 21, 1997, is reinstated, with allowance for time passed.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the PACA, is affirmed.

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Stay Order filed April 8, 1998.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On October 21, 1997, I issued a Decision and Order affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Michael Norinsberg [hereinafter Petitioner], was responsibly connected with The Norinsberg Corporation during the period of time that The Norinsberg Corporation violated the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA]. *In re Michael Norinsberg*, 56 Agric. Dec. ___, slip op. at 34 (Oct. 21, 1997). On December 3, 1997, Petitioner filed a petition for reconsideration, which I denied. *In re Michael Norinsberg*, 57 Agric. Dec. ___ (Jan. 26, 1998) (Order Denying Pet. for Recons.).

In re Havana Potatoes of New York Corp., 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On March 19, 1998, Respondent filed Motion for Stay Order stating that Petitioner had "filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit" and requesting "that the October 21, 1997, Decision and Order be stayed until Petitioner's appeal is resolved." On March 31, 1998, Petitioner filed Consent to Issuance of Stay Order stating that Petitioner "consents to the issuance of an Order staying the Decision and Order issued on October 21, 1997[,] until his appeal is resolved." On April 7, 1998, the hearing clerk referred the case to the Judicial Officer for a ruling on Respondent's Motion for Stay Order.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on October 21, 1997, *In re Michael Norinsberg*, 56 Agric. Dec. ____ (Oct. 21, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Order Denying Petition for Reconsideration filed February 2, 1998.

Failure to make full payment promptly – Willful, flagrant, and repeated violations – License revocation.

The Judicial Officer denied Respondent's Petition for Reconsideration for the reasons previously set forth in the Judicial Officer's decision.

Jane McCavitt, for Complainant.

Mark W. Romney, Fort Worth, TX, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [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], by filing a Complaint on July 29, 1996.

The Complaint alleges that, during the period May 1993 through February 1996, Allred's Produce [hereinafter Respondent] violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$336,153.40 for 86 lots of perishable agricultural commodities, which Respondent received and accepted in interstate commerce (Compl. ¶ III). Respondent filed Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Answer] on September 30, 1996, in which Respondent denies violating the PACA, but asserts that \$187,404.76 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on September 30, 1996 (Answer ¶ 5). Respondent filed Amended Response of Allred's Produce to the Complaint of the Secretary of Agriculture [hereinafter Amended Answer] on April 17, 1997, in which Respondent denies violating the PACA, but asserts that less than \$148,984.07 of the amount Respondent is alleged in the Complaint to have failed to have paid promptly in full remained unpaid on April 16, 1997 (Amended Answer ¶ 5).

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing begun on June 18, 1997, in Dallas, Texas, and continued and completed on August 8, 1997, in Washington, D.C. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Bruce W. Akerly, Esq., Bell & Nunnally, PLLC, Dallas, Texas, represented Respondent.¹ The ALJ issued a bench decision on August 8, 1997, in which the ALJ concluded that Respondent violated section 2 of the PACA (7 U.S.C. § 499b) and revoked Respondent's PACA license (Tr. 286). On August 20, 1997, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for errors of spelling, punctuation, and transcription [hereinafter Initial Decision and Order].

On September 5, 1997, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).² On October

¹On November 12, 1997, Bruce W. Akerly, Esq., filed a Motion to Withdraw as Counsel for Petitioner [sic], which was granted (Ruling on Motion to Withdraw as Counsel, filed November 14, 1997).

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

1, 1997, Complainant filed Complainant's Response to Respondent's Appeal, and on October 23, 1997, the case was referred to the Judicial Officer for decision.

On December 5, 1997, I issued a Decision and Order in which I: (1) found that during the period May 1993 through February 1996, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 86 lots of perishable agricultural commodities in the total amount of \$336,153.40, which Respondent had purchased, received, and accepted in interstate commerce; (2) concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) revoked Respondent's PACA license, effective 65 days after service of the Order in the Decision and Order on Respondent. *In re Allred's Produce*, 56 Agric. Dec. ____, slip op. at 10, 44 (Dec. 5, 1997).

On January 6, 1998, Respondent filed a Petition for Reconsideration³ and on January 26, 1998, Complainant filed Complainant's Objection to Respondent's Petition for Reconsideration. On January 28, 1998, the case was referred to the Judicial Officer for reconsideration.

Respondent raises seven issues in its Petition for Reconsideration. The seven issues raised by Respondent in its Petition for Reconsideration are identical to the issues raised by Respondent in Respondent's Appeal Petition, which issues were thoroughly addressed in the Decision and Order, filed December 5, 1997. *In re Allred's Produce, supra*. Respondent has raised nothing in its Petition for Reconsideration which would cause me to modify the December 5, 1997, Decision and Order.

For the foregoing reason and the reasons set forth in the Decision and Order filed December 5, 1997, *In re Allred's Produce, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the

³While the record does not indicate that an appearance was filed on behalf of Respondent after Mr. Bruce W. Akerly, Esq.'s motion to withdraw as counsel was granted on November 14, 1997, Respondent's Petition for Reconsideration was signed by Mr. Mark W. Romney, Esq., of Boswell & Kober, Fort Worth, Texas, and Respondent's Petition for Reconsideration was accompanied by a letter to Ms. Joyce A. Dawson from Kelly E. DeBerry of Boswell & Kober, Fort Worth, Texas. Moreover, Mr. Ronald Allred, one of the partners in Allred's Produce, contacted me by telephone on January 28, 1998, to determine whether Respondent's Petition for Reconsideration had been timely filed, and at that time, Mr. Allred informed me that Respondent was again represented by counsel. While Mr. Allred did not identify counsel representing Respondent, I infer that Mr. Mark W. Romney, Esq., of Boswell & Kober, Fort Worth, Texas, currently represents Respondent in this proceeding.

determination to grant or deny a timely filed petition for reconsideration.⁴ Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on December 5, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed December 5, 1997, is reinstated, with allowance for time passed.

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

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

In re: ALLRED'S PRODUCE.
PACA Docket No. D-96-0531.
Stay Order filed April 3, 1998.

Jane McCavitt, for Complainant.
 Mark W. Romney, Fort Worth, TX, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 5, 1997, I issued a Decision and Order concluding that Allred's Produce [hereinafter Respondent], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and revoked Respondent's PACA license. *In re Allred's Produce*, 56 Agric. Dec. ___, slip op. at 10, 44 (Dec. 5, 1997). On January 6, 1998, Respondent filed a petition for reconsideration, which I denied. *In re Allred's Produce*, 57 Agric. Dec. ___ (Feb. 2, 1998) (Order Denying Pet. for Recons.).

⁴*In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On April 2, 1998, Respondent, by telephone, requested a stay pending the outcome of proceedings for judicial review [hereinafter Respondent's Petition for a Stay Order], and the case was referred to the Judicial Officer for a ruling on Respondent's Petition for a Stay Order. On April 2, 1998, counsel for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me, by telephone, that Complainant does not oppose Respondent's Petition for a Stay Order.

Respondent's Petition for a Stay Order is granted. The Order issued in this proceeding on December 5, 1997, *In re Allred's Produce*, 56 Agric. Dec. ____ (Dec. 5, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

**In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.**

Clarification of Stay Order filed February 5, 1998.

Mary Hobbie, for Complainant.

Tab K. Rosenfeld, New York, NY, for Respondents.

Order issued by William G. Jensen, Judicial Officer.

On February 20, 1997, I issued a Stay Order in this proceeding which provides as follows:

The Order previously issued in this case, which would have revoked Respondent Havana Potatoes of New York Corp.'s PACA license and Respondent Havpo, Inc.'s PACA license, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re Havana Potatoes of New York Corp., 56 Agric. Dec. 1029 (1997).

On February 4, 1998, Havana Potatoes of New York Corp. [hereinafter Respondent] filed a motion stating that Respondent intends to file a petition for a writ of certiorari in the Supreme Court of the United States and requesting "an order continuing the stay of [the Order revoking Respondent's PACA license] until

a decision on Havana's petition for certiorari, or at least until March 19, 199[8], the date for submission of Havana's certiorari petition."

On February 4, 1998, I contacted Complainant's counsel to determine whether Complainant intended to file a response to Respondent's February 4, 1998, motion. Complainant's counsel stated that Complainant does not intend to file a response to Respondent's February 4, 1998, motion.

Respondent's motion for an order continuing the stay of the Order revoking Respondent's PACA license is denied, because such an order would be redundant.

The Stay Order issued on February 20, 1997, by its terms, remains in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction. The Stay Order issued February 20, 1997, has not been lifted by the Judicial Officer, has not been vacated by a court of competent jurisdiction, and is now in effect. No purpose would be served by issuing an order stating that the Stay Order issued February 20, 1997, remains in effect.

In re: STEVEN J. RODGERS.
PACA-APP Docket No. 96-0002.
Stay Order filed April 8, 1998.

Andrew Y. Stanton, for Respondent.
Mark L. Johansen and Steven R. Block, Dallas, TX, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On December 12, 1997, I issued a Decision and Order affirming the determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Steven J. Rodgers [hereinafter Petitioner], was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA]. *In re Steven J. Rodgers*, 56 Agric. Dec. ___, slip op. at 51 (Dec. 12, 1997).

On March 19, 1998, Respondent filed Motion for Stay Order stating that Petitioner had "filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit" and requesting "that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is resolved." On April 6, 1998, Petitioner filed Petitioner's Response to Respondent's Motion for Stay Order stating that Petitioner "joins Respondent's Motion for Stay Order and requests that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is concluded." On April 7, 1998, the hearing clerk referred the case to the Judicial

Officer for a ruling on Respondent's Motion for Stay Order.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on December 12, 1997, *In re Steven J. Rodgers*, 56 Agric. Dec. ____ (Dec. 12, 1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEFAULT DECISIONS**

In re: MENDENHALL PRODUCE, INC., and PRIMA ROMA SALES, INC. and MICHAEL J. MENDENHALL.

PACA Docket No. D-97-0028 & APP 97-0008.

Decision as to Mendenhall Produce, Inc. by Reason of Default and Dismissal as to Prima Roma Sales, Inc. by Reason of Withdrawal of Application for License filed November 7, 1997.

Failure to file an answer - Failure to appear at hearing - Failure to make full payment promptly - Failure to satisfy reparation orders - Willful, flagrant and repeated violations - Publication.

Eric Paul, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondents.

Decision & Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

This is disciplinary and show cause proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act," instituted by a notice to show cause and complaint filed against Mendenhall Produce, Inc., and Prima Roma Sales, Inc., on July 18, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United State Department of Agriculture. It is alleged in the complaint that during the period August 1995 through November 1995, respondent Mendenhall Produce, Inc. purchased, received and accepted in interstate commerce, from 16 sellers, 66 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices totaling \$219,913.17. In addition, it is alleged that respondent Mendenhall Produce, Inc. failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over \$195,000. It is alleged in the notice to show cause that respondent Prima Roma Sales, Inc. should be refused a license because Michael J. Mendenhall, its sole officer and shareholder, has engaged in practices of a character prohibited by the PACA. In addition, it is alleged that respondent Prima Roma Sales, Inc. and Michael J. Mendenhall have made false and misleading statements in the application for license submitted on June 21, 1997.

The notice to show cause and complaint were served upon the respondents by regular mail in accordance with section 1.147 of the Rules of Practice (7 C.F.R. § 1.147) after letters sent by certified mail were returned unclaimed. Pursuant to a telephone conference at which Michael J. Mendenhall appeared on behalf of

respondent Prima Roma Sales, Inc., the notice to show cause and complaint were set for hearing in Phoenix, Arizona, on November 5, 1997. An answer was filed on behalf of respondent Prima Roma Sales, Inc. by Michael J. Mendenhall. This answer was also accepted as a petition for review of the determination of the Chief, PACA Branch, that Michael J. Mendenhall was responsibly connected to Mendenhall Produce, Inc. Pursuant to Section 1.137 of the Rules of Practice (7 C.F.R. § 1.137), the Michael J. Mendenhall petition for review was joined for consolidated hearing with the notice to show cause and complaint proceeding. On October 14, 1997, respondent Prima Roma Sales, Inc. withdrew its application for license.

The time for respondent Mendenhall Produce, Inc. to file an answer admitting, denying, or explaining each of the allegations of the complaint in accordance with Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) having run, respondent Mendenhall Produce, Inc. having failed to appear at the hearing, and upon the motion of the complainant for issuance of the Default Order, the following Decision and Order is issued in Phoenix, Arizona, at the commencement of the hearing in the remaining responsibly connected appeal proceeding.

Findings of Facts

1. Respondent Mendenhall Produce, Inc. (hereinafter "respondent Mendenhall Produce"), is a corporation organized and existing under the laws of the State of New Mexico. Its business address is 3100 Harrelson, Mesilla Park, New Mexico 88047-1438. Its mailing address is P.O. Box 1438, Mesilla Park, New Mexico 88047-1438.

2. PACA License number 940906 was issued to respondent Mendenhall Produce on March 29, 1994, and terminated on March 29, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent Mendenhall Produce failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph V of the complaint, during the period August 1995 through November 1995, respondent Mendenhall Produce failed to make full payment promptly to 16 sellers for the agreed purchase prices totaling \$219,913.17 for 66 lots of perishable agricultural commodities which it received and accepted in interstate commerce. In addition, respondent Mendenhall Produce failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over \$195,000.

Conclusions

Respondent Mendenhall Produce's failure to make full payment promptly with respect to the 66 transactions set forth in Finding of Fact No 3 above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

The notice to show cause should be dismissed because respondent Prima Roma Sales, Inc. has withdrawn its application for license.

Order

A finding is hereby made that respondent Mendenhall Produce, Inc. has committed repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and such finding shall be published.

The notice to show cause is dismissed.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceeding thirty-five (35) days after service unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies of this Order shall be served upon the parties.

[This Decision and Order became final December 18, 1997.-Editor]

In re: A & E FOODS, INC.

PACA Docket No. D-97-0023.

Decision and Order filed October 23, 1997.

Failure to file an answer - Failure to pay reparation order - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter

referred to as the "Act", instituted by a complaint filed on May 16, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1994 through January 1996, respondent purchased, received and accepted, in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$525,887.75.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. Respondent, A & E Foods, Inc., was a corporation, organized and existing under the laws of Maryland. Its business mailing address was 8869-C Greenwood Place, Savage, Maryland 20763.

2. Pursuant to the licensing provisions of the Act, license number 830025 was issued to respondent on October 6, 1982. This license was suspended on July 5, 1996, for failure to pay a reparation order, and subsequently terminated on October 6, 1996, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph III of the complaint, during the period July 1994 through January 1996, respondent purchased, received and accepted in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$525,887.75.

Conclusions

Respondent's failure to make full payment promptly with respect to the 341 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 9, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Decision and Order filed January 6, 1998.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andre Vitale, for Complainant.

Peter M. Solomon, Bedford, NH, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on April 1, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period May through November 1995, Queen City Farms, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$713,638.10 for 578 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The Complaint also noted that on November 20, 1995, Respondent filed a voluntary petition in the United States Bankruptcy Court for the District of New Hampshire pursuant to

Chapter 7 of the Bankruptcy Code (7 U.S.C. § 7 *et seq.*), designated Case No. 95-12848. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Schedule F Creditors Holding Unsecured Nonpriority Claims that it owes 19 sellers at least \$713,638.10 which the complaint alleged that respondent failed to fully and promptly pay. This admission warrants the immediate issuance of a decision without hearing by reason of admissions. Therefore, upon the motion of the complainant for the issuance of a decision without hearing by reason of admissions, the following decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New Hampshire. Its business address was 610 Gold Street, Manchester, New Hampshire 03108. Its mailing address was P.O. Box 534, Manchester, New Hampshire 03108-5314.

2. Pursuant to the licensing provisions of the PACA, license number 940834 was issued to Respondent on March 21, 1994. This license terminated on March 21, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period May through November 1995, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received and accepted 578 lots of mixed fruits and vegetables with agreed purchase prices in the total of \$713,638.10 from 19 sellers in interstate commerce.

4. On November 20, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 7 *et seq.*) in the United States Bankruptcy Court for the District of New Hampshire. This petition has been designated Case No. 95-12848.

5. Respondent has admitted in bankruptcy pleadings that it owes fixed amounts that total \$859,886.05, an amount greater than which the complaint alleged, to 19 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$713,638.10 in this proceeding. The Schedule F consist of a table containing columns reflecting the name and address of the creditor and the amount of the claim. A comparison between the amounts of the claims of the 19

firms as listed in the complaint and respondent's bankruptcy filing are as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Bankruptcy Pleading</u>
Boston Tomato Co., Inc.	\$55,223.00	\$54,593.00
DiMare Bros., Inc.	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hall & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	72,511.70
D'Arrigo Bros., Co	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	18,831.09	31,069.50
Total	\$713,638.10	\$859,886.05

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 19 sellers at least \$713,638.10 for 578 lots of perishable agricultural commodities on November 20, 1995. Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's failures to pay for numerous and substantial produce purchase obligations within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law. *In re Five Star Food Distributors, supra*. Accordingly, the following Order is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh 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 and 1.145).

[This Decision and Order became final February 17, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Order Denying Late Appeal filed May 13, 1998.

Late appeal—Default—Admissions in bankruptcy filing—Failure to object to motion for default.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based both upon Respondent's failure to file objections to Complainant's motion for a default decision and proposed default decision, in accordance with the Rules of Practice (7 C.F.R. § 1.139), and upon Respondent's admissions in a bankruptcy filing that it failed to make full payment promptly to 19 sellers of the agreed purchase prices for perishable agricultural commodities in a total amount of at least \$713,638.10. Publication of the facts and circumstances of violations of 7 U.S.C. § 499b is not dependent on finding that the violations were willful. A violation is willful if, irrespective of evil motive, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 7 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

Andre Allen Vitale, for Complainant.
Victor Dahar, Manchester, NH, and Peter M. Solomon, Londonderry, NH, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jensen, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

[hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [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], by filing a Complaint on April 1, 1997.

The Complaint alleges that: (1) during the period May 1995 through November 1995, Queen City Farms, Inc. [hereinafter Respondent], failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Compl. ¶ IV(b)); (3) Respondent admitted in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05 (Compl. ¶ IV(b)); and (4) the failure of Respondent to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent filed Respondent's Answer [hereinafter Answer] on May 27, 1997: (1) admitting that on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Answer ¶ IV); (2) admitting that Respondent states, in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05, but stating that, as of the date of the filing of the Answer, the total amount Respondent owes to the 19 sellers referred to in paragraph III of the Complaint may be less than the amount set forth in *Schedule F - Creditors Holding Unsecured Nonpriority Claims* (Answer ¶ IV); and (3) denying that during the period May 1995 through November 1995 it failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce and stating that the total amount of \$713,638.10 cannot be verified by Respondent (Answer ¶ III).

On November 17, 1997, Complainant filed Motion for Decision Without Hearing by Reason of Admission and Supporting Memorandum [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason

of Admissions [hereinafter Proposed Default Decision]. Respondent did not file any response to Complainant's November 17, 1997, filings. On January 6, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: (1) found that Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848"; (2) found that Respondent has admitted in its bankruptcy pleadings that, as of November 20, 1995, it owed at least \$713,638.10 for 578 lots of perishable agricultural commodities to the 19 sellers that are referred to in paragraph III of the Complaint; (3) concluded that Respondent's admitted failures to make full payment promptly for perishable agricultural commodities constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of the violation (Default Decision).

On April 13, 1998, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).¹ On April 29, 1998, Complainant filed Motion to Dismiss Appeal Petition. On May 5, 1998, Respondent filed Objection to the United States Department of Agriculture's Motion to Dismiss, and on May 7, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions and Regulation

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

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

. . . .

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

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

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

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE)

UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

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

7 C.F.R. § 46.2(aa)(5).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on or about April 7, 1997.² Respondent filed a timely Answer admitting that, on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" and that Respondent states in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05.

On November 17, 1997, Complainant filed Motion for Default Decision in

²Letter from Chris Marchand, Claims and Inquiries, United States Postal Service, to Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, dated June 10, 1997.

which Complainant asserts that Respondent admits in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in a bankruptcy proceeding filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that Respondent owes the 19 sellers identified in paragraph III of the Complaint at least \$713,638.10 for perishable agricultural commodities. Complainant compares the amounts which Respondent is alleged in paragraph III of the Complaint to have failed to pay to 19 sellers in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) to amounts Respondent admits to owing these same 19 sellers in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Bankruptcy Pleading</u>
Boston Tomato Co., Inc.	\$ 55,223.00	\$ 54,593.00
DiMare Bros., Inc	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hale & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	172,511.70
D'Arrigo Bros., Co.	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	<u>18,831.09</u>	<u>31,069.50</u>
Total	\$713,638.10	\$859,886.05

Motion for Default Decision at unnumbered page.

A copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated November 18, 1997, from the

Hearing Clerk, were served on Respondent by certified mail on November 24, 1997.³ The November 18, 1997, letter from the Hearing Clerk states, as follows:

CERTIFIED RECEIPT REQUESTED

November 18, 1997

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

**Subject: In re: Queen City Farms, Inc., Respondent -
PACA Docket No. D-97-0020**

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Admissions and Supporting Memorandum, together with a copy of the Decision Without Hearing by Reason of Admissions, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,

/s/

JOYCE A. DAWSON
Hearing Clerk

³See Domestic Return Receipt for Article Number P 093 033 773, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating that the date of delivery is November 24, 1997. (The Answer indicates that Respondent was represented by Peter M. Solomon, Esq., of Boutin & Solomon, P.A., Londonderry, New Hampshire. However, on September 30, 1997, Mr. Solomon withdrew from the case and stated that "the only person who can appropriately represent [Respondent] would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101." (Letter dated September 23, 1997, from Peter M. Solomon to Ms. Linda Hamlin, filed September 30, 1997.) However, Respondent's Appeal from Decision Without Hearing by Reason of Admissions [hereinafter Appeal Petition], filed on April 13, 1998, and Respondent's Objection to the United States Department of Agriculture's Motion to Dismiss, filed May 5, 1998, are signed by Peter M. Solomon of Solomon, P.A., Londonderry, New Hampshire, as attorney for Michael Litvin, former vice-president and director of Respondent.)

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

On January 6, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ filed the Default Decision concluding that Respondent's admitted failures to make full payment promptly to 19 sellers for 578 lots of perishable agricultural commodities in the total amount of at least \$713,638.10 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Default Decision at unnumbered page).

The Default Decision was served on Complainant on January 8, 1998, and on Respondent on January 10, 1998.⁴ The Default Decision provides:

This order shall take effect on the eleventh 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. § [sic] 1,139 [sic] and 1.145).

Default Decision at unnumbered last page.

A letter from the Office of the Hearing Clerk accompanying the Default Decision states:

CERTIFIED RECEIPT REQUESTED

January 6, 1998

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

Subject: **In re: Queen City Farms, Inc., Respondent-**
PACA Docket No. D-97-0020

⁴See Domestic Return Receipt for Article Number P 093 033 798, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by Victor Dahar, and stating that the date of delivery is January 10, 1998.

Enclosed is a copy of the Decision issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on January 6, 1998.

Each party has thirty (30) days from the issuance of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its issuance. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,

/s/

PAMELA M. WRIGHT
Legal Technician

Section 1.145(a) of the Rules of Practice provides that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time, and on February 20, 1998, the Hearing Clerk issued a Notice of Effective Date of Decision Without Hearing by Reason of Admissions, which was served on Respondent on February 26, 1998.⁵

On April 13, 1998, Respondent filed Respondent's Appeal Petition. For the

⁵See Domestic Return Receipt for Article Number P 368 420 969, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH03101, signed by D. Marlen, and stating the delivery date is February 26, 1998.

reasons set forth below, Respondent's Appeal Petition must be rejected as untimely.

Respondent's Appeal Petition, filed April 13, 1998, was not filed within 35 days after service of the Default Decision on Respondent. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's Appeal Petition. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.⁶

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part,

⁶See *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. See, e.g., *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .^[7]

⁷*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order. 28 U.S.C. § 2344 (1976). This 60-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.^[8]

Accordingly, Respondent's Appeal Petition and request for oral argument must be denied, since they are too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. §

court can neither waive nor extend).

⁸*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

1.142(c)(4).)

Even if Respondent's Appeal Petition had been timely filed, it would have been denied based upon Respondent's failure to file timely objections to Complainant's Motion for Default Decision. The Rules of Practice and the Hearing Clerk's November 18, 1997, letter clearly provide that Respondent must file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service on Respondent (7 C.F.R. § 1.139). Respondent had ample opportunity during this 20-day period to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. In view of Respondent's admissions in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," there is no material issue of fact that warrants holding a hearing.⁹ Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.¹⁰ The same order

⁹See *In re Tolar Farms*, 56 Agric. Dec. 1865, 1878 (1997) (stating that in view of respondents' answer and respondents' promissory notes attached to complainant's motion for a default decision, there is no material issue of fact that warrants holding a hearing); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the Chief ALJ correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

¹⁰The Complaint alleges that Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities, in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Respondent admits in its bankruptcy filing that it owes these same 19 sellers \$859,886.05. Respondent admits in its bankruptcy filing that it owes the same amount as alleged in paragraph III of the Complaint to one of these perishable agricultural commodity sellers: Hale & Cole Produce, Inc. Respondent asserts in its bankruptcy filing that it owes more than the amounts alleged in paragraph III of the Complaint to 12 of these perishable agricultural commodity sellers: DiMare Bros., Inc.; Marco Tomato Co.; Community-Suffolk, Inc.; Garden Fresh Salad Co., Inc.; Apples Plus, Inc.; S. Strock & Co., Inc.; W.H. Lailer & Co., Inc.; M. Cutone Mushroom Co.; D'Arrigo Bros., Co.; Bay State Produce Co., Inc.; Fresh Start Marketing, Inc.; and Lisitano Produce, Inc. Respondent asserts in its bankruptcy filing that it owes \$630 less than the amount alleged in paragraph III of the Complaint (\$55,223) to Boston Tomato Co., Inc.; \$2,665.50 less than the amount alleged in paragraph III of the Complaint (\$39,526.75) to Dominic Gandolfo, Inc.; \$1,180 less than the amount alleged in paragraph III of the Complaint (\$15,022) to Noyes & Bimber, Inc.; \$12,948.15 less than the amount alleged in paragraph III of the Complaint (\$27,512.15) to Mutual Produce, Inc.; \$792.50 less than the amount alleged in paragraph III of the Complaint (\$29,778.50) to P. Tavilla Co., Inc.; and \$132.75 less than the amount alleged in paragraph III of the Complaint (\$21,391) to Forlizzi Bros., Inc. (Complainant's Motion for Default Decision).

would be issued in this case unless the proven violations are *de minimis*.¹¹

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,¹² Respondent has shown no basis for setting aside the Default Decision. The record establishes that Respondent admits in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that it owes at least \$713,638.10 to the 19 sellers to whom Complainant alleges Respondent failed to make full payment promptly, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.¹³

¹¹*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

¹²*In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ, L.A.W.A.* Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

¹³*See, e.g., Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Scamcorp, Inc.*, 57 Agric. Dec. ____ (Jan. 29, 1998)

Willfulness is not a prerequisite to publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondent's violations of 7 U.S.C. § 499b(4) were willful.

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.¹⁴ Willfulness is reflected by

(concluding that respondent's failure to pay 35 sellers \$634,791.13 for 165 transactions involving perishable agricultural commodities, during the period of April 1993 through June 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Allred's Produce*, 56 Agric. Dec. 1884 (1997) (concluding that respondent's failure to pay 19 sellers \$336,153.40 for 86 lots of perishable agricultural commodities, during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) (holding that respondents' failure to pay 7 sellers \$192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

¹⁴See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re*

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.¹⁵ Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$713,638.10 for 578 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period May 1995 through November 1995.

Scamcorp, Inc., 57 Agric. Dec. ____, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

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

¹⁵*See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 94 (2d Cir. 1997); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Scamcorp, Inc.*, 57 Agric. Dec. ____, slip op. at 34-35 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1906-07 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879-80 (1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 7-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁶

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"¹⁷ If Respondent were permitted to contest some of the allegations of fact after admitting the material

¹⁶*See In re Scamcorp, Inc.*, 57 Agric. Dec. ____, slip op. at 36 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1907 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1880-81 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

¹⁷*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

allegations in the Complaint, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

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

Order

Respondent's Appeal from Decision Without Hearing by Reason of Admissions, filed April 13, 1998, is denied. The Decision Without Hearing by Reason of Admissions, filed by Administrative Law Judge Edwin S. Bernstein on January 6, 1998, is the final Decision and Order in this proceeding.

In re: PETER DeVITO COMPANY, INC.
PACA Docket No. D-97-0014.
Decision and Order filed July 29, 1997.

Admission of material allegations - Official notice of bankruptcy documents - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Eric Paul, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on January 14, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the complaint that respondent had 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 11 sellers for purchases of 181 lots of perishable agricultural commodities in the course of interstate commerce in the amount of \$1,202,849.65 during the period April 1995 through August 1996. The complaint also alleged that on October 25, 1996, respondent filed a Voluntary Petition in the United States Bankruptcy Court for the Eastern District of Massachusetts pursuant to Chapter 11 of the Bankruptcy

Code(11 U.S.C. § 1100 *et seq.*), designated Case No. 96-18215-JNF, in which respondent admitted owing ten of the eleven sellers named in the complaint amounts totaling \$1,243,119.85. Complainant requested that, as a result of respondent's violations of the PACA, a finding should be made that respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and further requested that respondent's license be revoked.

Respondent submitted an answer on February 19, 1997, in which it admitted that it purchased, received and accepted the lots of perishable agricultural commodities alleged in the complaint, but denied that it willfully failed to promptly pay the prices therefor. No explanation was offered in support of this denial. Respondent admitted filing the bankruptcy petition alleged, and in response to the allegation that respondent in Schedule F of its bankruptcy petition admitted owing ten of the eleven sellers named in the complaint amounts that total \$1,243,119.80, respondent further stated that said Schedule F speaks for itself.

Complainant filed a request that official notice be taken of the documents filed by respondent in its bankruptcy proceeding, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the pleadings and precedent decisions cited by complainant, official notice is taken of the bankruptcy documents filed by respondent and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

7 U.S.C. § 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 and 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 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. (emphasis added).

7 U.S.C. § 499h. Grounds for suspension and revocation of license

(a) Authority of Secretary

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

Pertinent Regulation

7 C.F.R. § 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.

Findings of Fact

1. Peter DeVito Company, Inc. (hereinafter "respondent"), is a corporation organized and existing under the laws of the State of Massachusetts. Its business and mailing address is 34 Market Street, Everett, Massachusetts 02149.

2. At all times material herein, respondent was licensed under the provisions of the PACA. License number 890002 was issued to respondent on October 3, 1988. This license has been renewed annually and is next subject to renewal on or before October 3, 1997.

3. Respondent, during the period April 1995 through August 1996, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received, and accepted 181 lots of vegetables with agreed purchase prices in the total amount of \$1,202,849.65 from 11 sellers in interstate commerce.

4. On October 25, 1996, respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Massachusetts. This petition has been designated Case No. 96-18215-JNF.

5. Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that it owes fixed amounts that total \$1,243,119.85 to 10 of the 11 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$1,202,849.65 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 20 creditors named are 10 of the firms listed in the complaint, with the amounts of their claims. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by respondent are identical for six of the produce sellers, slightly higher for three of the produce sellers, and slightly lower for one of the produce sellers. One produce firm alleged to be unpaid for \$12,873.50 in the complaint, Robert O. Davenport & Sons, is not identified as a creditor on Schedule F. The amounts alleged unpaid by complainant and admitted unpaid by respondent with respect to the other ten produce firms are as follows:

Seller	Complaint	Schedule F
TGT, Inc.	\$147,405.90	\$147,405.90
R.D. Clifton Produce Company	8,167.00	8,167.00
James J. Piedmont & Sons, Inc.	60,484.00	60,484.00

M & R Company	53,411.35	52,646.00
Talley Farms	19,329.50	19,329.00
C-T Sales, Inc.	28,999.00	28,999.00
Cayuga Produce, Inc.	9,614.50	9,614.00
Windsor Distributing, Inc.	289,766.95	317,000.00
Walden-Sparkman, Inc.	423,975.90	444,258.15
John Molinelli, Inc.	<u>148,822.05</u>	<u>155,216.80</u>
	\$1,189,976.15	\$1,243,119.85

6. Respondent purchased perishable agricultural commodities from TGT, Inc. and Windsor Distributing, Inc. in 51 unpaid transactions where payment was due within 21 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between April 26, 1995 and February 16, 1996 in these 51 transactions were 8 to 18 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

7. Respondent purchased perishable agricultural commodities from the other eight sellers named above in 127 unpaid transactions where payment was due within 10 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between July 17, 1995 and August 11, 1996 in these 127 transactions were 2 to 15 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

Conclusions of Law

Respondent has admitted in its answer that it purchased, received and accepted from 11 sellers, during the period April 1995 through August 1996, 181 lots of vegetables in interstate commerce having agreed purchase prices in the total amount of \$1, 202,849.65. Respondent has further admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 10 of these 11 sellers at least \$1,189,976.15 for 178 of these lots of perishable agricultural commodities on October 25, 1996.¹ Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of section

¹Official notice is hereby taken of these documents as authorized by *In re Five Star Food Distributors, Inc.*, PACA Docket No. D-96-0521 (January 23, 1997), 56 Agric. Dec. ___; *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

2(4) of the PACA (7 U.S.C. § 499b(4)).² Respondent's failures to pay for numerous and substantial produce purchase obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law³, and respondent's denials in its answer that " it willfully failed to promptly pay the prices therefor" and "it willfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a bona fide dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.⁴ The appropriate sanction for repeated or flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4) when the respondent has a valid PACA license is revocation of license.⁵ Accordingly, the following Order should be issued.

²See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F. 2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972)(finding 26 violations involving \$19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110,115 (2d Cir. 1967)(concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *appeal docketed*, No. 97-4053 (2d Cir. April 2, 1997) (Havana's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, *supra*, slip op. at 18 (holding that 174 violations involving 14 sellers and at least \$238,374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

³*Id.*

⁴A respondent's evil intent need not be established for a violation to be willful, provided the record shows that the respondent acted with careless disregard of statutory requirements. The admissions in this case establish a gross neglect of the express provisions of the PACA and a substantive regulation known by respondent to require prompt payment. See, *In re Five Star Food Distributors, Inc.*, *supra*, slip op. At 20-21, and 7 C.F.R. § 46.2(aa)(5),(11).

⁵See, *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 612, 620-627 (1989)(reviewing the goal of having only financially responsible persons operating and the special exception provided in 11 U.S.C. § 525 for enforcement of the PACA); and *In re Andershock Fruitland, Inc.*, and *James A. Andershock, d/b/a AAA Recovery*, 55 Agric. Dec. 1204,1224-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996)(the license revocation requirement set forth in *Caito* is not altered by the Department's new sanction policy articulated in See *In re SS. Linn County, Inc.*, 50 Agric. Dec. 476 (1991)).

Order

Respondent Peter DeVito Company, Inc.'s PACA license is hereby revoked.

This Order shall become final and effective thirty-five (35) days after service hereof upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies thereof shall be served upon the parties.

[This Decision and Order became final February 25, 1998.-Editor]

**In re: GEORGE TOWELL DISTRIBUTORS, dba FANTASTIC PRODUCE.
PACA Docket No. D-98-0004.
Decision and Order filed April 16, 1998.**

Failure to file timely answer - Failure to make full payment promptly - Willful, flagrant, and repeated violations.

Andre Vitale, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S. C. § 499a *et seq.*) (PACA), which was instituted on December 16, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent failed to account and make full payment promptly of the net proceeds, in the total amount of \$576,334.45, due to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996. The complaint also alleges that Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of \$692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 through July 1996. A copy of the complaint was served on Respondent December 31, 1997, and Respondent did not file an answer. The period for filing a timely answer has elapsed.

As a result of the Respondent's failure to file an answer within the time required by section 1.136 of the Rules of Practice governing this proceeding (7

C.F.R. § 1.136), Complainant filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing by Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. George Towell Distributors, herein referred to as Respondent, is a corporation doing business as Fantastic Produce, organized and existing under the laws of State of Florida with a business address of 1131 N.W. 9th Street, Belle Glade, Florida 33430 and a business mailing address of P.O. Box 159, Belle Glade, Florida 33430-0159.

2. PACA license number 910137 was issued to Respondent on November 1, 1990. This license was suspended on November 5, 1996, because Respondent failed to pay a reparation order that had been entered against it. Respondent's PACA license was terminated on November 1, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because it failed to pay the required annual renewal fee.

3. As set forth more fully in paragraph III of the complaint, Respondent failed to account and make full payment promptly of the net proceeds due, in the total amount of \$576,334.45, to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996.

4. As set forth more fully in paragraph IV of the complaint, Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of \$692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 and July 1996.

Conclusions

Respondent's failures to remit the net proceeds due to three growers and its failures to make full payment promptly to sixteen sellers, as set forth above in Findings of Fact 3 and 4, constitute willful, repeated, and flagrant violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of Section 2 of the PACA (7 U.S.C. § 4996b).

The facts and circumstances of Respondent's violations of the PACA shall be published.

As provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 145), this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service.

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 1, 1998.-Editor]

**In re: BOBBY E. ROBERTSON, dba BOBBY ROBERTSON PRODUCE.
PACA Docket No. D-98-0009.
Decision and Order filed April 20, 1998.**

Failure to file answer - Failure to make full payment promptly - Willful, repeated, and flagrant violations.

Mary Hobbie, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a Complaint filed on January 2, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1994 through December 1996, respondent failed to make full payment promptly to 10 sellers in the total amount of \$426,170.11 for 42 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was mailed to the respondent by certified mail on January 2, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on February 10, 1998. This complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Bobby Robertson, d/b/a Bobby Robertson Produce, was a corporation organized and existing under the laws of the State of Alabama. Its business address was 414 Finley Avenue, Birmingham, Alabama 35207. Its mailing address was Route One, Box 2595, Oneonta, Alabama 35121.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 950699 was issued to respondent on February 9, 1995. This license terminated on February 9, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through December 1996, respondent purchased, received and accepted, in interstate commerce from 10 sellers, 42 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$426,170.11.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 16, 1998.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Cox Tomato Co., Inc. PACA Docket No. D-97-0006. 3/2/98.

Premier Produce Company, Inc. PACA Docket Nos. D-98-0018 & D-97-0033.
6/2/98.
