

AGRICULTURE DECISIONS

Volume 55

January - June 1996
Part Three (PACA)
Pages 506 - 726



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

PERISHABLE AGRICULTURAL COMMODITIES ACT

ERRATA

NORINSBERG CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 93-1842.

Errata.

In the Court Decision published at 54 Agric. Dec. 634, the correct name of the United States Court of Appeals that decided the case is the "DISTRICT OF COLUMBIA CIRCUIT."

In re: ATLANTIC PRODUCE CO. AND JOSEPH PINTO.

PACA Docket No. D-94-533.

Errata.

In the Decision and Order issued by Donald A. Campbell, Judicial Officer on March 22, 1995, and published at 54 Agric. Dec. 701, several lines were omitted from the final page of the Decision. The last two paragraphs of the Decision on page 715 should read as follows:

Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County, supra*, the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, 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, usually over an extended period of time. That doctrine is not altered by the new sanction policy set forth in *S.S. Farms Linn County*.

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

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.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1996

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

CARL NORMAN QUINN v. SECRETARY OF AGRICULTURE.
No. 72-1396 506

LILLY MINOTTO v. UNITED STATES DEPARTMENT OF
AGRICULTURE. No. 82-2174 532

VEG-MIX, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 85-1771.

KUZZENS, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1201.

HARRIS v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1202 537

ANITA KAPLAN v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 87-1176 556

TONY HUDLER v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 93-4111 558

GARY C. BAKER v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 93-9128 562

JOHN J. CONFORTI, D/B/A C & C PRODUCE v. UNITED STATES
OF AMERICA. No. 95-1735 564

DEPARTMENTAL DECISIONS

PETE'S TROPICAL CORPORATION.
PACA Docket No. D-95-532.
Decision and Order 572

N. PUGACH, INC. PACA Docket No. D-94-558. Decision and Order	581
MIDLAND BANANA AND TOMATO CO., INC., SUSAN E. HEIMANN, ROBERT S. HEIMANN, AND JEFFREY B. HEIMANN. PACA Docket No. D-93-548. ROYAL FRUIT CO., INC., AND ROBERT S. HEIMANN. PACA Docket No. D-93-549. Decision and Order	590
COUNTY PRODUCE, INC. PACA Docket No. D-94-548. Decision and Order	596
COUNTY PRODUCE, INC. PACA Docket No. D-94-548. Stay Order	617
COASTAL BANANA AND TOMATO CO. PACA Docket No. D-94-570. Initial Decision	617
HOGAN DISTRIBUTING, INC. PACA Docket No. D-94-556. Decision and Order	622
RUMA FRUIT AND PRODUCE CO., INC. PACA Docket No. D-94-565. Order To Show Cause	640
RUMA FRUIT AND PRODUCE CO., INC. PACA Docket No. D-94-565. Decision and Order and Remand Order	642

REPARATION DECISIONS

DANIEL P. CROWLEY AND MICHAEL D. CROWLEY D/B/A SHAMROCK FARMS OF CALIFORNIA V. CALFLO PRODUCE, INC. PACA Docket No. R-94-174. Decision and Order	674
PEE DEE PRODUCE CO-OP V. SUN VALLEY OF THE CAROLINAS, INC. PACA Docket No. R-94-292. Decision and Order	684

MISCELLANEOUS ORDERS

POTATO SALES CO., INC., TSL TRADING, INC., D/B/A SL INTERNATIONAL, AND EVER JUSTICE CORPORATION. PACA Docket No. D-93-513. Order Denying Petition to Reopen Hearing	708
JACOBSEN PRODUCE, INC., AND GEORGE SAER, D/B/A G.W. "GEORGIE" SAER CO. PACA Docket No. D-92-555. Modified Order and Order Lifting Stay.	709
DONALD BECK. PACA APP Docket No. 96-01 Dismissal	709
DENNIS YOUNG. PACA APP Docket No. 96-03. Order Dismissing Petition.	710

DEFAULT DECISIONS

TSAO-HSIU C. LIN AND TU-CHIN "JOSEPH" LIN, D/B/A GROW FOODS, CO. AND K F FARM, INC. PACA APP Docket No. D-94-517. Decision and Order and Order of Dismissal	711
--	-----

JODECO, INC. PACA Docket No. D-94-561. Decision and Order	713
MOUNTAIN WHOLESALE PRODUCE COMPANY. PACA Docket No. D-95-521. Decision and Order	715
LARRY DANIELS DAVIS D/B/A PHOENIX TRADING COMPANY AND/OR PHOENIX DISTRIBUTING COMPANY. PACA Docket No. D-95-523. Decision and Order	716
FRED P. STASART D/B/A PRIMO PRODUCE. PACA Docket No. D-96-503. Decision and Order	718
MOORESTOWN PRODUCE, INC., A/T/A BUCKS COUNTY PRODUCE. PACA Docket No. D-96-512. Decision and Order	720
PHILIP R. WELLER, D/B/A POTATO PLUS. PACA Docket No. D-96-507. Decision and Order	722
A.F. BUSINESS BROKERAGE, INC. PACA Docket No. D-96-510. Decision and Order	724
CONSENT DECISIONS	726

PERISHABLE AGRICULTURAL COMMODITIES ACT**COURT DECISIONS****CARL NORMAN QUINN v. SECRETARY OF AGRICULTURE.****No. 72-1396.****Decided January 6, 1975.****(Cite as: 510 F.2d 743)**

Rebuttable presumption - "Responsibly connected" - Secretary's authority to institute disciplinary proceedings not dependent on continued existence of licensee eligible to do business.

The United States Court of Appeals for the District of Columbia Circuit found that the administrative record did not support the action taken against Petitioner and remanded the case to the Secretary for further proceedings. The District of Columbia Circuit held that the presumption raised by PACA that a person is "responsibly connected" with a licensee if he is affiliated with the licensee as an officer was rebuttable. The court further stated that Petitioner, a former employee and vice-president of a licensee found to have violated the PACA, was entitled to the opportunity to prove that his officership was purely nominal and that he was not "responsibly connected" with the licensee. Petitioner-employee also was entitled to prove that licensee was not a corporation under the PACA. The court held that the Secretary erred in failing to consider Petitioner's evidence. However, the court rejected Petitioner's contention that the Secretary's authority to institute disciplinary proceedings depended upon the continued existence of a licensee eligible to do business under the Act.

Before BAZELON, Chief Judge, and LEVENTHAL and ROBINSON, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT****SPOTTSWOOD W. ROBINSON, III, Circuit Judge:**

Petitioner, Carl Norman Quinn, seeks review of orders¹ of the Secretary of Agriculture rendering him ineligible for employment by any licensee under the Perishable Agricultural Commodities Act² for a period of one year.

¹See note 35, *infra*.

²Act of June 10, 1990, ch. 436, § 1, as amended, 7 U.S.C. § 499a *et seq.* (1970). Pertinent amendments to the Act since the 1970 codification are noted hereinafter.

These orders rest upon determinations that DeVita Fruit Company, a corporate licensee, had flagrantly and repeatedly violated the Act, and that Quinn had then been "responsibly connected" with the company because he served nominally as its vice-president. Finding that the administrative record, in its present posture, does not support the action taken against Quinn, we remand the case to the Secretary for further proceedings.

I. THE LEGISLATIVE BACKGROUND

To facilitate an understanding of the issues presented for our review, we pause initially to briefly examine the purpose and principal features of the Act. Originally passed in 1930, this legislation was designed to combat a pattern of unfair practices prevalent in the perishable agriculture commodities industry.³ The basic problem was victimization of growers and shoppers by unscrupulous dealers to whom such commodities were sold or consigned for sale.⁴ A conspicuous example was a sale followed by a decline in the market for the commodity and the dealer faced financial loss if he accepted shipment, paid the contract price and then sold on his own account. In such instances, dealers frequently rejected shipments on false grounds, notably that the commodities arrived in a condition other than as promised.⁵ It was to eradicate these and other machinations that Congress settled on a statutory scheme which has been regarded as one of the Nation's most successful regulatory programs.⁶

In broad outline, the Act regulates the shipment of perishable agricultural commodities in interstate and foreign commerce through a system of licensing and administrative supervision of the conduct of licensees. Commission merchants, dealers and brokers in such commodities must obtain from the

³H.R. Rep. No. 1041, 71st Cong., 2d Sess. 1-2 (1930).

⁴*Id.*

⁵*Id.* at 1-2. Sellers of such commodities were also accused of unfair practices. "Many instances have arisen where the shipper, after having previously signed a contract to deliver the commodity on a certain date in the future, fails to do so when delivery would be to his disadvantage and he sells to some one else at a higher price." *Id.* at 2.

⁶H.R. Rep. No. 1546, 87th Cong., 2d Sess. 3, 1962 U.S. Code Cong. & Admin. News, p. 2749 (1962). See also *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966).

Secretary of Agriculture a license as a precondition to doing business.⁷ By Section 2, licensees are forbidden to engage in specified unfair practices,⁸ which include failure to make full payment promptly for commodities dealt in.⁹ An unfair practice subjects the licensee to liability to the injured party for damages, recoverable either in a proceeding before the Secretary or by suit in court.¹⁰ The Secretary is authorized to investigate complaints of unfair practices¹¹ and, finding a violation, to issue a reparation order requiring the offending licensee to pay damages.¹² Failure to obey the order automatically suspends the license during noncompliance.¹³

The Secretary is also empowered to suspend or revoke licenses for unfair practices,¹⁴ and to limit employment within the industry of those who violate

⁷Perishable Agricultural Commodities Act §§ 3, 4, 7 U.S.C. §§ 499c, 499d (1970).

⁸*Id.* § 2, 7 U.S.C. § 499b (1970).

⁹*Id.* § 2(4), 7 U.S.C. § 499b(4) (1970).

¹⁰*Id.* § 5, 7 U.S.C. § 499e (1970).

¹¹*Id.* § 6, 7 U.S.C. § 499f (Supp. III 1973).

¹²*Id.* § 7(a), 7 U.S.C. § 499g(a) (Supp. III 1973).

¹³"Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*. That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied." *Id.* § 7(d), 7 U.S.C. § 499g(d) (1970).

¹⁴Whenever (a) the Secretary determines, as provided in [§ 6], that any commission merchant, dealer, or broker has violated any of the provisions of [§ 2], or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated [§ 14(b)],
(continued...)

the Act and those who are "responsibly connected" with violators.¹⁵ Section 8(b) of the Act, in respects highly relevant to this case, provides that except with the Secretary's approval no licensee may employ any person, or anyone "responsibly connected" with a person, whose license has been revoked or is currently suspended, or who has been found to have committed any flagrant or repeated violation of Section 2, or against whom there is an unpaid reparation order issued with two years.¹⁶ Section 1(9), another provision bearing importantly on this case, specifies that a person is "responsibly connected" with an offending licensee if he is affiliated with the licensee as

¹⁴(...continued)

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. . . . " *Id.* § 8(a), 7 U.S.C. § 499h(a) (1970).

¹⁵*Id.* § 8(b), 7 U.S.C. § 499h(b) (1970), which in relevant part provides:

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

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

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

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

¹⁶See note 15, *supra*. The Secretary is authorized to 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, upon the posting of bond. *Id.* The Secretary may also approve employment without bond after the expiration of two years from the effective date of the disciplinary order. *Id.*

officer, director or holder of more than 10% of its outstanding stock.¹⁷

II. THE FACTUAL BACKGROUND

The material facts of the case at bar emerge without substantial dispute. Quinn commenced employment in the wholesale fruit and vegetable industry in 1944. During the first 12 years he worked as a truck driver and a buyer and seller of produce for different firms. In 1956, he was hired by John A. DeVita, who then conducted as a sole proprietorship a fruit and vegetable business in Lima, Ohio. Quinn supervised other employees in the packing and loading of produce; he also loaded trucks and made deliveries himself. From 1968 to 1970, his primary activity was buying and selling produce by telephone.

In 1964, DeVita incorporated his business. The assets and liabilities of the sole proprietorship were transferred to DeVita Fruit Company, a newly-organized Ohio corporation, in exchange for all of its issued stock. To meet a requirement of Ohio law, DeVita asked Quinn to become vice-president and Quinn assented.¹⁸ Quinn's officership was purely nominal, and in no way did his activities for the business change in consequence of the incorporation. DeVita remained sole stockholder and exercised full and exclusive control over the corporation's operations.

From October, 1964, onward DeVita Fruit Company obtained successive one-year licenses authorizing it to do business as a commission merchant, dealer and broker of perishable agricultural commodities in interstate and foreign commerce.¹⁹ Between November 1969, and July 1970, however, the company failed to make full payment for 47 lots of fruits and vegetables shipped to it from outside Ohio. One of the shippers filed a complaint with the Department of Agriculture and on September 14, 1970, was awarded

¹⁷The 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" *Id.* § 1(9), 7 U.S.C. § 499a(9) (1970).

¹⁸DeVita became president, and two others secretary and treasurer, respectively.

¹⁹See text *supra* at note 7.

reparations.²⁰ When, 30 days later, the award remained unsatisfied, the company's license was automatically suspended by force of the Act.²¹

In the meantime, on September 5, 1970, pursuant to the Bankruptcy Act, DeVita Fruit Company filed a petition in the District Court for the Northern District of Ohio for an arrangement with its creditors.²² A few days previously, the company had terminated Quinn's employment, and on October 1, 1970, he took a job with another wholesale fruit and vegetable company licensed to do business under the Act.²³ On December 8, 1970, DeVita Fruit Company was adjudged a bankrupt, but apparently never received a discharge.²⁴

III. THE ADMINISTRATIVE BACKGROUND

Several months later the Department of Agriculture moved against DeVita Fruit Company. On April 27, 1971, the Department's Consumer and Marketing Service sent a letter to the company calling attention to its outstanding financial obligations to the unpaid shippers. The letter advised that "[s]uch violations are sufficient grounds for instituting disciplinary action which could result in the revocation or suspension of your license," and that the company's explanation should be submitted within 20 days.²⁵ On June 22, no response having been received, the Service filed a complaint charging

²⁰See text *supra* at note 10.

²¹See note 13, *supra*.

²²See Bankruptcy Act, ch. XI, 11 U.S.C. § 701 *et seq.* (1970).

²³It was Quinn's employment by the licensee that gave rise to this litigation.

²⁴In his brief, Quinn states that the company was discharged in bankruptcy. Brief for Petitioner at 5, 12, 16, but no supporting record reference is supplied. Respondents' brief makes the contrary claim and appendicizes a letter outside the record from a referee in bankruptcy for the Northern District of Ohio stating "that the bankrupt has neither petitioned for nor been granted a discharge in Bankruptcy." Brief for Respondent at 17, 2a.

²⁵We have already noted that by the terms of the Act the company's license had already been automatically suspended for nonpayment of the reparation award. See text *supra* at note 21.

the company with violations of the Act by reason of its failure to pay the shippers and seeking revocation of the company's license.²⁶ Copies of the letter and complaint were sent to the company's officers, including Quinn, and no formal answer to the complaint was filed within the 20-day period allowed therefor.²⁷

On July 13, 1971, however, during the period for answering the complaint, Quinn's attorney sent to the Division a letter asking for the opportunity to appear at a hearing "to present factual evidence and legal arguments which will show that [Quinn] was not 'responsibly connected' with the DeVita Fruit Company at the time of the alleged violations of the [Act] which form the basis for the subject complaint." The letter recited the facts disclosing the nature of Quinn's relationship with the company and was accompanied by supporting affidavits.

On August 16, 1971, the Division moved for the issuance of a hearing examiner's report in default proceedings²⁸ and again recommended that DeVita Fruit Company's license be revoked. A copy of this motion was sent to Quinn's attorney on August 19 together with a letter stating the Division's view that the request for a hearing to show that Quinn was not "responsibly connected" with the company was "not responsive to the allegations of the complaint," and so was not considered an answer to the complaint.

On August 25, Quinn's counsel wrote that he wished to dispute the charge that the company's violations were "flagrant or repeated" on the ground that the company's default was occasioned by reasonable expectations of a large business loan which did not materialize.²⁹ In response to the hearing examiner's direction that Service state on the record its position on counsel's request, the Service filed an opposition on the ground that "no useful purpose would be served in holding an oral hearing on the violations alleged in the

²⁶See note 14, *supra*, and accompanying text.

²⁷See 7 C.F.R. §§ 47.30, 47.32(a) (1974).

²⁸See 7 C.F.R. § 47.30(c) (1974).

²⁹The letter stated that "the transactions referred to in the complaint were entered into by Mr. DeVita in anticipation of his receiving a \$350,000 loan from Small Business Administration" which DeVita did not ultimately receive, but that "Mr. DeVita's reliance upon the SBA's intention to make this loan was reasonable under the circumstances."

Complaint because on its face the Request shows there is no issue as to whether the violations were repeated." The opposition added that "[t]here is no assertion that the violations did not occur, but rather an implicit admission that they did, with an expressed intention merely to challenge the character of those violations. . . . Whether these violations constitute flagrant violations of the Act need not be considered since the Act speaks in the disjunctive as regards 'repeated or flagrant' violations, and 47 violations are clearly 'repeated.'" In turn, Quinn's counsel replied that his letter of August 25 was not intended to suggest "that we conceded that the violations actually occurred or that if any did occur they were 'repeated' within the meaning of the statute." The reply reiterated facts descriptive of the relationship which Quinn bore to the company.

On October 29 the hearing examiner filed a recommended decision. As to the request to reopen the proceedings, the examiner pointed out that DeVita Fruit Company had not answered the complaint and held that Quinn's attempt to raise a defense based on the unsuccessful loan applications for "the apparent purpose [of] show[ing] that [the alleged violations] were not flagrant" did not negate their character as repeated violations.³⁰ The examiner thus concluded that the request to reopen should be denied. On the merits, the examiner proposed revocation of the company's license, concluding that the company's nonpayment of the reparation award and its failure to account for the remainder of the 47 lots of fruits and vegetables "constituted willful flagrant and repeated violations of" the unfair conduct provisions of the Act.³¹ The examiner dismissed Quinn's lack-of-responsible-connection data with the observation that it indicated a "primary interest to obviate the provisions of

³⁰The examiner based this position on *Joseph Gangi & Sons, Inc.*, 30 Agric. Dec. 815, 816, *aff'd sub nom., Fruit Salad, Inc. v. Secretary of Agric.*, 451 F.2d 162 (1st Cir. 1971).

³¹See note 14, *supra*. Section 2 of the Act, 7 U.S.C. § 499b (1970), provides in relevant part:

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 fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had. . .

the Act which affect officers of an organization found to have violated the Act, or collateral consequences of violations found." Quinn filed exceptions to the recommended decision, restating earlier arguments, and asked that the proceeding be reopened to enable him "to present factual evidence and legal argument as to the merits of the Complaint and his contention that he was not 'responsibly connected' with DeVita Fruit Company within the meaning of" Section 8(b).

The Secretary's final decision and order, by the Department's judicial officer, came on February 16, 1972. It adopted in all respects the recommended decision of the hearing examiner and revoked the license of DeVita Fruit Company. By letters of February 22, 1972, the Consumer and Marketing Service notified Quinn and his new employer of the decision and of Quinn's resulting ineligibility for employment under the Act for a period of one year from the effective date of the decision.³² Quinn presented a petition for reconsideration and for reopening of the proceedings,³³ which the Consumer and Marketing Service resisted on the ground that the only proper issues in the proceedings were whether the alleged violations occurred and whether they were repeated or flagrant, and that uncontroverted facts required answers to both questions in the affirmative. The Service further asserted that "Mr. Quinn's real interest in contesting the allegations of violations in this proceeding is not to defend against the violations, but rather to endeavor to avoid the subsequent effect on his employment status should such violations ultimately be found to have occurred;" and that "[q]uestions as to whether Mr. Quinn was 'responsibly connected' with [DeVita Fruit Company] are not proper for consideration in this proceeding. Therefore, all arguments which have been made with respect to Mr. Quinn's status are irrelevant, and Mr. Quinn must seek any remedy he may have in this regard in the courts."

Quinn's petition for reconsideration was denied on April 4, 1972, and the effective date of revocation of the company's license was reset. On April 16, the Service sent Quinn's employer a letter directing Quinn's discharge for the one-year period, and sent Quinn a letter informing him of his ineligibility for employment during that period by licensees under the Act. Then followed the

³²See notes 15, 17, *supra*.

³³See 7 C.F.R. § 47.42(a), (b) (1974). The revocation order of February 16 was thereupon stayed pending action on the petition for reconsideration.

petition for review by this court,³⁴ attacking the action taken against the company as well as against Quinn.³⁵

IV. THE PROCEDURAL CONTENTIONS

Quinn presents for resolution four contentions, three of which require only relatively brief discussion. One is that the Secretary could not initiate a disciplinary action against DeVita Fruit Company because its license had already been suspended, by operation of the Act, on account of its discharge in bankruptcy.³⁶ We cannot accept Quinn's factual premise, for from aught that appears the company never did receive a discharge in the bankruptcy proceeding.³⁷ The disciplinary action, however, did not commence until after automatic suspension of the license by reason of the company's failure to satisfy the reparation award against it,³⁸ beyond that, the action endured well past the point at which the latest one-year term of the license expired.³⁹ For these latter reasons, Quinn's objection seemingly remains viable.

Nonetheless, we reject the point for in our view the Secretary's authority to institute disciplinary proceedings does not depend upon the continued existence of a once-effective license to do business under the Act: The purposes of such a proceeding extend to a determination as to whether a

³⁴See 28 U.S.C. § 2342(2) (1970). The revocation order against DeVita Fruit Company has been stayed administratively, and the notice of Quinn's ineligibility for employment withdrawn, pending our decision on review.

³⁵The rulings of which review is sought are (a) the decision and order of February 16, 1972, revoking the license of DeVita Fruit Company; (b) the order of April 4, 1972, denying Quinn's motion for reconsideration; (c) the direction incorporated in the letter of April 17, 1972, to Quinn's employer to discharge him for the one-year period; and (d) the declaration in the letter of April 17, 1972, of Quinn's ineligibility for employment for that period.

³⁶See Perishable Agricultural Commodities Act § 4(a), 7 U.S.C. § 499d(a) (1970).

³⁷See note 24, *supra*.

³⁸See note 13, *supra*.

³⁹That point was October 26, 1971.

licensee has flagrantly or repeatedly violated the Act⁴⁰ and, if so, a further determination as to whether the licensee and those responsibly connected with the licensee should in the future be allowed to engage in further activity in the industry.⁴¹ To say that the Secretary cannot decide these matters simply because the license has already been suspended for failure to pay a reparation award is to insulate those responsible for the failure from the statutory consequences of their own delinquency.⁴² And to allow individual wrongdoers to escape such consequences by the fortuity of license expiration during the pendency of the disciplinary action is to promote an obvious inconsistency in the statutory scheme.⁴³ Congress hardly contemplated avoidance of the statutory sanctions in instances where, in the public interest, they are needed most.⁴⁴

Quinn also argues that the Secretary's action in temporarily disapproving his employability is fundamentally faulty because the Department of Agriculture did not notify him beforehand that that could result from his undertaking to serve as vice-president of DeVita Fruit Company. More specifically, the argument is that the Department, in issuing a license to the company, took no steps to inform the company's officers of the sanctions applicable to them personally in the event that the license was subsequently revoked or suspended for conduct infringing the Act.⁴⁵ Appellees respond that the officers were bound, as a matter of law, to know the statutory provisions to which they became subject upon assuming office. Like Quinn, we cannot as a matter of logic subscribe to the oft-repeated proposition that

⁴⁰See note 14, *supra*.

⁴¹See notes 15, 16, *supra*.

⁴²*Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, 451 F.2d at 163.

⁴³See *id.*

⁴⁴See *id.*

⁴⁵We are advised that, although there is no statute requiring it to do so, the Consumer and Marketing Service of the Department of Agriculture, as a matter of administrative practice, transmits a copy of the Act and the implementing regulations to each licensee along with his license.

everyone is presumed to know the law,⁴⁶ but like the Secretary we are satisfied that Quinn's argument cannot prevail. We perceive no statutory or constitutional duty on the Department to take affirmative steps to bring to Quinn's attention provisions that are matters of general law. Absent such a duty, we cannot accept Quinn's contention.

Quinn further resists the statutory penalty on the ground that he was wrongfully deprived of the opportunity to defend the charge that DeVita Fruit Company had committed flagrant and repeated violations of the Act.⁴⁷ We may assume, without deciding, that though the company did not oppose the charge against it, Quinn was entitled to do so if indeed he was in position to present matter constituting a legitimate defense. The insuperable difficulty in Quinn's position, however, is that the only "defense" he proffered was that the company had sought, but ultimately did not obtain, a loan to enable it to accommodate its financial obligations.⁴⁸ While conceivably a showing to that effect might have been relevant on the question whether the violations were flagrant, it had no tendency to meet the charge that they also were repeated. The statutory language is in the disjunctive; disciplinary action is authorized if violations of the Act are either "flagrant or repeated."⁴⁹ With defaults aggregating more than \$100,000 due 19 shippers on 47 transactions over an eight-month period, we cannot overturn the Secretary's finding⁵⁰ that the company's violations were "repeated."⁵¹

⁴⁶See, e.g., *Van Aalten v. Hurley*, 176 F. Supp. 851, 857 (S.D.N.Y. 1959); *Martindale v. Falkner*, 2 C.B. 706, 135 Eng. Reg. 1124, 1129 (1846).

⁴⁷See Part III, *supra*.

⁴⁸See note 29. *supra*, and accompanying text.

⁴⁹See notes 14, 15. *supra*.

⁵⁰See text *supra* at and following note 31.

⁵¹*George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 991, 992, 994 (2d Cir. 1974); *Zwick v. Freeman*, 373 F.2d 110, 114 115 (2d Cir. 1967); *Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, 451 F.2d at 163.

V. THE INTERPRETATION CONTENTION

We now turn to the remaining question Quinn tenders for decision: whether Section 1(9) of the Act⁵² requires inexorably a holding that, as nominal vice-president of DeVita Fruit Company, Quinn was "responsibly connected" with the company, thereby foreclosing all opportunity to prove that he was not. We answer that question in the negative on each of two independent bases. Interpreting Section 1(9) conformably with accepted canons of statutory construction in light of its legislative history, we conclude that the section's formula for ascertaining responsible connection is rebuttable rather than absolute. We further conclude that in the current state of the record it cannot confidently be said that DeVita Fruit Company was a "corporation" within the meaning of Section 1(9), and so an organization to which the rule of that section applies.

A. *The Issue*

The Act limits licenses in the employment of any person then or theretofore "responsibly connected" with another (a) whose license is revoked or currently suspended by the Secretary, or (b) who has been found to have committed any flagrant or repeated violation of the fair-practice provisions, or (c) against whom there is an unsatisfied reparation award issued within two years.⁵³ The Secretary revoked the license of DeVita Fruit Company for flagrant and repeated fair-practice violations after the license had been statutorily suspended for nonpayment of a reparation award.⁵⁴ Section 1(9) of the Act then became relevant by reason of its specification that "[t]he term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as . . . officer . . . of a corporation. . . ." ⁵⁵ The Secretary's ruling that Quinn is ineligible, at least temporarily, for reemployment in the industry is predicated flatly and exclusively on this

⁵²See note 17, *supra*.

⁵³See note 15, *supra* and accompanying text.

⁵⁴See Part III, *supra*.

⁵⁵See note 17, *supra*.

provision.

Quinn contends that Section 1(9) is but a designation of categories of persons who *prima facie* are "responsibly connected" with a licensee, and who have the burden of proving, but also the prerogative of attempting to prove, a claim to the contrary. On the other hand, appellees argue, as had been administratively considered,⁵⁶ that Section 1(9) establishes a conclusive rule, barring anyone within its categories from undertaking to demonstrate that he was not "responsibly connected" with the offending licensee. So it was that the Secretary proclaimed a one-year moratorium on Quinn's employability on the ground that Quinn was responsibly connected with DeVita Fruit Company when it transgressed the Act.⁵⁷ Indulging Section 1(9) an irreversible effect, the Secretary refused Quinn's request, repeated throughout the administrative proceeding,⁵⁸ for an opportunity to prove that actually he bore no such relationship to the company. The sole reason cited for the refusal was the view that Quinn's contention manifested a "primary interest . . . to obviate the provisions of the Act, or collateral consequences of violations found."⁵⁹

If the facts are as Quinn represented them during the proceeding, it could hardly be urged that he ever was "responsibly" affiliated with the company in any true sense of the word. In an uncontroverted affidavit submitted in support of his application for an evidentiary hearing, Quinn acknowledged that he allowed John DeVita to use his name as vice-president of the company to enable incorporation under Ohio law, but swore that never was he assigned duties or paid additional salary as vice-president; that never did he perform services as vice-president, or even attend meetings of the board of directors; and that indeed, after the corporation was formed, never was his status as vice-president even discussed.

Never, Quinn further avowed, did he have anything to do with policy or business decisions, or have access to the company's records, or have any

⁵⁶See Part III, *supra*.

⁵⁷See Part III, *supra*.

⁵⁸See Part III, *supra*.

⁵⁹See text *supra* following note 31. The language quoted is that of the trial examiner, whose recommended decision, as there pointed out, was adopted by the Department's judicial officer, acting for the Secretary.

knowledge of the company's financial difficulties. Other unopposed affidavits stated that Quinn's occupancy of the vice-presidency of DeVita Fruit Company was purely nominal, and that John DeVita, as sole stockholder, completely controlled the company and effectively exercised the ultimate decision-making power in all aspects of company operations.

These circumstances, if they existed, would demonstrate not only that Quinn did not to any extent participate in the management of the company's affairs, but also that he was totally without power to do so; in other words, that Quinn did not bear any responsible connection with the company. They would also generate at least a doubt as to whether this one-man corporation dominated by its sole stockholder was a "corporation" within the contemplation of Section 1(9) to which the rule prescribed by that section could apply. The Secretary did not consider either of these aspects of the case, and the twin questions are whether he erred in not doing so.

B. Conclusiveness of Section 1(9)

The statutory language leaves open the question whether Section 1(9)'s definition of "responsibl[e] connect[ion]" is rebuttable or irrebuttable, and the Secretary's view that it is irrebuttable ignores well settled canons of statutory construction. The Secretary's interpretation obviously rests upon a literal reading of the language, a technique which well may stifle true legislative intent.⁶⁰ "It is a 'familiar rule,'" the Supreme Court has stated, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."⁶¹ Moreover, a construction of a statute leading to unjust or absurd consequences should be avoided.⁶² And "even when the plain meaning [of statutory language] did not produce absurd results but merely an unreasonable one 'plainly at variance

⁶⁰See *Lynch v. Overholser*, 369 U.S. 705, 710 (1962); *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946); *Cleary v. Chalk*, 488 F.2d 1315, 1322 (D.C. Cir. 1973); *Lange v. United States*, 443 F.2d 720, 722-23 (D.C. Cir. 1971).

⁶¹*National Woodwork Mfrs Ass'n v. NLRB*, 386 U.S. 612, 619 (1967); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

⁶²*United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). *Hagger Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Hechu v. Pro-Football, Inc.*, 444 F.2d 931, 945 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

with the policy of the legislation as a whole' [the Court] has followed that purpose, rather than the literal words."⁶³

Lacking enlightenment from the bare language of Section 1(9), we look to its legislative history, and there we find nothing showing that Congress opted for an incontestable formula for ascertaining "responsibl[e] connect[ion]" through corporate officership. As originally enacted in 1930, Section 8 empowered the Secretary to suspend or revoke the authority of a licensee to do business under the Act, but contained no provision enabling restrictions on future employment of those who were violators in an employee capacity.⁶⁴ Thus, for example, a violator could circumvent the Act by the subterfuge of acting as an "employee" of a dummy corporation newly licensed.⁶⁵ By enactment of what is now Section 8(b) in 1934⁶⁶ and amendment thereof in 1956,⁶⁷ the Secretary was authorized to revoke a license when the licensee, after notice from the Secretary, continued to employ in a "responsible position" one whose own license had been revoked or suspended or one who had been "responsibly connected" with a licensee who incurred revocation or suspension.⁶⁸ These charges, however, left to the Secretary the task of ascertaining what in the way of new employment constituted a "responsible position," and who in the way of old employment had been "responsibly connected" with a violating licensee.

It was to ameliorate the problems incidental to such determination that

⁶³*United States v. American Trucking Ass'ns*, *supra* note 62, 310 U.S. at 543, quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

⁶⁴Act of June 10, 1930, ch. 436, § 8, 46 Stat. 535.

⁶⁵See S. Rep. No. 2485, 84th Cong., 2d Sess. 4 (1956); H.R. Rep. No. 1196, 84th Cong., 1st Sess. 3 (1955); See also H.R. Rep. No. 489, 73d Cong., 2d Sess 2 (1934).

⁶⁶Act of Apr. 13, 1934, ch. 120, § 14, 48 Stat. 588.

⁶⁷Act of July 30, 1956, ch. 786, § 5, 70 Stat. 727.

⁶⁸The restriction imposed in 1934 precluded employment only of those whose licenses had been revoked and those "responsibly connected" with them. The 1956 amendment extended the restrictions to employment of suspended licensees and their "responsibly connected" affiliates. See H.R. Rep. No. 1156, 84th Cong., 1st Sess. 3 (1955).

Congress in 1962 again amended Section 8(b).⁶⁹ As Secretary Freeman commented, a major purpose of the bill proposing the amendments was

to improve and clarify the provisions relating to relicensing or employment of persons who had violated the act or had been affiliated with such persons;⁷⁰

as he pointed out,

frequent attempts are made to circumvent the law following revocation or suspension of a license. Effective enforcement of the act, therefore, rests on having comprehensive, *clear and equitable* provisions relating to relicensing and employment which fully cover the situations encountered in this area in the fruit and vegetable industry.⁷¹

Additionally, the hearings on the bill which eventually produced the 1962 amendments disclosed difficulty in securing evidence that an individual had a "responsible-position" with a new employer-licensee,⁷² and the focus on the troubles brewed by "responsible position" with a new employer was much greater than on any germinated by "responsibl[e] connect[ion]" with a former employer. As the House Committee on Agriculture explained,

[a]ny licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended and revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship

⁶⁹Act of Oct. 1, 1962, Pub. L. No. 87-725, § 11, 76 Stat. 675.

⁷⁰Hearing on H.R. 5023 Before the Subcommittee on Domestic Marketing of the House Committee on Agriculture, 87th Cong., 1st Sess., ser P, at 4 (1961).

⁷¹*Id.* (emphasis supplied).

⁷²*Id.* at 15, 79.

with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had active licenses. As amended, section 8(b) would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.⁷³

Simultaneously with the 1962 amendment of Section 8(b), Congress added the present Section 1(9) as a new provision of the Act. The explanation for this addition was sparse. When the Committee reported the bill out favorably, it stated merely that Section 1(9) would give the term "responsibly connected" and others "specific meaning, thus avoiding possible confusion as to interpretations."⁷⁴ There is nothing to indicate that the Committee was so gravely concerned about an employee's past relations with a defaulting licensee as to intend the provision of an absolute rule on that score.

We do not find in this history a clear purpose to fashion what in the Secretary's view was an irrebuttable presumption of responsible connection with an organizational licensee merely from officership in the organization. Secretary Freeman did not ask for such a presumption,⁷⁵ and the House Committee on Agriculture stated as the single object of Section 1(9) the provision of a definition to unify interpretations of "responsibly connected," as distinguished from an effort to absolutely bar inquiry as to whether one who satisfied the definition was really "responsibly connected" with an offending licensee.⁷⁶ What seems as likely to have been contemplated was the specification of a standard by which the caliber of licensee-connections could

⁷³H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962), 1962 U.S. Code Cong. & Admin. News, p. 2755 (1962). See also S. Rep. No. 750, 87th Cong., 1st Sess. 7 (1961).

⁷⁴H.R. Rep. No. 1546, 87th Cong., 3d Sess. 4 (1962), 1962 U.S. Code Cong. & Admin. News, p. 275 (1962). See also S. Rep. No. 750, 87th Cong., 1st Sess. 2 (1961).

⁷⁵See text *supra* at notes 70-71.

⁷⁶See text *supra* at note 73.

be ascertained, rather than a mechanical and possibly inequitable ascertainment of such a connection for all cases. If either the Secretary or the Committee had in mind the drastic effect which appellees attribute to Section 1(9), we would have expected a good deal more explication in that regard.

Moreover, assuming a passionate congressional concern about proof that an employee was responsibly connected, rather than a definition of when an employee was so affiliated, it does not follow that Congress settled on an irreversible presumption as the solution. Undeniably the proof problem is eased greatly by a rule establishing *prima facie* a responsible connection from officership and casting upon the officer the obviously heavy burden of demonstrating satisfactorily to the Secretary that such a connection did not actually exist. Congress has frequently supplied rebuttable presumptions and inferences to meet similar difficulties of proof,⁷⁷ and there is no significant indication that Congress felt that more was needed here.

The injustice,⁷⁸ indeed the absurdity,⁷⁹ of irrebuttably presuming that one is responsibly connected when actually he is not is readily apparent. If those who profess to know the facts are to be believed, Quinn was an officer of DeVita Fruit Company only on paper. Undeniably, the Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves.⁸⁰ 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.⁸¹

⁷⁷See *Turner v. United States*, 396 U.S. 398 (1970); *Adler v. Board of Educ.*, 342 U.S. 485, 494-496 (1952); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931); *United States v. Los Angeles, S. L. R.R.*, 273 U.S. 299, 311-312 (1927); *Luria v. United States*, 231 U.S. 9, 25-27 (1913).

⁷⁸See text *supra* at note 62.

⁷⁹See text *supra* at notes 62-63.

⁸⁰See text *supra* at notes 64-74.

⁸¹Quinn, now approaching the half-century mark in life with a wife and seven children, suddenly finds himself banned from the industry in which he has worked since a teenager. He has no income other than his present salary, and no vocational experience other than in the wholesale fruit and vegetable industry. He faces this dilemma allegedly because he acceded to

(continued...)

We are not persuaded that Congress, in enacting Section 1(9), intended that consequence. We think that when Congress decides to impose a conclusive presumption, its purpose must be, not merely arguable, but unmistakable. Here there is an almost total lack of indicia of such a purpose in the legislative history of Section 1(9). At the same time, the Act is replete with delegations to the Secretary of duties-some, difficult duties-requiring exertion of his fact-finding and discretionary power.⁸² There is ample basis for believing that in promulgating the formula set forth in Section 1(9), Congress contemplated the same administrative exercise.

To sum up, Congress provided, as the Secretary proposed, that once the Secretary determined that a person's license be suspended or revoked, the ensuing sanction should be prescribed by a "clear and equitable"⁸³ rule that denied him any employment, for the pertinent period, rather than require a new determination of precisely which positions were closed. But for something as consequential as the initial order of suspension or revocation of license, which traditionally rests on determination of personal fault, it would take more than the bare test and skimpy history of the statute before us to establish that this consequence was intended to be visited on a basis of absolute liability, of liability without either personal fault or a realistic capacity to counteract or obviate the fault of others.

We hold, then, that the rule of "responsible[e] connect[ion]" forged by Section 1(9) is rebuttable.⁸⁴ It operates unless and until there is a proffer of

⁸¹(...continued)

the request of his employer that his name be used to enable incorporation of the business for which he continued to work merely as an employee just as before.

⁸²See Perishable Agricultural Commodities Act §§ 3(a), (c), 4(b), (c), (d), (e), 6(a), (c), (e), 7(a), 8(a), (b), (c), 10, 12, 13(a), (c), (d), 14(a), 15, 7 U.S.C. §§ 499c(a), (c), 499d(b), (c), (d), (e), 499f(a), (c), (e), 499g(a), (d), 499h(a), (b), (c), 499j, 499l, 499m(a), (c), (d), 499n(a), 499o (1970).

⁸³See text *supra* at note 71.

⁸⁴We do not consider our construction of § 1(9) inconsistent with either of two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided. In *Fruit Salad, Inc. v. Secretary of Agric.*, *supra* note 30, there was no claim that officers affected by an order suspending a corporate license were not in fact "responsibly connected" with the corporation; the challenge was predicated upon an entirely different ground.

(continued...)

proof of facts and circumstances which might reasonably lead to the conclusion that actually the connection was lacking. When, however, such a proffer is made, the opportunity of proof must be accorded, and the issue must be resolved on the evidence. Quinn made a suitable proffer, and must now be given a chance to submit his proof.⁸⁵

C. Applicability of Section 1(9)

Quite apart from the considerations just discussed, there is another which demonstrates the Secretary's error in refusing to consider Quinn's proffer in connection with the determination that the statutory limitations on reemployment applied to him. The refusal rested on the theory that Quinn could not be permitted to contest the operation of Section 1(9)'s definition of an officer of a corporate violator as one responsibly connected with the corporate licensee,⁸⁶ and as such one whose reemployment was enjoined by Section 8(b).⁸⁷ We are unable to accept the Secretary's view that Section

⁸⁴(...continued)

See notes 42-44, *supra*, and accompanying text. In *Birkenfield v. United States*, *supra* note 6, where one who admittedly had been treasurer, director, and 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in" the corporation's affairs, *id.* 369 F.2d at 494, the court held merely that "[t]he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances." *Id.* The court felt that "the relationships of director, officer or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection," *id.*, and that "[t]he fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling." *Id.* We have no difficulty with the conclusion that one genuinely an officer is not the less "responsibly connected" with his corporation simply because he does not use the powers of his office. We think, however, that the situation is radically different where the affiliation is purely nominal and the so-called officer had no powers at all.

⁸⁵In light of our construction of § 1(9), it is unnecessary to consider whether as a definition of a conclusive presumption the section could have passed constitutional muster. See e.g., *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632, 644-650 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446-454 (1973). The obviously rational relationship between officership in a corporation and responsible connection with the corporation clearly sustains it as a rebuttable presumption. See *Leary v. United States*, 395 U.S. 6, 32-36 (1969).

⁸⁶See note 17, *supra*.

⁸⁷See Part III, *supra*.

1(9) was to be given automatic operation in the circumstances of this case.

To briefly recapitulate, Section 8(b) imposes restrictions on the employment of those who formerly were "responsibly connected" with revoked or suspended licensees.⁸⁸ The restraint on Quinn did not follow any determination that he was responsibly connected with DeVita Fruit Company as a matter of fact. Indeed, the Secretary declined to consider evidence, proffered by affidavits Quinn submitted, which if believed would have demonstrated that he never had such a relationship with the company. The Secretary relied instead upon the definition of "responsibly connected" set forth in Section 1(9), which he deemed unavoidable and incontrovertible in its effect upon Quinn.

Section 1(9), however, purports to attribute to Quinn a responsible connection with DeVita Fruit Company only if the company was a "corporation" within that section's meaning, and Quinn's tender challenged the Secretary's assumption that it was. The tender included an affidavit by Charles W. Daley, an attorney who had prepared and filed the articles of incorporation converting the DeVita business from individual to corporate form, and who thereafter had served as secretary of the corporation. Daley stated that "all decision making in this corporation was done by [John A.] DeVita who, throughout the entire corporate existence, was the sole stockholder." More importantly, there was also the affidavit of John DeVita, who stated "that in the conduct of his business as a corporation, affiant as shareholder, elected the directors of the corporation from year to year and that said directors as elected by affiant, elected the officers of the corporation;" and "that all policy decisions of the corporation with reference to the company operations were made by affiant throughout and where appropriate through his Board of Directors, but affiant effectively retained the decision making power in all aspects of corporate decision making." So a question arises as to whether the organization which DeVita individually dominated and controlled could in legal contemplation be treated only as a corporation. The further question is whether the Secretary was correct in his apparent conclusion that he lacked discretion to treat the DeVita organization in any other way.

⁸⁸See note 15. *supra*.

A corporation is ordinarily to be viewed as a distinct entity,⁸⁹ even when it is wholly owned by a single individual.⁹⁰ This concept is, however, designed to serve normal, inoffensive uses of the corporate device, and is not to be stretched beyond its reason and policy.⁹¹

Only recently we reminded that "[t]he courts have consistently recognized that a corporate entity must be disregarded in the interest of public convenience, fairness and equity"⁹² and that

[i]f any general rule can be laid down, in the present state of authority, it is that a corporation can be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.⁹³

This doctrine is firmly entrenched in our jurisprudence,⁹⁴ and it has been

⁸⁹E.g., *Jones v. Helvering*, 71 F.2d 214, 217 (D.C. Cir.), *cert denied*, 293 U.S. 583 (1934); *Callas v. Independent Taxi Owners' Ass'n*, 66 F.2d 192, 193 (D.C. Cir.), *cert denied*, 290 U.S. 669 (1933).

⁹⁰*Eichelberger v. Arlington Bldg., Inc.*, 280 F. 997, 999 (1922); *El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 483 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Robertson v. Roy L. Morgan Prod. Co.*, 411 F.2d 1041, 1043 (10th Cir. 1969).

⁹¹"[T]here is an exception to the entity rule, where its recognition would result in promoting illegality, fraud, or injustice. In other words, since the franchise is granted by the state for a useful and valid purpose, it may not be employed to further wrong. Where it is so employed the law will disregard the rule, go behind the fiction, and treat the stockholders as if the corporation did not exist." *Eichelberger v. Arlington Bldg., Inc.*, *supra* note 90, 280 F. at 999 (citations omitted).

⁹²*Capital Tel. Co. v. FCC.*, 498 F.2d 734, 738 (D.C. Cir. 1974) (citations omitted).

⁹³*Id.*, quoting *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905). See also *Francis O. Day Co. v. Sharpiro*, 267 F.2d 669, 673 (D.C. Cir. 1959); *Callas v. Independent Taxi Owners' Ass'n*, *supra* note 89, 66 F.2d at 193.

⁹⁴See the cases collected in 1 W. Fletcher, *Corporations*, §§ 41-46 (rev. ed. 1963) and Annot., 46 A.L.R.3d 428 (1972).

utilized in a variety of situations,⁹⁵ not the least of which are those wherein the corporation is simply the alter ego of its owners.⁹⁶ Here we speak not merely of single ownership,⁹⁷ or of deliberate adoption and use of a corporate form in order to secure its legitimate advantages,⁹⁸ but of such domination of a corporation as in reality to negate its separate personality.⁹⁹ When, at some innocent party's expense, the corporation is converted into such an instrumentality, "the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."¹⁰⁰

So, in *Capital Telephone Company v. FCC*,¹⁰¹ we upheld an agency's treatment of separate applications by a corporation and an individual for two high-band radio channels as a single application because the individual was the sole stockholder of the corporation and controlled its operations as well as his

⁹⁵Prominently included are those wherein the corporate fiction would enable circumvention of a statute, *Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944); *Alabama Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1937), or evasion of personal liability, *Anderson v. Abbott*, *supra*, 321 U.S. at 362-363; *Francis O. Day Co. v. Sharpiro*, *supra* note 93, 267 F.2d at 673-675; *Callas v. Independent Taxi Owners' Ass'n*, *supra* note 89, 66 F.2d at 193-195.

⁹⁶*Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500, 501 (1918); *Capital Tel. Co. v. FCC*, *supra* note 92, 498 F.2d at 737-739; *Rosen v. Cain*, 211 F.2d 809 (D.C. Cir. 1954); *Mansfield Journal Co. v. FCC*, *supra* note 180 F.2d 28, 37 (D.C. Cir. 1950). See also *Pardo v. Wilson Line of Washington, Inc.*, 414 F.2d 1145, 1149-1150 (D.C. Cir. 1969); *Francis O. Day Co. v. Sharpiro*, *supra* note 93, 267 F.2d at 673-674. See also cases cited *infra* note 107.

⁹⁷See text *supra* at note 90.

⁹⁸See, e.g., *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 436-437 (1946).

⁹⁹See cases cited *supra* notes 91-93, 95-96 and *infra* note 107.

¹⁰⁰*Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, *supra* note 96, 247 U.S. at 501. See also *Anderson v. Abbott*, *supra* note 95, 321 U.S. at 363.

¹⁰¹*Supra* note 92.

own.¹⁰² In *Mansfield Journal Company v. FCC*,¹⁰³ we sustained the agency's denial of separate applications by two newspaper companies for two radio-station licenses because the companies were wholly owned and actively controlled by one family.¹⁰⁴ In *S.O.U.P., Inc. v. FTC*,¹⁰⁵ we looked past a corporation to its members to ascertain eligibility to appeal in *forma pauperis*.¹⁰⁶ Many other courts for a variety of purposes have similarly disregarded the corporate fiction where its recognition would pervert the truth.¹⁰⁷

We are mindful that penetration of the corporate veil is a step to be taken cautiously,¹⁰⁸ and usually it is urged by rather than against the Government,

¹⁰²498 F.2d at 737-739.

¹⁰³*Supra* note 96.

¹⁰⁴180 F.2d at 37.

¹⁰⁵449 F.2d 1142 (1971).

¹⁰⁶449 F.2d at 1142-1143.

¹⁰⁷*Dickey v. NLRB*, 217 F.2d 652, 653 (6th Cir. 1954) (to subject partners who incorporated to a certification order); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1342-1343 (8th Cir. 1971) (to sustain a cease and desist order against corporate officers individually); *Oscarson v. Norton*, 39 F.2d 610, 612 (9th Cir. 1930) (to treat a dedication by a corporation as one to the stockholders' uses); *Sell v. United States*, 336 F.2d 467, 472 (10th Cir. 1964) (to ascertain the ownership of grain for purposes of a criminal prosecution); *United States v. Goldberg*, 206 F. Supp. 394, 405-406 (E.D. Pa. 1962) (ascertain the recipient of taxable income); *Industrial Research Corp. v. General Motors Corp.*, 29 F.2d 623, 625-626 (N.D. Ohio 1928) (to sustain the service of process); *In re Rieger, Kapner & Almark*, 157 F. 609 (S.D. Ohio 1907) (to extend a receivership of a firm to a subsidiary corporation's property); *Palmolive Co. v. Conway*, 43 F.2d 226, 229-230 (W.D. Wis. 1930) (to prevent a tax evasion); *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673, 676 (1921) (to regard payments by a corporation as individual payments, tolling the limitation period on an individual dept); *Caspers v. Chicago Real Estate Bd.*, 58 Ill. App.2d 113, 206 N.E.2d 787, 789(1965) (to bar a malicious prosecution suit against plaintiff's corporation); *Telis v. Telis*, 132 N.J.Eq. 25, 26 A.2d 249, 250-251 (1942) (to allow dower in a husband's realty); *Commonwealth v. Shafer*, 414 Pa. 613, 202 A.2d 308, 313-314 (1964) (to impose criminal liability).

¹⁰⁸*Pardo v. Wilson Line of Washington, Inc.*, *supra* note 96. 414 F.2d at 1149-1150.

but the ultimate principle is one permitting its use to avoid injustice, and the case at bar presented a situation warranting consideration of just such a step. Quinn made a preliminary showing that John DeVita dominated and exclusively controlled DeVita Fruit Company, and that his dominion over its affairs and operations was as complete as when the business was conducted as a sole proprietorship. Quinn's showing plainly indicated, too, that acceptance of the company as a Section 1(9) corporation, and as a result the invocation against Quinn of the statutory restriction on employment, would work a grave injustice on him.¹⁰⁹ Moreover, the irrationality of holding an employee "responsibly connected" with the licensee when actually he was not is self evident.

We conclude that the Secretary erred in failing to consider Quinn's evidence. We have admonished that "the fiction of a corporate entity, cannot stand athwart sound regulatory practice,"¹¹⁰ we have said that, on the contrary, "[t]o carry out statutory objections, it is frequently necessary to seek out and to give weight to the identity and characteristics of the controlling officers and stockholders of a corporation."¹¹¹ Nothing in the legislative history of the Perishable Agricultural Commodities Act suggests that the Secretary is powerless, in administering Section 1(9), to apply a doctrine commonplace in judicial decision making. The Act entrusts many regulatory matters to the Secretary's discretion,¹¹² and Section 1(9) is not so all-inclusive a definition of "responsible connect[ion]"¹¹³ as to negate the normal

¹⁰⁹See note 81. *supra*.

¹¹⁰*Capital Tel. Co.*, *supra* note 92, 498 F.2d at 738 n. 11, quoting *H. P. Lambert Co. v. Secretary of Treasury*, 354 F.2d 819, 822 (1st Cir. 1965). See also *Central & So. Motor Freight Tariff Ass'n v. United States*, 273 F. Supp. 823, 931-932 (D. Del. 1967).

¹¹¹*Mansfield Journal Co. v. FCC*, *supra* note 96, 180 F.2d at 37 (citations omitted). See also *Capital Tel. Co. v. FCC*, *supra* note 92, 498 F.2d at 739.

¹¹²See note 82, *supra*, and accompanying text.

¹¹³An employee managing the operations of a concern doing business as a sole proprietorship, for example, is "responsibly connected" with the owner of the business, and seemingly would encounter the employment bar of § 8(b) as a person "responsibly connected" although he does not fit the definition of "responsibl[e] connect[ion]" supplied by § 1(9), which in scope is limited to organizational personnel.

function of administrative interpretation of its terminology.¹¹⁴

It was not necessary for Quinn to allege actual fraud in the incorporation of DeVita Fruit Company;¹¹⁵ it sufficed that the corporate fiction actually visited an injustice upon him.¹¹⁶ Quinn's proffer suitably challenged the operation of Section 1(9) and he is entitled to an opportunity to show that the company was not in truth a corporation within the objective which Congress contemplated.¹¹⁷ If Quinn succeeds in establishing that the company is not properly to be recognized as a legal entity, it would follow that the definition of "responsibl[e] connect[ion]" contained in Section 1(9) has no application to him.¹¹⁸

We affirm the Secretary's action save to the extent that Quinn's evidentiary proffer was rejected. To the end that it may now be considered, we reverse the Secretary's action and remand the case to the Secretary for proceedings in harmony with this opinion.

So ordered.

LILLY MINOTTO v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 82-2174.

Decided July 19, 1983.

(Cite as: 711 F.2d 406)

Responsibly connected - Prima facie evidence - Personal fault and knowledge.

The United States Court of Appeals for the District of Columbia Circuit reversed the final

¹¹⁴*Compare Capital Tel. Co. v. FCC, supra* note 92, 498 F.2d at 737; *Mansfield Journal Co. v. FCC, supra* note 96, 180 F.2d at 32, 33; *Bruhn's Freezer Meats of Chicago Inc. v. United States Dep't of Agric., supra* note 107, 438 F.2d at 1343.

¹¹⁵*Francis O. Day Co. v. Shapiro, supra* note 93, 267 F.2d at 673 n. 11.

¹¹⁶267 F.2d at 673. *See also* cases cited *supra* note 81.

¹¹⁷*Compare NLRB v. Deena Artware, Inc., 361 U.S. 398, 402 (1960).*

¹¹⁸*See* cases cited *supra* notes 91-93, 95-96, 100-107.

decision of the Secretary which found that Petitioner was responsibly connected with an agricultural products marketing company which violated the Perishable Agricultural Commodities Act. Being a director, officer, or ten percent stockholder is prima facie evidence that one is responsibly connected to a company. A finding of liability must be premised upon personal fault or the failure to counteract or obviate the fault of others. The District of Columbia Circuit stated that Petitioner's mere presence at Board meetings during which illegal transactions were never discussed could not be the basis for imputing personal knowledge to her. Petitioner was a nominal director. No evidence supported the conclusion that she knew of the company's misdeeds; thus, Petitioner could not be deemed responsibly connected to the company which violated the PACA.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

Before EDWARDS, Circuit Judge, McGOWAN and MacKINNON, Senior Circuit Judges.

MACKINNON, Senior Circuit Judge:

Petitioner Lilly Minotto seeks review of a final order issued by the Secretary of Agriculture wherein she was found to have been "responsibly connected" with an agricultural products marketing company which violated the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a *et seq.* (1976 & Supp. V 1981) (the Act).¹ Based upon this finding, Minotto was barred from employment with a Department licensee for two years. Petitioner asserts that the Secretary's conclusion is not supported by facts on the record as a whole. We agree. The petition for review is, therefore, granted and the decision of the Secretary is reversed.

I.

Minotto was employed by Conte, Inc. (the Company), a wholly owned subsidiary of American Specialty Foods, Inc., which markets fresh fruits and vegetables and is, therefore, subject to the Act. In November 1980 the

¹The Perishable Agricultural Commodities Act regulates the shipment of perishable agricultural products in interstate and foreign commerce through a system of licensing and administrative supervision. As a precondition of doing business, merchants, dealers, and brokers in such commodities must obtain a license from the Secretary of Agriculture. Section 2 of the Act forbids licensees from engaging in certain enumerated unfair practices, including the failure to make prompt, full payment for commodities. An unfair practice subjects the licensee to liability for damages and to suspension or revocation of its license.

enforcement branch of the Department of Agriculture filed a complaint against Conte under section 499f of the Act, charging the Company with failure to make full and prompt payment for 250 lots of perishable agricultural commodities received during August and September, 1979. When the Company failed to answer the complaint, the agency obtained a default order. *In re Conte, Inc.*, 40 Agric. Dec. 620 (1981).

After obtaining the order of liability, the Department of Agriculture notified Company officers and directors, including Minotto, that they were "responsibly connected" to the Company within the meaning of section 499h of the Act and therefore would be subject to employment sanctions.² The Chief of the Department's Regulatory Branch concluded that Minotto was "responsibly connected" solely because she was a corporate director and she had attended nine corporate board meetings. File PACA D-0042; Joint Appendix (JA) 47. Minotto disagreed with the determination and requested a hearing.³

²The Secretary is authorized to limit employment, within the agricultural industry, of individuals who violate the Act. The Act provides:

- (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. . . .

7 U.S.C. § 499h (1976):

and

- (9) The term "responsibly connected" means affiliated 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 . . . *Id.* § 499a.

The Secretary may approve the reemployment of such "responsibly connected" person following the violating company's payment of a reparation award, or upon the individual's posting of a bond following one year of the employment sanction.

³The terms of the Act do not expressly require a hearing, but in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), this court required the agency to provide "responsibly connected" persons with an opportunity to rebut the agency's charge. The agency has complied with this judicial directive by implementing regulations governing the proceedings and review applicable in a "responsibly
(continued...)

The facts developed at the hearing are uncontested. Minotto was employed by Conte from 1974 until 1980 as a bookkeeper with secretarial and accounting duties. She had completed one year of post-high school business training and was twenty-three years of age when she began working for the Company. Although during her tenure Minotto was given additional clerical, bookkeeping, and accounting responsibilities, she remained an hourly employee.

In January 1976, Conte was restructured under a Chapter XI bankruptcy proceeding and Minotto was appointed to its newly created five-person Board of Directors.⁴ Her election was solely for the convenience of the Company; because of her presence in the office, Minotto could be counted upon to attend Board meetings and to insure the availability of a quorum. The other four members of the Board were James L. Price, a director of the parent company, American Specialty Foods, and President of Conte; Samuel Schreffler, Secretary/Treasurer and later President of Conte; George McLaughlin; and Kenneth Kalligher, Vice President of Conte. Minotto did not receive an increase in salary upon assuming a director's position, nor did she receive any stock as compensation for her new duties. Except to attend Board meetings, Minotto performed no additional work in conjunction with her appointment. During the four years of her directorship Minotto attended all nine Board meetings which were held. She never proposed any motions at these meetings, but is recorded as having voted in favor of all resolutions proposed. Minotto 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. The minutes of the Board meeting confirm her assertion.

Based upon this evidence, the Department's Hearing Officer held that Minotto was "responsibly connected" with Conte during the time period when

³(...continued)
connected" determination. 7 C.F.R. §§ 47.47-.68 (1983).

Neither party disputes that the "substantial evidence" test is the applicable standard of review. The hearing authorized by the regulations, and which was in fact provided to Minotto, was a formal, on-the-record adjudicatory proceeding. *See id.* §§47.58-.63. Therefore, the substantial evidence test is appropriate.

⁴In December 1979, after the underlying violations by the company were consummated, Minotto was appointed Assistant Secretary. In this capacity she was authorized to co-sign checks for the Company.

the violations occurred. Decision, PACA RC 81-1005 (June 21, 1982); JA 102-11. Characterizing Minotto's directorship as being "more than nominal," the Officer reasoned that Minotto's "participation in the Board of Directors meetings" was the "critical issue" because her attendance assured the quorum necessary to enact resolutions dealing with the "well-being of the Company." *Id.* at 8; JA 109. The Hearing Officer found the mere fact that Minotto was a director to be dispositive, regardless of whether she exercised any real authority within the Company. Because she was found to be "responsibly connected," Minotto was subject to the employment sanctions of the Act.

Minotto appealed, but the Department of Agriculture affirmed the Hearing Officer's decision. Decision, PACA RC 81-1005 (Aug. 6, 1982): JA 117. This petition for review followed.

II.

As a "director" of a company which violated the Act, Minotto falls within the language of section 499a of the Act. However, that fact alone is not sufficient to render her automatically subject to the sanctions of the Act. In *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), this court established that being a director, officer, or ten per cent stockholder was only *prima facie* evidence that one was "responsibly connected" to a company which had violated the Act. The *Quinn* court held the statute was not intended to establish absolute liability. A finding of liability under section 499h of the Act must be premised upon personal fault or the failure to "counteract or obviate the fault of others." *Id.* at 756.

At oral argument, counsel for the Department conceded that the Department's decision was not premised upon Minotto's failure to counteract the fault of others. Instead, the Department's decision was based upon its conclusion that Minotto was personally at fault. Conspicuously absent from the record evidence and from the Hearing Officer's findings of facts or conclusions, however, is *any* suggestion that Minotto knew or should have known of the Company's misdeeds. Her mere presence at Board meetings during which the illegal transactions were never discussed cannot be the basis for imputing personal knowledge to her. Such a conclusion would be the functional equivalent of an absolute liability standard which this court expressly rejected in *Quinn*. *See id.* The finding that an individual was "responsibly connected" must be based upon evidence of an actual, significant nexus with the violating company. "[W]here the affiliation is purely nominal and the so-called [director] had no powers at all," the "responsibly connected"

determination cannot stand. *Id.* at 756 n. 84.

The record in this case clearly establishes that Minotto was no more than a nominal director. She lacked both the training and the experience to be an active director. She had no real authority within the Company and simply acquiesced in the decisions made by the Company President, her boss. The nominal nature of her role at the Board meetings was attested to by both the former President of the Company and a fellow member of the Board; she had no policy or decision-making role. She was essentially a clerical employee.

Notwithstanding her designation as a director, it cannot be said that Minotto was "responsibly" affiliated with the Company. There is no evidence in the record to support the conclusion that Minotto knew or should have known of the Company's misdeeds. The fact that Minotto was an uncompensated, nominal director who attended Board meetings at the request of her employer does not support the conclusion that she was "responsibly connected" to the violating company within the meaning of the Act.

The petition for review is *granted* and the decision of the Department of Agriculture is *reversed*.

Judgment accordingly.

VEG-MIX, INC. V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 85-1771.

KUZZENS, INC. V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1201.

HARRIS V. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 86-1202.
Decided October 30, 1987.

(Cite as: 832 F.2d 601)

Bankruptcy petition properly considered by ALJ - Hearing not required when no genuine dispute of material fact - Flagrant and repeated violations - Piercing the corporate veil - Rebuttable presumption - Responsibly connected.

This decision covers three connected cases. In *Veg-Mix, Inc.*, the United States Court of Appeals for the District of Columbia Circuit held that administrative law judge was authorized to consider corporation's invoices and bankruptcy petition in determining whether the corporation failed to make full payment promptly for produce, regardless of whether bankruptcy petition was

made on personal knowledge of person who signed it. The court further stated that an agency may ordinarily dispense with a hearing when there is no genuine dispute as to material issue of fact. The court remanded the decision in *Veg-Mix, Inc.*, however, to determine whether violations occurring prior to director's resignation were flagrant and repeated. Petitioners Harris and Kuzzens, Inc., asserted that the Secretary was obliged to pierce the corporate veil of Petitioner Veg-Mix, Inc., and exonerated them. In *Kuzzens, Inc.*, the District of Columbia Circuit affirmed the Secretary's decision that Kuzzens, Inc., was a majority shareholder of Veg-Mix, Inc., and therefore was responsibly connected to the corporation. The court stated that there is a rebuttable presumption that an officer, director, or large shareholder of a corporation found to have violated the PACA is "responsibly connected" to that corporation and subject to sanctions. In *Harris*, the court stated that Petitioner Harris' resignation as director did not have to be in writing to absolve him from liability for corporation's violations occurring after his resignation and remanded the case to the Secretary.

Before MIKVA, STARR and WILLIAMS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

WILLIAMS, Circuit Judge:

The Perishable Agricultural Commodities Act ("PACA") attempts to facilitate interstate commerce in fresh fruits and vegetables. 7 U.S.C. § 499a *et seq.* (1982 & Supp. III 1985). To help instill confidence in parties dealing with each other on short notice, across state lines and at long distances, it provides special sanctions against dishonest or unreliable dealing. In the cases before us, the sanctions provided evidently failed to deter one merchant, and the Department of Agriculture launched its enforcement machinery. The main culprit having disappeared, it proceeded against lesser lights, with results that we do not find fully in conformity with the law.

PACA makes it unlawful for certain merchants of fresh fruits and vegetables to fail to pay fully and promptly for their purchases. 7 U.S.C. § 499b(4). It allows the Secretary of Agriculture to revoke the licenses of those whose offenses are "flagrant or repeated." *Id.* § 499h(a). Persons "responsibly connected" to such a violator may be barred from a PACA license for two years and from employment with any licensee for a year. *Id.* §§ 499a(9), 499(b), 499h(b).

Our decision covers three connected cases. In No. 85-1771, petitioner Veg-Mix, Inc., challenges the Secretary's determinations of flagrant and repeated PACA violations, and in Nos. 86-1201 and 86-1202, petitioners Kuzzens, Inc., and Charles M. Harris challenge orders finding them to be responsibly

connected with Veg-Mix. For the reasons given below, we remand the *Veg-Mix* decision (No. 85-1771) for a limited factual determination, affirm in *Kuzzens* (No. 86-1201), and remand in *Harris* (No. 86-1202).

I. BACKGROUND

Veg-Mix was a fruit and vegetable business conceived by William Lipman (acting on behalf of Kuzzens) and Larry Watkins, who was to become its president and part owner, and whose manipulations and ultimate disappearance are at the root of these cases. Early in September 1982 Watkins and Kuzzens entered into a preincorporation agreement, and articles of incorporation were filed with the Florida Secretary of State that same month. Shortly thereafter, *Veg-Mix* obtained a PACA license.

By the terms of the preincorporation agreement, Kuzzens invested \$30,000 directly (\$12,000 in exchange for equity, \$18,000 for debt) and lent Watkins \$20,000 for him to invest; Kuzzens was to own 60 percent and Watkins 40 percent. The agreement obliged Watkins to "devote his undivided time and attention and use the utmost of his skills and ability to the furtherance of the Corporation" and gave him complete management authority over day-to-day affairs, subject to review by the board of directors.

The directors designated in both the agreement and the articles of incorporation were Watkins, Wayne M.D. Press, and Charles M. Harris. Press and Harris were relatives of William Lipman and salesmen for Six L's Packing Company, another enterprise owned in part by the Lipman family and operating in the same offices as Kuzzens, Inc. William Lipman originally designated Press and Harris as directors without their knowledge, although Harris a lawyer, learned of his directorship when Lipman directed him to prepare the articles of incorporation. No scheduled directors' meetings, shareholders' meetings, or other corporate formalities were observed during *Veg-Mix*'s single season of operations, from November 1982 to late May or early June 1983.

In March 1983, Watkins offered to buy Kuzzen's interest in *Veg-Mix* for \$100,000. Lipman and Watkins shook hands in agreement on the deal, but they never prepared or signed a written agreement and Watkins never paid up. Though the sales agreement remained executory, it led to the resignations of Press and Harris either in late March or early April, as we shall see in more detail in reviewing the "responsibly connected" findings.

At the end of the marketing season, in late May or early June 1983, *Veg-Mix* ceased merchant operations. (Bookkeeping activity continued.) Kuzzens

officials discovered in October 1983 that Watkins had written checks on Veg-Mix's accounts without proper authorization. Watkins himself had by this time disappeared. The Kuzzens representatives took steps to staunch the flow of funds, temporarily reinvolving Press and Harris in Veg-Mix's affairs. In March 1984 a bankruptcy petition was filed on Veg-Mix's behalf. The petition was prepared by lawyer who examined Veg-Mix documents, Joint Appendix ("J.A.") B-385-86, and was signed by Paula Berry, as Secretary, for Veg-Mix. The petition listed Harris and Press as directors and Kuzzens and Watkins as shareholders.

The Agriculture Department's Agricultural Marketing Service, Fruit and Vegetable Division filed an administrative complaint in August 1984 alleging that Veg-Mix violated 7 U.S.C. § 499b(4) during the February-July 1983 period by failing to make full, prompt payment of agreed purchase prices for 50 lots of fruits and vegetables in interstate commerce. The total sum asserted was \$191,306.60, owed to six sellers. J.A. B-387. It further alleged that these failures were willful, flagrant, and repeated, and thus it requested publication of the relevant facts and circumstances pursuant to 7 U.S.C. § 499h(a). (The de-licensing remedy of § 499h(a) was moot because Veg-Mix had already lost its license for failure to pay the required annual fee.) Also in August, the agency notified Harris, Press, Kuzzens, and others of a preliminary determination that they were "responsibly connected" with Veg-Mix.

After various delays, the administrative law judge ("ALJ") issued a dispositive order against Veg-Mix. *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612 (June 26, 1985). Veg-Mix appealed unsuccessfully to a judicial officer and then, equally unsuccessfully, petitioned for reconsideration. Meanwhile, the cases of Kuzzens and Harris were considered in a consolidated hearing on May 22, 1985. In *In re Kuzzen's [sic], Inc.*, PACA RC 84-1022 (September 27, 1985) and *In re Harris*, PACA RC 84-1024 (September 30, 1985), the presiding officer determined that both were responsibly connected with Veg-Mix during the period at issue. Soon afterwards the same officer found Press not so connected. *In re Press*, PACA RC 84-1023 (October 16, 1985). The administrator of the agricultural marketing service summarily affirmed the Kuzzens and Harris decisions on February 6, 1986.

II. VEG-MIX'S CLAIMS

Veg-Mix challenges the agency's determination on several grounds. First, it claims that the ALJ should not have considered the bankruptcy pleadings

and invoices that formed the principal documentary evidence. Second, it contends that it was wrongly denied an evidentiary hearing, in violation of the agency's procedural rules and in the face of material factual disputes. Third, it claims that the judicial officer erred by insufficiently addressing the issues Veg-Mix raised in its appeal and in not admitting newly discovered evidence. We disagree with all these contentions.

A. *The Invoices and the Bankruptcy Petition*

The strongest evidence against Veg-Mix consisted of 50 invoices from transactions which the agency contended had not been fully and promptly paid. Veg-Mix contends that the ALJ should not have considered these. The business records exception to the hearsay rule ordinarily requires "the testimony of the custodian or other qualified witness." Fed. R. Evid. 803(6). As that was not offered, Veg-Mix argues, the invoices lacked authentication.

Laxer standards of admissibility, however, apply to administrative tribunals. See, e.g., 3 K. Davis, *Administrative Law Treatise* § 16.5 (1980). Generally, for example, if hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious, see 5 U.S.C. § 556(d) (1982), agencies are entitled to weigh it according to its "truthfulness, reasonableness, and credibility," see *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980); see also *National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F.2d 816, 825 (D.C. Cir. 1980) (finding agency's disregarding of probative hearsay evidence to be arbitrary and capricious).

This case is not one for testing the outer limits of these more permissive rules. Veg-Mix stresses the agency's purported technical error, rather than the truthfulness of the invoices. Brief for Petitioner at 28-32. In the absence of a serious, nonspeculative argument that the records were something other than they appeared to be, the practical standards applicable to administrative proceedings are not offended.

Veg-Mix makes a similarly technical objection with regard to the ALJ's taking official notice of Veg-Mix's bankruptcy petition. The bankruptcy petition listed debts that generally corresponded to the debts shown by the sales invoices. The papers were signed by Paula Berry, as Secretary of Veg-Mix, who was required to "certify under penalty of perjury" that the information was "true and correct to the best of [her] knowledge, information, and belief." Respondent's Appendix 57-63. Veg-Mix argues that because affidavits submitted under Fed. R. Civ. P. 56(e) must be made "on personal

knowledge," the bankruptcy pleadings--which by Berry's statement may have rested on mere "information and belief"--should have been excluded. Whatever merit the claim might have in a formal civil litigation context, it has none in informal administrative proceedings.

The agency's rules provide that "[o]fficial notice shall be taken of such matters as are judicially noticed by the courts of the United States . . ." 7 C.F.R. § 1.1141(g)(6)(1987). Courts may take judicial notice of official court records, including bankruptcy pleadings. *See, e.g., Freshman v. Atkins*, 269 U.S. 121, 123-24, (1925); *In re Aughenbaugh*, 125 F.2d 887, 890 (3d Cir. 1942); *In re Eaason Corp.*, 37 B.R. 471, 479-80 (Bankr. E.D. Pa. 1984). Indeed, this court has observed, "[I]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties." *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 755 (1943). *Accord Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n. 4 (8th Cir. 1984); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). The agency has previously indicated, albeit in dictum, that it will take official notice of bankruptcy petitions. *In re Fava & Co.*, PACA Docket No. 2-6547 (Dec. 4, 1984) [43 Agric. Dec. ____].

Veg-Mix invokes *In re Aughenbaugh*, 125 F.2d 887 (3d Cir. 1942), in which the Third Circuit examined a district court's reliance on information in a bankruptcy referee's files. The court of appeals found fault with the district court's reliance on evidence not properly introduced before the bankruptcy referee or the district court.

Aughenbaugh appears to rest on a vulnerability in classic judicial notice: that it may operate without parties having a chance to identify defects or to explain away apparent implications. No such problem exists here, as Veg-Mix knew that the agency was offering the bankruptcy proceedings and thus had ample opportunity to respond. Indeed, even now Veg-Mix's position rests only on the supposed technical deficiency. Although it contested the inferences naturally to be drawn from the bankruptcy petition and invoices, the data it offered in support did not truly draw them in question, as we shall shortly see.

B. *The Failure to Hold a Hearing*

1. *Agriculture Department Requirements.* Agriculture Department rules

dispense with a hearing when no answer is filed, 7 C.F.R. § 1.139 (1987),¹ and Veg-Mix would have us infer from this that under every other circumstance a hearing must occur, regardless of the non-existence of material factual disputes. Since Veg-Mix answered the complaint with a denial of the allegations that some of the transactions were in interstate commerce and denials that some of the transactions were accurately described, it contends that a hearing was required.

This argument strikes us as an utterly implausible application of the ancient maxim *expressio unius est exclusio alterius*. Common sense suggests the futility of hearings where there is no factual dispute of substance. Moreover, the agency has previously held that obviously meritless denials and affirmative defenses do not require a PACA hearing, and it placed the burden on the respondent to show a substantial issue requiring a hearing. *In re Fava & Co.*, 44 Agric. Dec. 870 (1985).

The Department's view in *Fava* accords with our rulings that an agency may ordinarily dispense with a hearing when no genuine dispute exists. See *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (Leventhal, J.) ("the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing"). In *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986), we suggested that a "request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held." See also *Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission*, 677 F.2d 124, 128-29 (D.C. Cir. 1982). Thus we think the agency's approach on the general issue of when a hearing is required was unexceptionable. We therefore turn to the question of whether Veg-Mix raised a material issue of fact.

2. *Possible Genuine Disputes.* The agency presented evidence with its motion for decision--the invoices, the bankruptcy petitions, and two affidavits by agency investigators--strongly suggesting numerous PACA violations. We think that the agency satisfied its initial burden with this evidence. Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (describing genuine

¹Section 1.139 provides in part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. . . . Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof. . . .

dispute in civil action as one in which "a reasonable jury could return a verdict for the nonmoving party"); *Celotex Corp. v. Catrett*, 477 U.S. 417 (1986) (describing burden of party seeking summary judgment in a civil action). It was thus incumbent on Veg-Mix to come forward with evidence rebutting this showing. See *In re Fava & Co.*, 44 Agric. Dec. 870 (1985). Cf. *Anderson*, 106 S. Ct. at 2510 (in the face of a properly supported motion for summary judgment, nonmoving party may not rest on allegations in pleadings but must come forward with significant probative evidence); *Celotex Corp.*, 106 S. Ct. at 2553-54 (same).

Veg Mix, however, chose not to exercise its right under the agency's regulations to oppose the agency's motion for decision. All that it presented in its defense was what it styled a Request for Issuance of Subpoenas Duces Tecum to compel the appearance of nine individuals to testify at a hearing. (In fact, as both sides now agree, Veg-Mix was seeking subpoenas ad testificandum.)²

This submission placed great stress on the nefarious character of the missing Watkins, and suggested that the accuracy of the records and bankruptcy pleadings could not be assessed in his absence. It included exhibits suggesting that Watkins had composed false Veg-Mix invoices in order to benefit himself or had had Veg-Mix billed by other companies in his control. J.A. B-17, 22 (Affidavit of James P. Doherty), J.A. B-30 (Affidavit of Jack Rosenthal). Veg-Mix now argues that this information of Watkins' dishonesty casts doubt on the accuracy of the bills to Veg-Mix from independent firms.

The logic of this escapes us. The exhibits suggest various devices by Watkins for raiding Veg-Mix. But in the absence of some reason to believe that Watkins had somehow manipulated the firms whose bills are at issue--and even now no such thing is suggested--the items do not undermine the apparent significance of the invoices before the ALJ. As the Court in *Anderson* noted, once a moving party has satisfied its burden, "[i]f the evidence [offered by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." 106 S. Ct. at 2511 (citation omitted). Here the submissions by Veg-Mix were not substantial enough to create a genuine dispute requiring a hearing.

²There is no indication in the record before us that this request was ever ruled on. At oral argument counsel for Veg-Mix indicated that he did not press for a response because he was pessimistic about the chances for success.

C. *Objections to the Administrative Appeal*

Veg-Mix appealed the ALJ's decision to the judicial officer, who found no error and adopted the ALJ's decision. It then petitioned for reconsideration and sought to submit new evidence. Veg-Mix now claims two errors. Although both are meritless, we remand for the agency to decide whether Veg-Mix's violations reached the "flagrant or repeated" level before Harris ceased to be "responsibly connected" to the firm.

1. *Reliance of the Judicial Officer on the ALJ's opinion.* The judicial officer affirmed on the basis of the ALJ's opinion and Veg-Mix argues that this conduct breached the agency's duty to explain its actions. See, e.g., *Harborlite Corp. v. Interstate Commerce Commission*, 613 F.2d 1088, 1092-93 (D.C. Cir. 1979). So long as the explanations offered by the lower administrative level are adequate--and Veg-Mix doesn't claim otherwise--obviously the practice here is a sensible fulfillment of the duty to explain. Cf. *Martino v. Department of Agric.*, 801 F.2d 1410, 1412 (D.C. Cir. 1986). It happens, in fact, to be expressly authorized by the Agriculture Department's regulations.³

2. *Refusal to consider new evidence.* Veg-Mix also argues that the judicial officer should have granted its request to reopen the proceedings to consider new evidence. This consisted of an affidavit from Gary Syracuse relating to the earliest transactions at issue, in which Veg-Mix was alleged to owe \$12,360.70 to Syracuse and Jenkins Produce, Inc. The affidavit said that the amounts shown on the invoices from February and March 1983 were in dispute until May 1983. Veg-Mix concedes that exoneration on these transactions would not render its violations *de minimis*, Brief for Petitioner at 39, but argues that the evidence casts doubt on the validity of the other invoices and may exculpate some of the "responsibly connected" parties.

In rejecting these arguments, the judicial officer relied on the agency's rule on petitions to reopen hearings, which requires that such petitions be

³7 C.F.R. § 1.145(i) (1987) provides in part:

If the Judicial Officer decides that no change or modification of the [ALJ's] decision is warranted, the Judicial Officer may adopt the [ALJ'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. We note with some surprise that agency counsel failed to direct our attention to this regulation.

filed "prior to the issuance of the decision by the Judicial Officer." 7 C.F.R. § 1.146(a)(2) (1987). Veg-Mix did not meet that deadline.

Veg-Mix argues that this rule does not apply: given the summary judgment, there was no "hearing" to reopen. We think the agency could properly read the rule as applying to summary proceedings. No regulation specifically addresses the subject of petitions to reopen summary proceedings. To adopt Veg-Mix's view might mean either that *no reopenings* of summary proceedings were permitted or that there are *no limitations* on petitions to reopen. Neither of these outcomes would be sensible. On the other hand, the limitations provided in § 1.146(a)(2)--requirements that the petitioner raise the matter of new evidence before a final decision has issued, show why such evidence is significant, and give a good reason for late filing--make quite as much sense in a challenge to a summary proceeding as in a challenge to a hearing.

The application of the rule here clearly was not unfair. Veg-Mix had some four months to gather evidence before the deadline to respond to the agency's motion for decision before the ALJ, and about two more months before the judicial officer's decision. It has not provided any explanation for its failure to offer the Syracuse affidavit sooner. We do not think the judicial officer erred in refusing to accept the evidence.

We nevertheless remand the case for a single factual determination. As developed in the next part, only the Syracuse and Jenkins transactions occurred before the end of petitioner Harris's association with Veg-Mix. Instead of evaluating these few transactions ourselves to determine whether standing alone they qualify as "flagrant or repeated" violations, we return the issue to the agency. See *Securities and Exchange Commission v. Chenery*, 318 U.S. 80 (1943). As we understand the relevant regulations, the agency is not barred from considering the untimely evidence drawing the status of the Syracuse and Jenkins transactions in question, and it may well wish to do so.⁴

⁴Counsel for the agency has suggested in a footnote unaccompanied by record authority that "the seeds of injury were inevitably planted during . . . Harris' tenure in office as a director." Brief for Respondents in Nos. 86-1201 and 86-1202 at 19 n. 10. We fail to see the inevitability; this statement is *pre ipse dixit*. It strikes us as unlikely, moreover, that the definition of responsibly connected could stretch far enough to include connection to and enterprise that will one day become a PACA violator.

III. CLAIMS OF KUZZENS AND HARRIS

PACA is relatively clearcut in identifying the persons subject to sanction because of their link to a PACA violator. Under 7 U.S.C. § 499a(9), "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." As previously noted, the agency alleged that Charles M. Harris, Wayne M.D. Press, as directors and Kuzzens, Inc., as a 60 percent shareholder, were responsibly connected to Veg-Mix. After a joint hearing, the presiding officer issued three separate opinions, finding that Harris and Kuzzens were responsibly connected but that Press was not.

Harris and Kuzzens, Inc., challenge the adverse findings on the grounds that piercing the corporate veil was appropriate in these circumstances. We reject these claims. They also invoke prior decisions of this court tightening the requirements for a finding of responsible connection, but we find those decisions inapplicable here. We therefore conclude that Kuzzens was responsibly connected, as owner of 60 percent of Veg-Mix's stock. But as Harris resigned as a director of Veg-Mix prior to the bulk of the transactions at issue, we remand his case for further consideration.

A. *Veg-Mix's Legal Status*

Harris and Kuzzens assert that under *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975) (Robinson, J.), the agency was obliged to pierce the corporate veil of Veg-Mix and exonerate them. In *Quinn*, the court indicated a willingness to engage in veil piercing when necessary to prevent injustice to a mere employee of a PACA violator. No sensible reading of *Quinn*, will aid petitioners. Cf. *Martino v. Department of Agric.*, 801 F.2d 1410, 1414 n. 46 (D.C. Cir. 1986) (Robinson, J.) ("*Quinn* required no more than that petitioners receive 'an opportunity to show that the company was not in truth a corporation within the objective that Congress contemplated.'") (quoting *Quinn*, 510 F.2d at 760). *Quinn* involved an employee of a sole proprietorship who was asked by the owner to become a vice president when the owner converted the business to a corporation. The employee's officership was purely nominal; it was conferred by the owner to meet a state corporation law requirement and involved no change in duties. The original proprietor continued to have exclusive control of the business.

Kuzzens, Inc., by contrast, was a majority shareholder of Veg-Mix, not a

powerless employee. There is no injustice analogous to that in *Quinn* in holding such a party accountable for PACA violations. As for Harris, he was a lawyer by training, and thus presumably aware of the responsibilities of corporate directors. He accepted a directorship in Veg-Mix and even helped in the preparation of the corporate documents. Unlike the employee in *Quinn*, he was not directly or indirectly accountable to the proprietor of the transgressing business. In short, there is no indication that he was a helpless pawn who could not in good conscience be held accountable as a bona fide director. Thus we do not think that the presiding officer erred in refusing to apply *Quinn*.⁵

B. *The Evidence of Responsible Connection*

Our decisions have read § 499a(9) as establishing only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected. *Quinn*, 50 F.2d at 756; *Minotto v. Department of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983). The *Quinn* court suggested that one who was an officer "only on paper" and both "unaware of the wrongdoing [and] powerless to curb it," 510 F.2d at 755, could not be held

⁵Petitioners also argue that there is some uncertainty as to Veg-Mix's corporate status under Florida law. That law requires a corporation to have the number of initial directors fixed by the articles of incorporation, Fla. Stat. Ann. § 607.114(1) (West 1976), in this case three, J.A. B-343-44. Petitioners allege that Press never became a director, J.A. 368-69, and therefore that Veg-Mix never came into being as a corporation.

Before the presiding officer, petitioners made no such claim, but rather asserted in their Proposed Findings of Fact that "Veg-Mix was a Florida corporation. . . ." J.A. B-406. They did raise the contention in their petition for administrative review, J.A. B-469, but the judicial officer did not address the matter, perhaps relying on 7 C.F.R. § 1.141(g)(2)(ii) (1987) (requiring objection below). Jurisdictional objections aside, petitioners' argument avails Kuzzens nothing, for in default of corporate form Veg-Mix would be either a partnership (of which it would be a partner) or an association (of which it would be a shareholder within the meaning of 7 U.S.C. § 499a(9)). Invocation of the defect by Harris encounters Florida's provision that no "persons acting as a corporation shall be permitted to set up the lack of legal organization as a defense to an action against them as a corporation." Fla. Stat. Ann. § 607.401 (West 1976). While perhaps not directly in point, it suggests that one who acts as incorporator (as Harris did) could not, to escape any obligations arising out of the corporate form, invoke the corporation's failure to secure the acceptance of a directorship by a person named as a director in the articles of incorporation. See also *id.* § 607.397 ("All persons who assume to act as a corporation without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.").

responsibly connected under PACA. The court required the agency to consider the issue at a hearing. Similarly, in *Minotto*, the court found that a clerical employee designated as a corporate director was not automatically responsibly connected under PACA. The court articulated a loose fault concept, saying that "[a] finding of liability under section 499h of the Act must be premised upon personal fault or the failure to 'counteract or obviate the fault of others.'" *Id.* at 408 (quoting *Quinn*, 510 F.2d at 756).⁶

We apply the standard of these cases, but find it unavailing for Kuzzens and unnecessary for Harris.

2. *Kuzzens, Inc.* The analogy to *Quinn* and *Minotto* is weakest here. Neither case involved shareholders, although *Minotto* suggests in dictum that the same rule applies to them. 711 F.2d at 408. In any event, a majority shareholder, such as Kuzzens, can hardly be viewed as powerless to control delinquent management, as the petitioners in *Quinn* and *Minotto* arguably were. As we indicated in *Martino v. Department of Agric.* 801 F.2d 1410, 1414 (D.C. Cir. 1986), the crucial inquiry is whether an individual has an "actual, significant nexus with the violating company," rather than whether the individual has exercised real authority. In *Martino*, we found that ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection. Majority ownership obviously suffices.

Apart from its reliance on *Quinn* and *Minotto*, Kuzzens argues that it either was never a stockholder or sold its interest before the majority of the transactions at issue. Neither of these contentions withstands analysis.

In arguing that it never became a shareholder, Kuzzens states that no executed stock certificate was issued to it. We are puzzled by this contention. A stock certificate for twelve shares of Veg-Mix, Inc., issued to Kuzzens, Inc., is part of this record. Even if there is some technical inadequacy in the certificate, on the facts here it would matter little, since the preincorporation agreement and bankruptcy pleadings both list Kuzzens as 60 percent

⁶Other circuits have read § 499a(9) as establishing a *per se* rule of accountability for officers, directors, and major stockholders of PACA violators. *Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966). See also *Steinberg & Son v. Butz*, 491 F.2d 988, 992, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir.) (noting that the sanctions desired by Congress according to § 499h(b) "could be harsh in some cases." but finding the *per se* approach constitutionally valid). *cert. denied*, 389 U.S. 835 (1967). The court in *Pupillo*, 755 F.2d at 644, explicitly criticized our analysis in *Quinn* and *Minotto* as "run[ning] afoul of Congressional intent."

shareholder, and the former clearly recites the consideration of \$12,000. Moreover, one can be a shareholder without a stock certificate having been physically issued. 11 L. Zajdel, *Fletcher Cyclopedia of the Law of Private Corporations* § 5094 (1986). Substantial evidence thus supports the finding that Kuzzens was a 60 percent shareholder.

Kuzzens is more energetic, but no more persuasive, in arguing that it sold its interest to Watkins in late March 1983, before most of the offending transactions took place. William Lipman, vice-president of Kuzzens, testified that he agreed to sell Kuzzens's interest to Watkins, but said that this agreement was never reduced to a writing. Under Florida law a contract for a sale of securities is generally unenforceable unless it is in writing and signed by the party against whom enforcement is sought. Fla. Stat. Ann. § 678.8-319 (West 1966). No claim is made that any exception to the Florida Statute of Frauds applies, and, even if the contract were binding, Kuzzens regarded it as executory throughout the relevant transactions here. When it was discovered in October 1983 that Watkins was writing checks for his personal purposes on Veg-Mix's account, Lipman directed employees of Six-L's (an enterprise with some of the same management and the same office space as Kuzzens) to protect Veg-Mix's assets. When an attorney for Watkins sought corporate documents from Kuzzens, Geoffrey Fradin (a Six-L's employee) refused to turn them over, stating that he would not do so until the purchase price was paid. J.A. B-145-46. Finally, Kuzzens is listed as a shareholder on the bankruptcy petition. Substantial evidence supports the finding that there was no completed sale.⁷

2. *Harris*. Harris likewise argues that his association with Veg-Mix was merely nominal, and thus insufficient to support a finding of responsible connection under *Quinn* and *Minotto*. Harris is a lawyer by training. William Lipman selected him as a director of Veg-Mix and secured his help in drafting the Veg-Mix articles of incorporation. These named him as a director, along with Watkins and Press. His legal training put him on notice of the responsibilities of a corporate director. If he was aware of the preincorporation agreement, he would have recognized that it left Watkin's authority subject to the directors' review; if not, then he ought to have assumed the usual. See Fla. Stat. Ann. § 607.111(4), (6) (West 1976). He was under no obligation to Watkins; rather he was employed by Six-L's. Thus his case is easily distinguishable from those of the nominal officer and corporate

⁷See *Minotto*, 711 F.2d at 407 n. 3 (finding substantial evidence test applicable).

director in *Quinn* and *Minotto*, who were unsophisticated persons employed by the wrongdoers. Cf. *Martino*, 801 F.2d at 1414 (contrasting the enticement or coercion present in *Quinn* and *Minotto* with voluntary assumption of stock ownership or a responsible position in the violating company). Although there is language in those cases suggesting that liability under PACA should be premised on personal fault, they also indicate that realistic capacity to counteract the fault of others will also suffice. *Quinn*, 510 F.2d at 756 & n. 84; *Minotto*, 711 F.2d at 408.

Harris also argues that he resigned as a director at Watkin's request shortly after the sales agreement, in late March or early April 1983. The presiding officer rejected this argument, relying mainly on Harris's conduct and statements after he purported to resign. We find here that substantial evidence does not support the officer's conclusion.

Harris testified that he and Press tendered their resignations as directors to Watkins in late March 1983. Watkins responded by saying that he would get Harris and Press "off the books." J.A. B-216-17. Harris's testimony was uncontroverted. It was also corroborated by Wayne Press, who attended the same meeting and resigned at the same time. J.A. B-165. There is no specific credibility determination concerning Harris, but there is absolutely no indication that the presiding officer did not credit Harris's account of the meeting. Indeed, in the separate decision finding Press not to be responsibly connected, the presiding officer invoked Harris's testimony to support Press's account, suggesting that he found both Harris and Press to be credible witnesses. J.A. B-386.

Furthermore, the presiding officer's discussion of the need for formal removal, though expressing legally erroneous views, reflects his acceptance of Harris's testimony. He stated, "There is nothing in the record to show that Watkins fulfilled his commitment to buy the firm or have Petitioner removed as director." J.A. B-307. The officer's objection here is plainly not to the testimony. He regarded either the failure of Watkins to fulfill his commitment, or of Harris to resign in writing, as somehow rendering the resignation ineffective. But a director's resignation ordinarily need not be in writing. 2 C. Scotti, *Fletcher Cyclopedia of the Law of Private Corporations* § 346 (1982). It certainly does not ordinarily require the approval of another director. See *id.* § 347 (no acceptance of a director's resignation is necessary). Nothing in Veg-Mix's articles of incorporation or in the

preincorporation agreement modified the usual rules.⁸

The presiding officer laid considerable weight on Harris's role in the efforts to protect Veg-Mix from Watkin's piracy. In October 1983 Paula Berry, Veg-Mix's bookkeeper and at the time its only employee, discovered that Watkins was drawing checks on its account for his personal purposes. She called Carlos Bustabad, the comptroller for Six L's, who in turn alerted Lipman. After discussing it with an attorney, Lipman told Bustabad and Fradin to try to stop the looting. They spoke to the bank, which agreed to cooperate, but only on the condition that Veg-Mix's directors sign a resolution. J.A. B-150-52. The Kuzzens officials sent resolution forms authorizing new check-signing procedures to Press and Harris for their signatures. Both signed such forms, despite their earlier resignations.

The presiding officer took this act (and the appearance of Harris's name on the bankruptcy petition) as showing that he had continued as a director. He quoted at length from a letter written by Harris to his attorney as follows:

After these facts had become evident, I was then made aware that my name may never have been formally removed as Director (i.e., writing) notwithstanding my oral resignation at the prior Director's meeting. It was at this point I sought legal counsel and he advised me that since Watkins had disappeared, there might be a moral obligation to preserve whatever assets could be located. He instructed me to see that this was done and I did just that.

Our method was to revoke any oral resignation since it was not in writing and Watkins was not present to verify that my resignation had been formally accepted. I was further advised to take steps to bring the corporation under the protection of the bankruptcy court by participating in the bankruptcy proceedings.

The presiding officer failed to make clear exactly what inference he drew from this letter, but counsel for the agency suggests that it shows that Harris questioned the validity of his own resignation. Brief for Respondent in 86-1201 and 86-1202 at 47. We agree that it shows uncertainty on Harris's part as to his status. But far from undermining his claims, the letter in the main

⁸The government argues that the preincorporation agreement's requirement that "[a]ny and all notices between the parties hereto provided for or permitted under this Agreement or by law shall be in writing" binds Harris. Brief for Respondents in 86-1201 and 86-1202 at 47. The only parties to the agreement, however, were Watkins and Kuzzens. J.A. B-331.

supports them. Obviously, Harris's legal notions do not determine the legal effect of his oral resignation. Similarly, his supposition that he could revoke his resignation would not make it so. See Fla. Stat. Ann. § 607.114(3), (6) (West 1976) (shareholders to elect directors except in certain limited cases); see also 2 C. Scotti, *supra*, at § 285 (same). The evidence strongly indicates that he made an effective resignation. His letter is completely consistent with his testimony describing his resignation.

The letter is also consistent with the testimony of Press. Indeed, the participation of Press in the affairs of Veg-Mix was in most respects identical to that of Harris. Each acted to keep Watkins from wrongfully withdrawing funds, signing documents representing himself as a director for the bank; the names of both appeared on the bankruptcy petition. Although Harris knew about his directorship sooner than Press, their activity affecting Veg-Mix after the resignation was almost identical. It made no sense for the presiding officer to find that Harris's signing of banking resolutions showed that he was a director, while Press's signing did not prove the same for him.⁹

In sum, we find that substantial evidence supports the finding that Harris was initially a director of Veg-Mix, but not the finding that he continued to be a director (or responsibly connected person) after his resignation. At the time of the resignation, only a few of the transactions had taken place - the ones with Syracuse & Jenkins. Both because of their quantity and the newly offered evidence that they were open to legitimate dispute at the time, there is reason to doubt that they constitute repeated or flagrant transactions for purposes of § 499h(a). If they do not, then Harris would face no penalties as a responsibly connected person. We therefore remand Harris's case to await the agency's decision in Veg-Mix.

So ordered.

MIKVA, Circuit Judge, dissenting in part and concurring in part:

I would affirm all three of these connected cases rather than remand the Veg-Mix and Harris decisions for further proceedings by the Secretary of

⁹It is also worth noting that Bustabad and Fradin posed as Veg-Mix officers. This was apparently the agency's basis for issuing them preliminary notification of responsible connection liability. Bustabad's participation in Veg-Mix appears to have been more active than either Press or Harris - he organized the bank change and perhaps the bankruptcy petition - but he was determined not to be a responsibly connected person prior to the hearing. Fradin similarly participated in these affairs and was dropped from the proceedings.

Agriculture under the Perishable Agricultural Commodities Act ("PACA"). The record fully supports the Secretary's conclusion that Mr. Harris was "responsibly connected" with Veg-Mix during the entire period of its "flagrant" and "repeated" misconduct. In deciding that the Secretary's determination on this point is not supported by substantial evidence, this Court indulges in an excessively intrusive and picayune review of the factfinder's decision and arrogates to itself the role assigned to the administrator. By remanding for an evaluation of whether transactions predating Harris' alleged resignation as a Veg-Mix director constitute a course of "flagrant or repeated" misconduct in violation of PACA, we invite the very full-scale hearing which the majority itself concedes was properly denied under PACA.

PACA accords sellers of perishable fruits and vegetables some very special protection against non-payment. Merchants in these commodities must be licensed, and the Act allows the Secretary of Agriculture to revoke the licenses of merchants whose offenses are "flagrant or repeated." Persons "responsibly connected" to merchants who so violated the Act can be barred from holding a license or working for a licensee for specified periods.

The majority agrees with the hearing officer's determination, which was affirmed by the agricultural marketing administrator and adopted by the Secretary, that the violations of PACA by Veg-Mix were "flagrant" and "repeated" in nature. The Secretary additionally affirmed the findings that appellants Kuzzens, Inc. and Harris were "responsibly connected" with Veg-Mix throughout the relevant period. On review, the majority acknowledges that Kuzzens was responsibly connected with Veg-Mix, but weaves a convoluted and tortuous doubt about whether Harris was appropriately found to be responsibly connected with Veg-Mix during the period in question. The record and the decision of the presiding officer make this doubt unreasonable.

Harris, a lawyer and family member of the dynastic financial sponsor of Veg-Mix and Kuzzens, Inc., drew the original articles of incorporation for Veg-Mix. Harris inserted himself as one of three directors (as well as the registered agent) of the corporation. The preincorporation agreement and the bylaws of Veg-Mix provided that the day-to-day affairs would be managed by the disappeared culprit, Watkins, subject to "periodic review" by the board of directors.

The disposition of this case turns on whether Harris continued as a director of Veg-Mix throughout its short and unhappy life. Harris claimed that he orally resigned as director in late March or April of 1983, after at least some of the delayed payment purchases were made by Veg-Mix. The

presiding officer obviously found nothing in the record to conclusively confirm Harris's resignation and he noted that the particular actions Harris took subsequent to his alleged oral resignation contradicted his testimony. These actions included signing bank resolutions and bankruptcy petitions as a director. Accordingly, the Secretary specifically held that "[t]he record fully supports the conclusion that petitioner (Harris) was appointed a director of Veg-Mix, Inc. and he remained a director during the business span in question." I think it can be reasonably concluded, therefore, that he did not believe Harris' version of events.

The majority boldly pries into the factfinder's reasoning process and faults him for not explicitly stating that Harris was not credible. From this omission it is inferred that the presiding officer believed Harris' story about the oral resignation as director, thereby undermining the fact-finder's own conclusion. The majority even suggests that the hearing officer must have found Harris a credible witness here, since he cited a corroborating statement by Harris in a related proceeding.

However, it is simply not our place to lay down a rule of "once credible, always credible" when certain witness statements were contradicted by a course of conduct, and greater weight was justifiably placed on the latter. The fact-finder need not make every step of his reasoning explicit in order to insulate his conclusions from this kind of high-handed judicial revisionism. I have never understood our reviewing process to include a course in opinion-writing for Article II officials. I have no doubt that such a course might be helpful, just as it might help those of us laboring as Article III officials. The test, however, is not whether the opinion is well-written but whether it meets the requirements of reasoned decision-making when reviewed under an "arbitrary and capricious" standard. While the reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). The administrative adjudicator is only required "to state findings of fact and reasons to support its decision . . . [that] must be sufficient to reflect a considered response to the evidence and contentions of the losing party." *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). It certainly cannot be said here that the Secretary failed to "articulate any rational connection between the facts found and the choice made," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), or that the agency offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view." *Motor Vehicle Mrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1982).

It is hardly doubtful that the opinion of the Secretary can be matched with his duties under the Act. He found "repeated" and "flagrant" violations of PACA by Veg-Mix. There is ample evidence to sustain that finding. He found Harris to be "responsibly connected" with Veg-Mix during the entire period in question. There is ample evidence to sustain that finding. That ought to be the end of our review.

The Supreme Court has advised, admonished, and instructed us as reviewing courts not to try to assume the role that Congress ordained for administrators. When reviewing the record, as in *SEC v. Chenery Corp.*, 318 U.S. 80 (1942), or addressing agency choice of procedure, see *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978), or scrutinizing agency statutory interpretation, see *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1983), the Court has repeatedly exhorted us to remember the limited nature of our review. We neither teach nor supervise administrators in their administrative capacities. Our review must be cabined to those tasks which preserve the primacy of the administrators as the fact-finding, interpretive, and enforcement officials under the statutes creating their distinctive role.

The instant case represents a classic example of overreaching the modest review tasks assigned to us under statute. Had Congress wanted the courts to play a more active role in carrying out the statutory mission, it could have made these violations of PACA criminal offenses. Instead, Congress provided for civil sanctions and knowingly chose the machinery of administrative law. We ought to respect that choice and resist the temptation to teach the administrators how to write opinions, or how to order their reasoning.

**ANITA KAPLAN v. UNITED STATES DEPARTMENT OF AGRICULTURE
and UNITED STATES OF AMERICA.**

No. 87-1176.

Decided July 22, 1988.

Responsibly connected - Substantial evidence - Rebuttable presumption.

The United States Court of Appeals for the District of Columbia Circuit denied Petitioner's petition for review, finding that substantial evidence supported the Secretary's determination that Petitioners were responsibly connected to a company found to have violated the Perishable

Agricultural Commodities Act. Under PACA, the rule of responsible connection is rebuttable rather than absolute. Petitioners failed to produce evidence to rebut the presumption of responsible connection.

Before GINSBURG, STARR and WILLIAMS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

JUDGMENT

This case was considered on the record and on briefs filed by the parties on petitions for review of Orders of the United States Department of Agriculture. The court had determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). Subsequently for the reasons indicated in the Presiding Officer's decisions, *In re Anita Kaplan*, PACA RC 85-1008, filed September 29, 1986, and *In re Milton Kaplan*, PACA RC 85-1009, filed September 25, 1986, and in the accompanying memorandum, it is

ORDERED and ADJUDGED that the petitions for review be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam¹

MEMORANDUM

Petitioners Anita and Milton Kaplan seek review of two final orders of the United States Department of Agriculture ("USDA"), declaring them persons "responsibly connected" to Kaplan's Fruit & Produce Co., Inc. ("KFP") during the five-month period in which KFP was found to be in violation of the

¹Rule 11(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit provides that "[u]npublished orders or judgments, including explanatory memoranda and sealed opinions, of this Court are not to be cited as precedents." Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a *et seq.* (1982 & Supp. IV 1986). The court is satisfied that substantial evidence in the record supports the findings and conclusions of the Presiding Officer regarding petitioners' "responsibly connected" status. See 7 U.S.C. § 499a(9); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 612 n.7 (D.C. Cir. 1987); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 407 n.3 (D.C. Cir. 1983).

Under PACA, the rule of "responsibl[e] connect[ion] . . . is rebuttable" rather than absolute. *Quinn v. Butz*, 510 F.2d 743, 756 & n.84 (D.C. Cir. 1975). Petitioners thus bore the burden of rebutting the presumption raised by the weight of the evidence in the record. They failed, however, to adduce any evidence, other than self-serving testimony, to rebut the presumption.

Indeed, there is ample support in the record relative to both Kaplans' continued involvement with KFP, even after Frangipani had obtained practical control of the company. The existence of various telltale corporate records (e.g., PACA licensing documents, KFP checks, the Memorandum of Intent and the amendment thereto) undercuts petitioners' disavowal of responsibility. Moreover, the Kaplans' continued course of dealing relative to KFP sales, shareholding and officer responsibilities also undermines their position and further buttresses the conclusion as to their "actual, significant nexus with the violating company." See *Veg-Mix, Inc.*, 832 F.2d at 611; *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986).

As there is no reason to disturb the agency's final orders, we deny the petitions for review.

TONY HUDLER v. SECRETARY OF AGRICULTURE and UNITED STATES OF AMERICA.

No. 93-4111.

Decided October 8, 1993.

Responsibly connected - Per se reading of statute.

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review, affirming the Secretary's decision that Petitioner was responsibly connected to a company found to have violated the Perishable Agricultural Commodities Act. "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 ten percent of the outstanding stock of a corporation or association. Proof that a person falls in one of the enumerated categories establishes that he is responsibly connected to the wrongdoing company.

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

PER CURIAM:*

I.

In late 1988 the Green Grove Citrus company failed to pay for fruit it ordered. On July 10, 1990, the director of the Fruit and Vegetable Division of the Agricultural Marketing Service filed an administrative complaint against the company. On August 6, 1990, the agency told Hudler that he might be "responsibly connected" to Green Grove and thus personally subject to sanctions. The agency issued an unopposed order finding that Green Grove had violated the Perishable Agricultural Commodities Act (PACA). A series of administrative appeals about Hudler's status ensued, culminating in a decision by the Administrator of the Agricultural Marketing Service on December 7, 1992 that Hudler was "responsibly connected" to Green Grove.

II.

PACA allows regulators to deny work in the interstate agriculture commodity market to persons "responsibly connected" to an organization making a "flagrant or repeated violation" of the statute. *See* 7 U.S.C. § 499h(b)(2). "Responsibly connected" means:

affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

7 U.S.C. § 499a(b)(9). This court joins the Second, Third, and Eighth Circuits in using a "per se" reading of the statute. *Faour v. United States Dep't of*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Agric., 985 F.2d 217, 221 (5th Cir. 1993). Proof that a person falls in one of the three categories enumerated in (B) establishes that he was "responsibly connected" to the wrongdoing company. An agency's determination of "responsibl[e] connection" is upheld if supported by substantial evidence. *Id.* at 219.

At least two pieces of evidence support the agency's conclusion. First, on September 22, 1988 Hudler signed an assignment as:

/s/Tony Hudler Pres.
Green Grove Citrus, Inc.

Hudler countered in the agency hearing that he was signing as president of the Val-Mex Fruit Company. Since the document on its face counters his testimony, the agency did not lack substantial evidence for its decision. *See Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982) ("If the evidence of record is such that it supports inconsistent inferences and conclusions, the courts must defer to administrative choice." (citing *Illinois Central R.R. v. Norfolk & Western Ry. Co.*, 385 U.S. 57, 69 (1966))).

Second, Hudler declared four times in Green Grove's bankruptcy petition, filed January 27, 1989, that he was its president. Hudler counters that "the presumption of continuity" makes this evidence irrelevant. He contends that:

As a general rule, mere proof of the evidence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward. 31A C.J.S. *Evidence* § 140 (1964), pp. 305-306.

The argument continues that the petition proves only that Hudler was president in 1989, and the presumption of continuity blocks any inference back in time that he was president before that.

This argument is weak. This kind of evidentiary rule is designed to control juries and is of questionable relevance to the proceedings of an administrative agency. *See, e.g., Dirt, Inc. v. Mobile County Comm'n*, 739 F.2d 1562, 1566 (11th Cir. 1984); *People v. ICC*, 722 F.2d 1341, 349 (7th Cir. 1983). Further, the assignment Hudler signed as president predates Green Grove's activities of 1988, so even if the presumption has effect it does not do enough for

Hudler.

III.

Hudler also argues that the agency's finding should be set aside as arbitrary and capricious even if it is supported by substantial evidence, as the facts found do not match the decision it reached. *See Bowman Transp. Co. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). On its face this argument is flawed, as the fact the agency found (Hudler is president) is the same as the decision it reached (Hudler is president).

Hudler appears to be arguing that the agency acted arbitrarily by sending him a letter on June 26, 1991. That letter referred to the articles of incorporation, which do not say anything about who the officers of Green Grove are, as one of the sources the agency relied on in deciding to investigate his connection to Green Grove. However, the letter makes clear that the agency is contacting him because his signature appeared on Green Grove's bankruptcy petition. Furthermore, there is a distinction between the decision to send a letter out to Hudler and the ultimate decision the agency reached about his status. The initial letter is a notice of the beginning of an inquiry. This kind of housekeeping decision is due deference. *See Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958) (per curiam).

IV.

Hudler argues that it was arbitrary and capricious for the agency to find that Robert Barnes, his co-owner in Green Grove's parent company, was not responsibly connected with Green Grove while he was. This argument lacks merit.

Assuming that the events in the Barnes proceeding do amount to a decision to prosecute one co-owner and not the other, the agency's decision is protected by *Heckler v. Chaney*, 105 S. Ct. 1649, 1659 (1985). Hudler is unable to maintain that the agency exceeded any regulations setting guidelines for the exercise of its authority.

We deny the petition for review and affirm the order of the Secretary.
Petition denied and order affirmed.

**GARY C. BAKER v. UNITED STATES DEPARTMENT OF AGRICULTURE,
ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, ET AL.**

No. 93-9128.

Decided July 26, 1994.

Exhaustion of administrative remedies - Denial of injunctive relief - Abuse of discretion.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of Appellant's request for injunctive relief in connection with an administrative proceeding charging him with misconduct in the performance of his job. The issue before the Fifth Circuit was the request for discovery and other injunctive relief relating to a pending and incomplete administrative proceeding. The court determined that the district court did not abuse its discretion by denying injunctive relief to the Appellant because administrative remedies had not yet been exhausted. Parties are required generally to exhaust administrative remedies before seeking relief from the federal courts.

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

PER CURIAM:*

This appeal challenges the decision of the district court denying injunctive relief sought by appellant Gary C. Baker in connection with an administrative proceeding charging him with misconduct in the performance of his job. Having determined that the district court properly dismissed Baker's claims, we **AFFIRM**.

I.

Baker was previously employed by Goodman Produce Co. This company was the subject of a disciplinary complaint filed by the Agriculture Marketing Service alleging wilful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a, *et seq.* In connection with the proceedings against Goodman, Baker was advised in April

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1992 that his employment within the produce industry could be restricted if the Secretary of Agriculture determined that he engaged in violation of PACA and was "responsibly connected" with Goodman at any relevant time. After Baker was given an opportunity to provide information, he was determined in December 1992 to be responsibly connected with Goodman. Baker sought review and the matter was assigned to a hearing officer who advised Baker, by letter dated June 22, 1993, that a hearing would be held on October 5, 1993, to determine whether he was a "responsibly connected" person.

By letter dated September 15, 1993, Baker's counsel requested that certain subpoenas duces tecum be issued for the October 5 hearing. The defendants promptly advised Baker's counsel that the issuance of such subpoenas was not authorized. Thereafter, on October 4, 1993, Baker initiated this action seeking a temporary restraining order, and temporary and permanent injunctions enjoining the defendants from holding the October 5 hearing. Baker further requested the district court to enter an order allowing him to take discovery for the administrative hearing.¹

Baker's motion for a temporary restraining order was heard by the district court on October 5, 1993. In denying the request to restrain the administrative hearing set for the same day, the district court questioned why Baker had not pursued other forms of discovery since the dispute first arose in April 1992. At a subsequent hearing before the district court, Baker withdrew the request for preliminary and permanent injunctive relief as moot. Following that hearing, the district court denied the request for discovery, stating that Baker's complaints must be addressed to the Fifth Circuit in an appeal of the agency's final order. Baker timely appealed the district court's order denying his requested relief.

II.

The only issue before this court is a request for discovery and other injunctive relief relating to a pending and incomplete administrative proceeding. We review the denial of injunctive relief for abuse of discretion. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981). We, therefore,

¹Specifically, Baker requested the district court to issue subpoenas and subpoenas duces tecum or, alternatively, to order the Secretary of Agriculture to promulgate regulations providing for depositions and subpoenas in the rules applicable to the administrative hearing or, alternatively, to order the Secretary of Agriculture to designate a person to sign and issue subpoenas for the hearing.

must determine whether the district court abused its discretion in denying the injunctive relief that Baker sought. As a general rule, parties are required to exhaust administrative remedies before seeking relief from the federal courts. *McCarthy v. Madigan*, 112 S. Ct. 1081, 1086 (1992). Although there are exceptions to this rule, it is not clear from the record that the applicability of any exception was raised before the district court. Accordingly, we cannot conclude that the district court abused its discretion in denying injunctive relief under these circumstances.² We, therefore, AFFIRM the district court's denial of Baker's request for injunctive relief.

III.

For the foregoing reasons, the judgment is AFFIRMED.

JOHN J. CONFORTI, d/b/a C & C PRODUCE v. UNITED STATES OF AMERICA.

No. 95-1735.

Decided January 18, 1996¹

(Cite as: 74 F.3d 838)

Employment restrictions - "Responsibly connected" employee - Official notice - Good faith effort to secure bond not sufficient - Reduction of sanction.

The United States Court of Appeals for the Eighth Circuit affirmed the Secretary's decision sanctioning Petitioner for violating the employment restrictions in PACA by employing a "responsibly connected" person. PACA prohibits licensees from employing individuals "responsibly connected" to a company that has failed to satisfy USDA reparation orders. Petitioner contended that the Judicial Officer improperly took official notice of ALJ's opinion to conclude that employee was "responsibly connected." The Judicial Officer may take official notice of "relevant publications and records of the department." An officer, director, or holder

²We also note that Baker had known since June 1993 that he would have a hearing on October 5 and yet he waited until September 15 to request subpoenas for that hearing. Moreover, he waited from September 17 until October 4 to seek injunctive relief from the district court.

¹This decision revises and supersedes the opinion printed at 69 F.3d 897 and 54 Agric. Dec. 1212.

of more than ten percent of the outstanding stock of a corporation is "responsibly connected" to that corporation. Petitioner further alleged that he did not violate PACA because he made a good faith effort to obtain a bond, and USDA led him to believe that he could continue to employ a "responsibly connected" person while searching for a bond. The Eighth Circuit held that such good faith efforts could not excuse Petitioner's failure to fire the "responsibly connected" employee. The court reversed the Judicial Officer's imposition of a 90-day suspension as being unjustified by the facts and an abuse of discretion and reinstated the ALJ's 30-day license suspension.

Before WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

**UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

MORRIS SHEPPARD ARNOLD, Circuit Judge:

John Conforti appeals the Secretary of Agriculture's decision sanctioning him for violating the employment restrictions in the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499h(b) (1980) ("PACA"). We uphold the Secretary's determination that Conforti violated PACA, but modify the penalty that the Secretary imposed.

I.

PACA was enacted to protect produce growers "from the 'sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities.'" *In re Lombardo Fruit & Produce Co.*, 12 F.3d 110, 112 (8th Cir. 1993) (quoting *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 780 (8th Cir. 1991)). PACA requires wholesale produce dealers to obtain a license from the United States Department of Agriculture ("USDA"), 7 U.S.C. § 499c(a), and prohibits licensees from employing individuals "responsibly connected" to a company that has failed to satisfy USDA reparation orders. *Id.* § 499h(b)(3). Under the statute, a person is responsibly connected to a company if he serves as a partner, officer, or director of it, or if he holds more than 10 percent of its outstanding stock. *Id.* §§ 499a(b)(9).

Conforti operates C & C Produce, a licensed produce dealership. In June, 1993, Conforti hired Joseph Cali, his life-long friend, to work for C & C Produce. On June 24, 1993, Conforti received a letter from the USDA informing him that Cali was responsibly connected to Royal Fruit, a company with several outstanding reparation orders. The letter indicated that Conforti could not employ Cali after July 24, 1993, unless he posted a bond that was

later set at \$100,000.

Conforti then tried to obtain a bond. He first asked his insurance company for one, but it required full collateralization. He next applied for a line of credit at United Missouri Bank ("UMB") to collateralize the bond, but learned that approval would take three months. Conforti then decided to post \$100,000 of his own funds to guarantee the line of credit. UMB initially approved the transaction, but changed its mind after the USDA advised the loan officer that Conforti's license was going to be revoked. In November, Conforti secured a line of credit at a different bank, but when he learned that the insurance company charged an additional \$15,000 fee to issue the bond, he "threw up his hands" and abandoned his efforts.

Conforti did not fire Cali on July 24 as instructed; he did not finally fire him until November 19, 1993, after he gave up his search for a bond. In the interim, the USDA warned Conforti at least five times that Cali's continued employment could result in the suspension or revocation of his PACA license.

Three months after he fired Cali, the USDA filed a complaint seeking to revoke Conforti's PACA license. The Administrative Law Judge ("ALJ") found that Conforti had violated PACA and suspended his license for thirty days. The USDA appealed to the Judicial Officer ("JO"), who affirmed the ALJ's decision that Conforti violated PACA but increased the suspension to 90 days. The JO's decision is the final decision of the Secretary of Agriculture. 7 C.F.R. § 2.35 (1993). Conforti petitioned this court to review the Secretary's order pursuant to 28 U.S.C. § 2342.

II.

Conforti first argues that the JO improperly found that Cali was responsibly connected to Royal Fruit. He contends first that the finding cannot stand in the absence of a predicate finding in a special hearing on the question of Cali's connection to Royal Fruit. We disagree. It is true that USDA regulations establish a procedure to challenge the USDA's "responsibly connected" designation. 7 C.F.R. §§ 47.48-47.63 (1993). This proceeding, however, commences after the USDA finds that a person is responsibly connected, *id.* § 47.49(a), and nothing in the statute indicates that PACA's employment restrictions take effect only after this proceeding is completed. The statute straightforwardly prohibits employing anyone who is a responsibly connected person as defined by PACA. 7 U.S.C. § 499h(b). Thus, if the record contains evidence that Cali was a partner, director, or officer in Royal Fruit, or held more than 10 percent of Royal Fruit's stock, his employment is

restricted and Conforti violated PACA by employing him. *Id.* § 499a(b)(9).

Conforti also maintains that even if a previous hearing under 7 C.F.R. §§ 47.48-47.63 was not required, the record lacks evidence indicating that Cali met PACA's definition of a responsibly connected individual. This argument is without merit. Prior to issuing his final order, the JO took official notice of an ALJ's opinion in *In re Midland Banana and Tomato Co.*, PACA Docket No. D-93-548, and *In re Royal Fruit*, PACA Docket No. D-93-549 (USDA 1994) ("*Royal Fruit*"). In *Royal Fruit*, the ALJ found that Cali was the President and a director of Royal Fruit and that he held 50 percent of the company's stock. Given these previous findings, we believe that the JO was justified in concluding that Cali was responsibly connected.

Conforti contends that the JO was not entitled to consider these previous findings because he improperly used the device of official notice. We find no error in the JO's procedure. USDA regulations allow the JO to take official notice of "such matters as are judicially noticed by the courts of the United States," 7 C.F.R. § 1.141(g)(6) (1993), and the USDA Rules of Practice permit the JO to consider "any matter of which official notice is taken." 7 C.F.R. § 1.145(i) (1993). We have held that "federal courts may *sua sponte* take judicial notice of proceedings in other courts if they relate directly to the matters at issue." *Hart v. Comm'r*, 730 F.2d 1206, 1207 n. 4 (8th Cir. 1984); see also *United States v. Jackson*, 640 F.2d 614, 617 (8th Cir. 1981). The JO also gave Conforti the required opportunity to object to the order taking official notice. 5 U.S.C. § 556(e).

Alternatively, Conforti contends that Cali is not responsibly connected because he played only a minor role in Royal Fruit. Conforti points to the ALJ's findings in *Royal Fruit* that Cali was by-and-large a "front man" and that Royal Fruit was actually the "alter ego" of Robert Heimann. Conforti argues that, under the doctrine adopted in *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975), Cali's nominal status in Royal Fruit merely raises a rebuttable presumption that he is responsibly connected.

The central difficulty that Conforti's argument encounters is that we specifically rejected it ten years ago. See *Pupillo v. United States*, 755 F.2d 638, 643 (8th Cir. 1985). We apply a *per se* rule: "Section 499a(9) [is] an irrebuttable statement that an officer, director, or holder of more than ten percent of the outstanding stock of a corporation is responsibly connected with that corporation or association." *Id.* Cali's actual responsibilities or interests in Royal Fruit are, therefore, irrelevant to the question of whether he was responsibly connected; because he was both an officer in the company and held 50 percent of its stock, he was responsibly connected as a matter of law.

Because we find that the JO's decision that Cali was a responsibly connected person is supported by substantial evidence, we affirm it. *Pupillo*, 755 F.2d at 643.

III.

Conforti also asserts that he did not violate PACA because he made a good faith effort to obtain a bond and because the USDA led him to believe that he could continue to employ Cali while he was searching for a bond. We see how Conforti could have gotten this impression from his communications with the USDA. Although the USDA initially told Conforti to obtain a bond or fire Cali by July 24, the USDA did not set the bond amount until July 16, leaving very little time before the deadline. Conforti then asked the USDA to reduce the bond; the USDA denied his request on August 9. The August 9 letter reiterated that Conforti needed either to obtain a bond or fire Cali, but it did not mention the July 24 deadline. On July 30, the USDA sent a letter asking Conforti whether he intended to fire Cali or to obtain a bond. Finally in November, after Conforti stopped looking for a bond, M.A. Clancy, the PACA Licensing Program Review Head, advised him that if he could not post a bond, he should fire Cali.

Conforti does not cite any authority to support his official estoppel argument, and we know of none. In point of fact, the Supreme Court has repeatedly indicated that an estoppel will rarely work against the government. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990). As the Court has noted, "When the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interests of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984). Therefore, in the absence of "affirmative misconduct" by the government, *INS v. Hibi*, 414 U.S. 5, 8 (1973), "not even the temptations of a hard case" like Conforti's justify applying an estoppel against the USDA. *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 386 (1947).

We strictly construe PACA's employment restriction, *see Hull Co. v. Hauser's Foods*, 924 F.2d 777, 782 (8th Cir. 1991); *Pupillo*, 755 F.2d at 643, and, as the D.C. Circuit has noted, the "employment bar is phrased as an absolute." *Siegel v. Lyng*, 851 F.2d 412, 415 (D.C. Cir. 1988); 7 U.S.C. § 499h(b) ("The Secretary may . . . 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."). Therefore, Conforti's good faith efforts, however

sincere, cannot excuse his failure to fire Cali.

IV.

After the Secretary determines that a licensee violated PACA's employment restrictions, he may suspend or revoke the license. 7 U.S.C. § 499h. Conforti argues that suspending his license for 90 days was unduly harsh. We review the Secretary's sanction for an abuse of discretion, affirming it unless it is "without justification in fact." *ABL Produce v. United States Dep't of Agric.*, 25 F.3d 641, 645 (8th Cir. 1994). Even under this deferential standard, we agree that a 90-day suspension was not justified by the facts. We therefore reverse the JO's sanction and reinstate the ALJ's 30-day license suspension.

In *ABL Produce*, 25 F.3d at 645, a license-holder challenged an order revoking his license for violating PACA's employment restrictions. We reversed the sanction and reinstated the 30-day suspension awarded by the ALJ because the JO failed to consider several "relevant factors," namely, whether the company's conduct threatens to undermine PACA's purposes, the circumstances of the violation, and the effect the sanction will have on the company. *Id.* at 646. We apply these considerations to the case at hand.

A.

The JO found that by employing Cali, Conforti threatened to undermine PACA's purposes. As we have already noted, PACA was designed to protect produce growers from "sharp" and "unscrupulous" practices of financially irresponsible brokers. *In re Lombardo Fruit & Produce Co.*, 12 F.3d at 112. Congress was particularly concerned about the risk of non-payment. *ABL Produce*, 25 F.3d at 646.

The record in this case is devoid of evidence that Conforti is in any way a threat to produce growers. C & C Produce is financially healthy, and Conforti's suppliers themselves characterized his payment practices and ethics as "exemplary." The JO disregarded this information, however, concluding that "Mr. Conforti's ethics, payment practices, complaints against C & C produce and the financial health of Mr. Conforti's company are irrelevant." Given the fact that PACA was intended to protect suppliers, we do not see how this kind of information can be characterized as irrelevant. The JO therefore erred when he refused to consider it.

The JO further found that employing Cali threatened the industry because

he was responsibly connected to Royal Fruit. As we have already said, however, Cali was simply a "front-man" who lacked both authority and an actual interest in Royal Fruit. The ALJ considered Cali's "front man" status and concluded that "to say that Mr. Cali was a great risk to the industry is hyperbole." The JO, on the other hand, disregarded Cali's limited involvement because it "did not lessen the responsibility of Mr. Cali for Royal's PACA violations."

We agree entirely, as we said above, that the extent of Cali's participation has no bearing on whether he is responsibly connected to Royal Fruit. *Pupillo*, 755 F.2d at 643. We believe, however, that his actual position at Royal Fruit is relevant to whether Cali's employment at C & C Produce threatened the produce industry. By disregarding the fact that Cali's role in Royal Fruit was *de minimis*, therefore, the JO overstated the threat that Cali's employment posed to the produce industry.

B.

The JO also increased the ALJ's sanction because Conforti "deliberately chose not to heed [the government's] warning" to fire Cali or obtain a bond. We agree that Conforti should be punished for employing Cali for four months after the USDA's deadline. We find, however, that the JO abused his discretion by not considering the mitigating circumstances in the case.

As the ALJ noted, Conforti "made a diligent and good faith effort to comply with the complainant's demands that he obtain a bond." During the period that Conforti employed Cali, he tried to obtain a bond from several different sources, and he consistently updated the USDA about his progress. While, as we have said, we do not agree with Conforti that his diligence absolves him of guilt in the matter, we do think that, particularly in light of the mixed signals sent by the USDA, all of which we rehearsed above, the JO erred by completely discounting his efforts.

C.

Finally, we think that the JO abused his discretion when he failed to consider how the 90-day suspension would affect C & C Produce. Conforti operates a wholesale produce dealership. Because his customers, primarily restaurants, require daily service, even a 30-day suspension is likely to have devastating financial consequences. *ABL Produce*, 25 F.3d at 647; see also *Capital Produce Co. v. United States*, 930 F.2d 1077, 1081 (4th Cir. 1991) ("The

45-day suspension may destroy or seriously hamper [the produce company's] relationships with its customers, who depend upon daily services"). We think that there is every chance that suspending his license for 90 days will drive Conforti, a man with a previously spotless record, out of the produce business altogether.

V.

For the reasons adduced, we affirm the decision of the Secretary of Agriculture finding that Conforti violated PACA's employment restrictions. We find, however, that the facts in the case do not justify the sanction imposed. In light of Conforti's exemplary record, his diligent efforts to obtain a bond, and Cali's limited participation in Royal Fruit, we reverse the JO's sanction and reinstate the ALJ's decision suspending Conforti's PACA license for 30 days.

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEPARTMENTAL DECISIONS****In re: PETE'S TROPICAL CORPORATION.****PACA Docket No. D-95-532.****Decision and Order filed November 22, 1995.****Failure to show cause why application for PACA license should not be denied - Prohibited affiliation - Failure to promptly pay for produce constitutes conduct of character prohibited by PACA.**

Judge Hunt denied the PACA license application of Respondent Pete's Tropical Corporation, which failed to make full payment promptly for produce purchases amounting to approximately \$17,000. Failure to pay promptly for produce constitutes conduct of a character prohibited by the PACA. Respondent's business relationship with PACA-barred person constitutes a prohibited affiliation. Respondent failed to show cause why its application for a PACA license should not be denied.

Kimberly S. Hart, for Complainant.

Plinio Almeida, for Respondent.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding arises under the Perishable Agricultural Commodities Act, 1930, as amended, ("PACA"), (7 U.S.C. § 499a *et seq.*). It was instituted on July 26, 1995, by a Notice to Show Cause why respondent Pete's Tropical Corporation's application for a PACA license should not be denied. The Notice was filed by the complainant, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("USDA").

A hearing was held in New York, New York, on August 22, 1995. Complainant was represented by Kimberly S. Hart, Esq. Respondent was represented by its owner, Plinio Almeida.

Statement of the Case

Respondent, Pete's Tropical Corporation, incorporated in New York in 1993, is solely owned by Plinio Almeida. Respondent received a PACA license as a produce dealer in 1993. However, the license expired in April 1995 when respondent failed to renew its license. Respondent applied for a new license in June 1995.

Complainant denied respondent's request for a license on the ground that

it was unfit to receive a license because it was allegedly affiliated with a Roger Almeida who was barred from being affiliated with a PACA licensee. Complainant contends that respondent should also be denied a license because it is undercapitalized and that it had failed to pay for certain produce purchases.

Plinio Almeida and Roger Almeida are brothers. Roger Almeida is the sole owner of a company called Plantains, Inc. Until 1994, Plantains was a PACA-licensed produce dealer. However, its license was revoked that year because the company was found to have committed flagrant and repeated violations of the PACA by failing to pay promptly for produce purchases totalling over \$347,000. Roger Almeida was found to be responsibly connected with Plantains and was barred from being employed by or affiliated with another PACA licensee until April 29, 1995, and barred thereafter unless his employment or affiliation was approved by USDA and a suitable surety bond was posted. Respondent was notified by USDA of this bar to Roger's employment and affiliation. Roger Almeida has not received permission to be employed by or affiliated with a PACA licensee.

Complainant contends that Roger Almeida and respondent Pete's Tropical Corporation (referred to as "Pete's Tropical") have a business relationship that constitutes an affiliation and that respondent therefore is unfit to receive a PACA license.

Plantains, Inc., owned by Roger Almeida, has two operations called, respectively, Plantains Beverage Wholesale and Plantains Cash & Carry. The two businesses are separated by a driveway. Plantains Beverage Wholesale conducts its business at the same site as respondent Pete's Tropical Corporation. Plantains Beverage Wholesale sells soft drinks and beer while Pete's Tropical sells produce. An outdoor sign identifies the site to the public and customers as the location for Plantains Beverage but there is no similar identifying sign for Pete's Tropical.

Plantains Beverage and Pete's Tropical share a common sales area in the building. A cashier makes sales for both businesses, but gives customers separate receipts indicating the company from which merchandise was purchased.

Plantains Beverage and Pete's Tropical maintain separate bank accounts and separate payrolls. Cash for the two companies is kept separate, but kept in a common safe located in Roger Almeida's office at Plantains Cash & Carry. Pete's Tropical keeps its money in Plantains safe because of concern about robberies in the area.

Plantains Beverage and Pete's Tropical use the same bookkeeper who

works in the same office area as Roger Almeida. The record is not clear as to which company, or both, pay the bookkeeper's salary. The records for the two companies are kept separate but kept in the same filing cabinet. Complainant's investigator testified that respondent makes a "diligent" effort to keep its records and inventory separate from Plantains.

In addition to sharing space, Plantains Beverage and Pete's Tropical share many business activities. The workers compensation and liability insurance policy is in the joint name of Plantains Beverage and Pete's Tropical, with each company paying for half the premium. The telephone bill for the phone used by Pete's Tropical is in Plantains name, but Pete's Tropical pays the telephone company directly for the phone's use. The two companies share costs for security and trash removal. Pete's Tropical also paid a fine levied against Plantains by the State Department of Agriculture.

Pete's Tropical rents its store space from a company owned by Roger Almeida. There is no formal rental agreement and Pete's Tropical owes several months back rent.

Pete's Tropical uses Plantains' trucks. An unwritten informal arrangement apparently provides for Pete's to pay for the repair and upkeep of the trucks in return for their use. Plinio Almeida testified that Pete's pays Plantains for the services it receives and that such payments are made directly to Plantains. He said that no payments are made to Roger personally.

Plantains and Pete's have engaged in joint advertising. One such advertisement, a circular, told prospective customers that "To Order Groceries, Cigarette and Candy call (212) 777-1044 ask for: Andres," and that "To Order Fruit, Vegetables, Tropical Products, A Full Variety of Imported and Domestic Beers call (212) 777-4940 ask for: Peter or Roger." The only "Roger" is Roger Almeida and Plinio Almeida testified that he goes by the name Pete. The circular carried only the name of Plantains Cash & Carry.

Roberta Rucker, a USDA senior marketing specialist, testified that both customers and creditors of Pete's Tropical and Plantains appear to believe that the two businesses are two divisions of the same company. She also testified that, after reviewing respondent's records, she determined that it had an inventory of fruits and vegetables of about \$12,000, that it had unpaid produce purchases totalling \$17,000, that it had accounts receivable of \$4,500, that its April 1995 bank statement showed a balance of between \$1,401 and \$3,031, and that fifteen checks had been returned because of insufficient funds. (Tr. 24-25, 39-42, 47.)

The owner of Pete's Tropical, Plinio Almeida, denied that respondent was affiliated with Roger Almeida. He said that Pete's Tropical and Plantains are

separate operations and that the reason they share services is to save on expenses. He also contends that respondent's unpaid produce purchases are \$9,752.50 rather than the \$17,000 claimed by complainant.

Jane Servais, the head of PACA's Trade Practices Section, testified that respondent Pete's Tropical should be denied a PACA license because the comingling of its activities with Plantains constitutes an affiliation with Roger Almeida, Plantains' sole owner. She also said that she did not believe that Pete's Tropical could comply with PACA's prompt payment requirements because it is undercapitalized.

Law

Section 4(d) of the PACA (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 the 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 practices of the character prohibited by this Act 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 involved any misrepresentation, concealment, or withholding of facts respecting any violation of the Act 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 the Act 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 Act by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Section 8(b) (7 U.S.C. § 499h(b)) states:

(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 the 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 2 of this Act; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right to appeal under Section 7(c) of this Act.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation. . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary. 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.

Section 1(10) (7 U.S.C. § 499a(1)(10)) provides:

- (10) the terms "employ" and "employment" mean any affiliation of any person with the business of a licensee, with or without compensation, including ownership or self-employment.

Section 2(4) (7 U.S.C. § 499b(4)) states:

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 purpose 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 5(c);

Regulations

9 C.F.R. § 46.22(aa) states:

'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 the 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; . . .

Discussion

Complainant contends that respondent Pete's Tropical Corporation should be denied a license because its relationship with Plantains, a business owned solely by Roger Almeida, constitutes a prohibited affiliation. It also contends that it should be denied a license because its failure to pay for produce constitutes an act of a character prohibited by the PACA and because it is undercapitalized.

Complainant argues that the relationship between Pete's Tropical and Plantains shows that Pete's Tropical is "some sort" of subsidiary of Plantains.

Plinio Almeida, however, contends that his business, Pete's Tropical, is a separate business from Plantains. He contends that the relationship is with Plantains as a business and not with Roger personally. He also contends that the relationship is a means of reducing respondent's costs of doing business.

As far as the record shows, Pete's Tropical and Plantains are separately owned businesses. There is no evidence that Pete's is a subsidiary of Plantains. There is also no evidence showing that the relationship between Pete's Tropical and Plantains is based on other than cost-cutting considerations. PACA's concern, however, in scrutinizing the relationship, is that it is not two independent businesses dealing with each other at arm's length, but rather a situation where one of the two businesses, Pete's Tropical, which is engaged in a PACA-regulated business, appears to be closely interacting with a company whose sole owner is barred from being affiliated with a PACA-licensed business.

Complainant contends that a PACA-barred person, like Roger Almeida, is not only personally prohibited from affiliating with a PACA-licensed business, but also prohibited from affiliating through a solely owned corporation, such as Plantains. This argument has merit. An unscrupulous person could otherwise easily evade the PACA and defeat its purpose by the simple device of forming a corporation to affiliate with a business from which he is personally barred. I therefore find that it is immaterial whether Roger Almeida maintains his relationship with Pete's Tropical personally or through his solely owned corporation in determining whether the relationship is a prohibited affiliation.

Affiliation is also defined as meaning "to associate or connect oneself." (Webster's II New Riverside Dictionary, 1984.) PACA's bar against any form of prohibited affiliation is sweeping. "The word 'any' is a broad and comprehensive term . . . [it] includes all kinds of affiliation -- whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986).

In the circumstances here it is clear that Pete's Tropical and Plantains have a close association and connection. They share common store space, safe, insurance, utilities, bookkeeper, vehicles, advertising, and phones. Pete's Tropical also rents space and vehicles from a Roger Almeida-owned corporation and does so without any form of written agreement. To the public the two businesses appear to be divisions of the same enterprise. While the reason for this close interaction may be due to economic considerations, it is nevertheless such a close association or connection as to constitute an affiliation. As Plantains is a corporation solely owned by Roger Almeida, its

affiliation constitutes a prohibited affiliation between Roger Almeida and Pete's Tropical. Accordingly, the application of Pete's Tropical for a license will be denied.

Complainant further argues that Pete's Tropical should be denied a license because its failure to pay its produce suppliers constitutes an act of a character prohibited by the PACA. Pete's Tropical contends that the amount of its unpaid purchases is \$9,752, rather than the \$17,000 claimed by respondent. However, whether \$9,000 or \$17,000, the amount in either event is more than *de minimis*. The failure to pay even \$9,000 is therefore an act of a character prohibited by the PACA and thus a ground for denying respondent a license.

Finally, complainant contends that Pete's Tropical should also be denied a license because it is undercapitalized. The PACA, however, does not provide that undercapitalization is a basis for denying a license. Complainant cites no authority for its position except for the argument that undercapitalization shows that an applicant would be unable to comply with the PACA.

As it has already been determined that respondent's application for a license is to be denied, and as the adequacy of an applicant's capitalization is a matter of general concern that is better considered in a notice-and-comment rulemaking procedure, there is no need to decide the matter in this proceeding.

Findings of Fact

1. Pete's Tropical Corporation, the respondent, is a corporation organized and existing under the laws of the state of New York. Its sole owner is Plinio V. Almeida. It is in the business of selling produce.
2. Respondent was issued a PACA license on March 9, 1993. The license terminated on March 9, 1995, when respondent failed to pay the required annual renewal fee.
3. Respondent applied for a new license on June 27, 1995.
4. Plantains, Inc., is a corporation organized and existing under the laws of the state of New York. Plantains, Inc., is owned solely by Roger Almeida.
5. Plantains, Inc., was issued a PACA license on September 21, 1988. The license was suspended in 1992 for failing to pay reparation awards and was revoked on March 8, 1994, for committing wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
6. Roger Almeida was found to be responsibly connected with Plantains,

Inc., and informed that he could not be employed by or affiliated with another licensee, in any capacity, until April 29, 1995, and then only with the approval of the Secretary and the posting of a suitable surety bond. Roger Almeida has not received approval from the Secretary to be employed by or be affiliated with a PACA licensee.

7. Respondent was notified that it could not employ or be affiliated with Roger Almeida.

8. Respondent and Plantains, Inc., at all times relevant to this proceeding, conduct their respective business operations at the same site; use the same bookkeeper; use the same safe to keep money from their operations; keep their books at the same location; and have a joint business and workers compensation insurance policy. The bookkeeper maintains his office at the offices of Plantains, Inc.

9. Respondent leases space from a company owned by Roger Almeida and rents trucks owned by Roger Almeida. There is no formal agreement for these leasing and rental arrangements.

10. Respondent and Plantains, Inc., engage in joint advertising without identifying respondent as a business separate from Plantains, Inc. Respondent and Plantains, Inc., appear to the public and their customers as being part of the same operation and not as separate and distinct businesses.

11. Respondent has not made prompt payment for produce purchases amounting to approximately \$17,000.

Conclusions of Law

Respondent's business relationship with Plantains, Inc., a business owned solely by Roger Almeida, constitutes an affiliation with Roger Almeida. Respondent's failure to promptly pay for its produce purchases constitutes conduct of a character prohibited by the PACA. Respondent has failed to show cause why its application for a PACA license should not be denied.

Order

Respondent's application for a PACA license is denied.

This Order shall become final and effective thirty-five (35) days after the date of service of this Order on respondent unless there is an appeal to the Judicial Officer within thirty (30) days after service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

This Decision and Order became final and effective January 3, 1996.-

Editor]

**In re: N. PUGACH, INC.
PACA Docket No. D-94-558.
Decision and Order filed November 30, 1995.**

Failure to make full payment promptly - "Full payment promptly" defined - Mere excuses for payment violations never sufficiently mitigating - Finding of willful misconduct not required - Flagrant and repeated violations - Publication.

Judge Kane published the finding that Respondent committed repeated and flagrant violations of PACA by failing to make full payment promptly, during the period August 1992 through July 1993, to 24 sellers for 166 lots of perishable agricultural commodities, totaling \$384,979.33. "Full payment promptly" is defined by the Regulations as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted. Trust payments were made by Respondent's trustee to qualified trust claimants in the amount of \$29,866.75, leaving an unpaid balance of \$355,112.58 at the time of the hearing. Mere excuses for payment violations are never sufficiently mitigating to prevent a failure to pay from being considered flagrant or willful. A finding of willful misconduct is not required because complaint counsel did not seek revocation or suspension of a license as part of the sanction.

Kimberly D. Hart, for Complainant.

Gerard DeGregoris, Jr., Mineola, NY, for Respondent.

Decision and Order issued by Paul Kane, Administrative Law Judge.

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, 80 Stat. 384 (1966), as amended Pub. L. 95-251, 92 Stat. 183 (1978)¹ and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-151 (1995).

The Deputy Director of the Fruit and Vegetable Division of the Department's Agricultural Marketing Service, by complaint filed July 25, 1994, alleges that respondent N. Pugach, Inc., hereinafter "respondent," willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, ch. 436, 46 Stat. 531, as amended, ch. 120, 48 Stat. 584 (1934); ch. 719, 50 Stat. 725 (1937); ch. 456, 54 Stat. 696 (1940); Pub. L. 87-725, 76 Stat. 673 (1962); Pub. L. 91-107, 83 Stat. 182 (1969); Pub. L. 95-562, 92 Stat. 2381

¹Particular reference is made to 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1995) [unofficial codifications of statutes are cited herein].

(1978); Pub. L. 97-98, Title XI, 95 Stat. 1269 (1981); Pub. L. 97-352, 96 Stat. 1667 (1982); Pub. L. 98-273, 98 Stat. 166 (1984) [hereinafter the Act, or PACA] specifically § 2(4) thereof.² The complaint alleges that respondent violated the Act by failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it purchased, received and accepted in interstate and foreign commerce.

By answer filed September 6, 1994, counsel for respondent admits that respondent is a corporation, admits that a PACA license was issued to it, denies the essential allegations of the complaint, avers that its alleged conduct was not willful, flagrant or repeated, avers it has not engaged in a course of conduct which resulted in the failure to pay promptly for agricultural commodities, and further avers that some of the perishable agricultural commodities allegedly received and accepted were not in interstate commerce.

A public hearing was held on March 22, 1995, in Uniondale, New York, before the undersigned. Subsequently, proposed findings of fact and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "CRX" refers to the lettered exhibits offered by counsel to respondent.

The United States Department of Agriculture, hereinafter the Department, is represented by Kimberly D. Hart, Esq., Washington, D.C. N. Pugach, Inc., is represented by Gerard DeGregoris, Jr., Esq., Mineola, New York.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

Findings of Fact

1. Respondent, N. Pugach, Inc., is a corporation organized and existing under the laws of the State of New Jersey whose business address was Row B, 269 New York Terminal Market, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the PACA, license number 910212 was issued to respondent on November 14, 1991. This license

²⁷ U.S.C.A. § 499b(4) (West 1980 & Supp. 1995).

terminated on November 14, 1993, when respondent failed to pay the required annual renewal fee.

3. During the period of time prior to the commencement of the investigation, the Department was in receipt of numerous trust notices and reparation complaints against respondent. (Tr. 12) In addition, the Department became aware that respondent has ceased business operations in August 1993. (Tr. 12)

4. Roberta Rucker, a senior marketing specialist with complainant's PACA branch in North Brunswick, New Jersey, was assigned to investigate respondent as a result of the numerous trust notices and reparation complaints being filed against respondent as well as respondent ceasing business operations. The purpose of the investigation was to determine if there were violations of the Act on the part of respondent. (Tr. 12)

5. Ms. Rucker's investigation took place between December 13-21, 1993. (Tr. 14) Ms. Rucker had spoken with Mr. Pugach, respondent's principal, by telephone prior to the investigation regarding the location of respondent's business records, and he informed her the records had been boxed and moved and that she should contact the trustee, Mr. Kreinces, to obtain access to the firm's records. (Tr. 13) Mr. Pugach also informed Ms. Rucker that he would be unable to meet with her. (Tr. 13) Ms. Rucker visited with Mr. Kreinces and determined that he was only in possession of records relating to respondent's outstanding receivables and the money being held in trust for creditors. (Tr. 14) Ms. Rucker reviewed the records in Mr. Kreinces' possession and determined that there was approximately \$150,000.00 in outstanding receivables at that time. (Tr. 15)

6. Ms. Rucker later determined that respondent's attorney, Mr. DeGregoris, was also in possession of some of respondent's business records. (Tr. 15-16) Ms. Rucker visited with Mr. DeGregoris and reviewed the records in his possession which included a "purchase book," bank statements, disbursement journals, canceled checks, payable invoices, and additional records pertaining to the business. (Tr. 17) Ms. Rucker testified that she conducted a search of all of the records provided by Mr. DeGregoris but was unable to locate respondent's unpaid invoices. (Tr. 21) Ms. Rucker questioned Mr. Pugach, Mr. Kreinces and Mr. DeGregoris about the missing unpaid invoices and none of these individuals was able to give her information as to where those records could be located. (Tr. 22)

7. Being unable to locate respondent's unpaid invoices within its records, Ms. Rucker utilized the "purchase book" as a source of information to ascertain whether respondent had any additional creditors who had not filed

trust notices or reparation complaints. (Tr. 17) Ms. Rucker testified that the "purchase book" was a receiving book listing in date order the purchases received by respondent, the names of shippers, the lot numbers, the quantities of commodities and the amounts owed to the shipper. (Tr. 17) Ms. Rucker compiled a list of respondent's creditors and contacted the creditors either by telephone or in person requesting copies of all unpaid invoices involving produce sold to respondent. (Tr. 19) She requested that the creditors located outside the State of New York send the unpaid invoices by mail and she personally picked up most of the unpaid invoices from the creditors who were located in the local New York area. (Tr. 19)

8. Ms. Rucker personally obtained sworn affidavits from those local creditors who indicated whether produce sold to respondent originated outside the State of New York and/or within the State of New York. (CX 28; Tr. 19, 21) Ms. Rucker testified that it took several weeks to receive unpaid invoices from the creditors located outside the State of New York but she was able to make a preliminary determination as to the extent of respondent's produce debt at the time that she completed her review of respondent's records located at Mr. DeGregoris' office. (Tr. 23) Since she was unable to contact Mr. Pugach, Ms. Rucker conducted an exit interview with Mr. DeGregoris and informed him about the unpaid produce debt shown by the trust notices and reparation complaints, advised him about the prompt pay requirements of the Act and the possible administrative action that could be taken by the Department. (Tr. 23) During the course of the interview, Mr. DeGregoris stated to Ms. Rucker that "he was aware that his client owed approximately \$400,000.00 in produce debt." (Tr. 24)

9. Ms. Rucker testified that upon receiving the necessary unpaid invoices, she compared the unpaid amounts listed on the invoices against the unpaid amounts found in respondent's "purchase book" for the corresponding shipments. (Tr. 25) Ms. Rucker also testified that she did not merely take the creditor's word as to the unpaid amounts listed on the invoices but made a conscientious effort to apply respondent's figures to those invoices in instances where the two figures differed. (Tr. 25)

10. As a result of her investigation, Ms. Rucker found that, during the period of August 1992, through July 1993, respondent purchased, received and accepted perishable agricultural commodities from 24 sellers in 166 lots in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$384,979.33, as more fully set forth in paragraph III of the complaint. (Complaint ¶ 3; CX 3, 28; Tr. 28)

11. Trust payments were made by respondent's trustee to qualified trust claimants contained in the complaint in the amount of \$29,866.75; however, no other sums have been paid, leaving an unpaid balance of \$355,112.58 at the time of the hearing. (CX 30; Tr. 62-65)

Statutes and Regulations

Respondent is alleged to have willfully, flagrantly and repeatedly violated the PACA in the following specific section:

It shall be unlawful on 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.³

The Act assigns liability for violations as follows:

. . . .

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 . . . , the

³7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1995).

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.⁴

The Secretary has applied the following definition to the interpretation of the relevant section of PACA in the following regulation:

(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;⁵

Discussion

The Perishable Agricultural Commodities Act was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by 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. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities⁶ "Accordingly, certain conduct by commission merchants,

⁴ U.S.C.A. § 499h(a) (West 1980 & Supp. 1995).

⁵ 7 C.F.R. § 46.2 (1992, 1993).

⁶It has also been held that Congress intended, by enactment of the Perishable Agricultural Commodities Act, to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act. *Zwick v. Freeman*, 373 F.2d 110, 117 (2nd Cir.), cert (continued...)

dealers, or brokers [was] declared to be unlawful." *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 858 (9th Cir. 1976). Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930); *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

The instant proceeding is an enforcement action with a two-fold purpose: (1) to determine whether respondent violated section 2(4) of the PACA (7 U.S.C.A. § 499b(4)); and (2) if so, to further determine what sanction should be issued as a consequence thereof. These issues are dealt with below.

Section 2(4) of the PACA makes it unlawful for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. 7 U.S.C. § 499b. Insofar as is pertinent here, "full payment promptly" is defined by the regulations as requiring payment of the agreed purchase prices for produce within ten (10) days after the day on which the produce is accepted. The regulations in effect during 1992 and 1993, 7 C.F.R. § 46.2(aa)(10), (1992, 1993) provided, that "when contracts are based on terms other than those described in these regulations, payment is due the supplier/seller within twenty (20) days from the date of acceptance of shipment under the terms of the contract. . . ." The provisions of the Act do not allow partial payments or settlements to constitute "full payment promptly."

Complainant presented sufficient evidence at the hearing to prove that respondent failed to make full payment promptly to 24 sellers of the agreed purchase prices totaling \$384,979.33 for 166 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce during the period of August 1992, through July 1993. (Complaint ¶ 3; CX 3, 28; Tr. 28)

Respondent's failure to pay promptly and in full for 166 transactions occurring over a period of 11 month, totalling \$384,979.33 constitutes repeated and flagrant violations of section 2 of the Act. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *George Steinberg and Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom.*, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974). The

⁶(...continued)
denied, 389 U.S. 835 (1967).

violations alleged in the complaint are repeated because they occurred 166 times. The violations are flagrant because of the number of violations, the amount of money involved and the length of the period of time during which the violations occurred. *See, Veg Mix, Inc.*, 48 Agric. Dec. 595 (PACA Dkt. No. 2-6612) (May 19, 1989).

Respondent's principal, Mr. Pugach, testified that there were two major factors which accounted for respondent's financial difficulties: (1) the fact that it hired several salesman who brought to the business customers who did not pay their bills in a prompt manner (Tr. 77-79); and (2) the fact that respondent's accountant made an accounting error in computing and reporting respondent's profits and losses over a three-month period. (Tr. 82-84). Such excuses do not mitigate against a finding that respondent committed the violations as alleged. The inability to make prompt payment for produce because of financial difficulties does not negate the violations under the Act. *See, B.G. Sale's Co., Inc.*, 44 Agric. Dec. 2021 (PACA Dkt. No. 2-6790) (October 9, 1985); *Oliverio, Jackson Oliverio, Inc.*, 42 Agric. Dec. 1151 (PACA Dkt. Nos. 2-6193 and 2-6200) (August 31, 1983). Moreover, as stated by the Judicial Officer in *Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. 701, 712 (PACA Dkt. No. D-94-533) (March 22, 1995), "[e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful."

Although trust payments have been made by respondent's trustee to qualified trust claimants, some of which were identified in the complaint in the amount of \$29,866.75, no other sums have been paid, leaving an unpaid balance of \$355,112.58. (CX 30; Tr. 62-65) However, it is the Department's policy ". . . [I]f full payment is not made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations, . . . the case will be treated as a 'no pay' case." *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 150 (PACA Dkt. No. 2-6186) (January 27, 1984), *aff'd* 815 F.2d 706 (6th Cir. 1987) (Table). *See also, Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 506 (PACA Dkt. No. 2-6846) (March 26, 1987), *aff'd* 851 F.2d 1500 (D.C. Cir. 1988) (Table).

Accordingly, I find that respondent committed flagrant and repeated violations of the PACA by failing to make full payment promptly for perishable agricultural commodities purchased in interstate commerce.

Sanction

As stated above, respondent has presented many arguments in mitigation of the sanction. However, ". . . [E]xcuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." *Caito Produce Co.*, 48 Agric. Dec. 602, 614 (PACA Dkt. No. D-88-511) (June 1, 1989); *Atlantic Produce Co. and Joseph Pinto, id.*, 54 Agric. Dec. at 701, 712; *Gilardi Truck & Transportation, Inc., id.*, 43 Agric. Dec. at 118 150 (holding that all excuses have been routinely rejected in determining whether payment violations occurred since "the Act calls for payment--not excuses.")

Accordingly, the appropriate sanction is the publication of a finding that respondent committed repeated and flagrant violations of the PACA. As stated by the Judicial Officer in *S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. 476, 497 (AWA Dkt. No. 89-3) (February 8, 1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table):

. . . the 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.

The record contains analyses of criteria upon which the Department relies in support of its recommended sanction. These primarily relate to the number of transactions jeopardized by respondent's conduct and the time-span during which such behavior was displayed. As noted, 166 transactions were flawed during 11 months. (Tr. 66-70) This justifies a finding that respondent has committed repeated and flagrant violations and publication of that finding.⁷

In this case, a finding of willful misconduct is not required because complaint counsel is not seeking revocation or suspension of a license as part of the sanction.

⁷See *Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (PACA Dkt. No. 2-5845) (December 2, 1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984)

Conclusions

Based upon entry of the above findings of fact and upon the existence of those facts within the content of the Perishable Agriculture Commodities Act, it is concluded that respondent repeatedly and flagrantly violated the Act at 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1995) by failing to timely pay for produce it received in interstate commerce.

Accordingly, the following order is entered.

Order

A finding is hereby made that respondent has committed repeated and flagrant violations of section 2 of the PACA (7 U.S.C. § 499b), and such finding shall be published.

This Order shall take effect on the eleventh (11th) day 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 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).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 8, 1996.-Editor]

**In re: MIDLAND BANANA & TOMATO CO., INC., SUSAN E. HEIMANN,
ROBERT S. HEIMANN, and JEFFREY B. HEIMANN.
PACA Docket No. D-93-548.**

and

**In re: ROYAL FRUIT CO., INC., and ROBERT S. HEIMANN.
PACA Docket No. D-93-549.**

**Decision and Order on Application for Attorney's Fees and Expenses
Pursuant to the Equal Access to Justice Act filed November 30, 1995.**

Equal Access to Justice Act - "Substantially justified."

Judge Bernstein found that the government was substantially justified in bringing the Complaint against Respondent Jeffrey B. Heimann and dismissed Respondent's Application for Fees and Expenses. To recover fees under the Equal Access to Justice Act, applicant must file a timely

application, be the prevailing party, and it must be found that the government's position in bringing the proceeding was not substantially justified. Respondent was a prevailing party and his application was timely. To be "substantially justified" an action must be justified in substance or in the main, not justified to a high degree. The action must be justified to a degree that could satisfy a reasonable person, and must have a reasonable basis in both law and fact. The government need not show that it had a substantial likelihood of prevailing.

Eric Paul, for Complainant.

Richard L. Katz, Coral Gables, FL, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an application by Jeffrey B. Heimann for an award of attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), as amended (5 U.S.C. § 504). In my initial decision, I dismissed the Complaint with respect to Respondent Jeffrey B. Heimann in Docket No. D-93-548. To recover fees under the Act, an applicant must file a timely application, be the prevailing party, and it must be found that the government's position in bringing the proceeding against the applicant was not substantially justified.

I have previously found that Mr. Heimann's application was timely. It is clear that he is a prevailing party (5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.184(a)). The issue in this decision is whether or not filing of the Complaint against Jeffrey B. Heimann in this proceeding was substantially justified. I conclude that it was.

In this proceeding Complainant is represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent is represented by Richard L. Katz, Esq., of Coral Gables, Florida. Complainant's exhibits in the original action are referred to as "CX"; Respondent's exhibits in the original action are referred to as "RX"; and the hearing transcript is referred to as "Tr."

Under the EAJA there is a rebuttable presumption that a prevailing party in litigation against the government is entitled to fees. *Thomas v. Peterson*, 841 F.2d 332, 335 (9th Cir. 1988); *United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984). The government can rebut the presumption by demonstrating that its position was substantially justified. *Poole v. Rourke*, 779 F. Supp. 1546, 1562 (E.D. Cal. 1991) (citation omitted). The burden is on the government to present a substantial justification for its actions. *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987).

The words "substantially justified" as used in the provision of the EAJA means to be justified in substance or in the main, not justified to high degree; the action must be justified to a degree that could satisfy a reasonable person, and must have reasonable basis in both law and fact. *Pierce v. Underwood*,

487 U.S. 552, 565 (1988). The government need not "show that it had a substantial likelihood of prevailing." *United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984).

To understand the factual background, it is important to consider the interrelationship between Midland Banana & Tomato Co., Inc. ("Midland"), Royal Fruit Co., Inc. ("Royal"), and Robert, Jeffrey and Susan Heimann. As the Judicial Officer stated in his decision affirming my initial decision, this proceeding is ultimately all about Robert S. Heimann who involved his son Jeffrey and his daughter Susan in subterfuges in order to conceal the actual control of these two business entities by Robert himself. At the times that Royal began business and Midland later began business as Royal's successor, Robert Heimann did not want it to be known that he was actually in control of these two businesses. Therefore, an application for a license was filed by Royal Fruit Company, a partnership, and a license was subsequently issued under the PACA on October 13, 1988, to Jeffrey Heimann (Robert's son), Joseph Cali, and Beverly Heimann (Robert's wife) (CX 2, p. 5). Subsequently, Royal became a corporation with shares of stock being held by the same three principals, and the corporation was licensed under the PACA. Funds for the corporation were obtained through Small Business Administration (SBA) loans in the amount of \$650,000, secured by the assets of Royal and personal guaranties of Jeffrey Heimann, Robert and Beverly Heimann, and Joseph Cali (CX 15, 16, 61; Tr. 586-87).

On November 9, 1992, Jeffrey Heimann distributed to Royal's employees an announcement which stated that the company would cease operations effective November 17, 1992 (CX 62). The announcement also stated that beginning November 18, 1992, "a new company, similar to Royal Fruit Co., will be leasing the building" and that the new company might possibly hire some of the Royal employees (CX 62).

Midland was incorporated on November 17, 1992. Its PACA license application, dated November 23, 1992, identifies Susan Heimann, Respondent's sister, then a full time college student, as the sole officer, director and shareholder (CX 26, pp. 2-6). A license was issued to Midland on November 30, 1992 (CX 26, p. 1; Tr. 539).

Jeffrey Heimann was initially employed by Midland as a bookkeeper, then as a warehouse foreman, overseeing loads and supervising the packaging of tomatoes (Tr. 487, 603-07). For the quarter ending December 31, 1992,

Jeffrey Heimann received \$6,000 in salary (CX 37)¹; for the quarter ending March 31, 1993, he received [REDACTED] (CX 39). Jeffrey Heimann was no longer employed by Midland as of July 1993 (RX 13; Tr. 607).

Prior to becoming the sole officer and director of Midland, Susan Heimann's experience in the produce industry was limited to her work during weekends on a few occasions (CX 17, p. 19; Tr. 474). In connection with her duties at Midland, Susan testified that she made up to three trips from college to visit the facility for a total of approximately 15 hours per week (Tr. 485-8).

In its Notice to Show Cause and Complaint in Docket No. D-93-548, USDA alleged among other things, "Respondents Robert S. Heimann and Jeffrey B. Heimann manage, control and direct the operations subject to the PACA of Respondent Midland Banana & Tomato Co., Inc., behind the nominal ownership and direction of Respondent Susan E. Heimann." Further, USDA alleged that Respondents Robert S. Heimann, Jeffrey B. Heimann and Susan E. Heimann arranged for the incorporation of respondent Midland Banana & Tomato Co., Inc., on November 17, 1992, and the concealment of the fact that Respondents Robert S. Heimann and Jeffrey B. Heimann were the persons in control of the operations and assets of Respondent Midland Banana & Tomato Co., Inc., in an attempt to evade the sanctions and prohibitions that the PACA places on persons who are responsibly connected to licensees that fail to pay reparation awards and/or engage in repeated or flagrant violations of § 2(4) of the PACA."

In my initial decision in Docket No. D-93-548, I stated:

Complainant has failed to meet its burden of proof with respect to the allegations relating to Jeffrey Heimann. Although Jeff Heimann was employed in various capacities at Midland, I conclude that the evidence is insufficient to meet the requirements discussed, *supra*, necessary for a finding that Midland was his *alter ego*, as Complainant alleges.

Despite my dismissal of the proceeding against Jeffrey Heimann, I find that the government's bringing of its Complaint against Jeffrey Heimann in that proceeding was substantially justified. Robert Heimann had established Royal to conceal his involvement in Royal, and Jeffrey Heimann, together with Robert's wife, Beverly, and Joseph Cali were installed as the nominal owners

¹The average of these two salaries per quarter is substantially similar to Jeffrey Heimann's salary at Royal of [REDACTED] for the quarter ending September 30, 1992.

and managers of the business. Jeffrey was involved in the business but, in fact, Robert controlled the business.

I also found that Midland was a successor in business to Royal. At page 28 of my initial decision I stated:

With the exception of the names on the PACA license applications, there is little to distinguish Royal and Midland. Midland operated out of Royal's facility at 303 Grand Avenue in Kansas City, using the same telephone and facsimile numbers (CX 18, p. 12). Even though Midland commenced business in November, Midland employees did not begin answering the telephones as "Midland Banana and Tomato" until January 1 (CX 17, p. 20). Midland utilized Royal's office equipment, assumed the lease on Royal's tomato wrapping machine and used other Royal warehouse equipment such as jacks and two-wheelers (CX 17, p. 20; RX 21). Midland's customers were the same as Royal's: government purchases, Associated Grocers and Fleming Foods continued to comprise the bulk of sales (CX 17, p. 21; Tr. 380-82). Indeed, the testimony of several experienced members of the produce industry who dealt with both Royal and Midland indicated that they perceived no real difference between the two entities (Tr. 71, 187, 207-08).

When Midland succeeded Royal, instead of Jeffrey being held out as one of those in control, now Susan, a full-time college student, was held out as being the owner who controlled Midland. In fact, I found that Robert controlled Midland as he previously controlled Royal. However, as was the case in Royal, Jeffrey had a conspicuous and prominent role in connection with Midland. Thus when asked as to what his role was in Midland, Jeffrey answered as follows:

- Q. All right. And so when you started to work at Midland, what were you doing?
- A. When I started to work at Midland, you know I was doing bookkeeping. I was ripening bananas. I was running a tomato crew, unloading trucks, loading trucks, uh, checking inventory, maintaining trucks, tractor-trailers, straight trucks, delivery trucks. I was selling produce to people in the Kansas City Area. I was doing everything I can, you know, just everything almost-- aspect in the business, really.

Q. All right. And were you also assisting in terms of training people to take on these jobs after you were going to be forced to leave?

A. Yes.

(Tr. 603)

When asked about Jeffrey's involvement, Susan testified as follows:

Q. And in connection with the duties of a warehouse foreman, what does a warehouse foreman do? What's your understanding of his duties during the day?

A. He takes inventory; he controls all the temperatures in all the coolers; he gasses bananas; he loads and unloads trucks; he makes sure all the trucks are working properly. Those are his duties.

Q. Does he act as bookkeeper?

A. He was not at this time, no.

Q. Does he sign checks for the firm?

A. He was not at this time, no.

Q. He was doing that previously?

A. Yes, he was.

(Tr. 487)

Susan further testified:

Q. Do you think that you had substantial credibility at Midland because of the fact that your father, Bob, and your brother, Jeff, were key employees of that business?

A. Yes.

(Tr. 499)

Furthermore, at the hearing Richard Armstrong, a USDA investigator, testified as follows as to his conversation with Robert Heimann in which Robert gave him some background about Midland:

A. And Jeff with the closure of the business [Royal], they were aware that there was a strong possibility that he would come under sanctions as a result of unpaid reparation awards and also as a result of the pending disciplinary investigation.

So, therefore, he was not -- it was not an option for Jeff to be involved directly as an officer or director of the new company and, therefore, it provided Susan with the opportunity.

Q. And when Mr. Robert Heimann gave you this explanation, was anyone else present?

A. Jeff was present.

Q. And did Jeff Heimann say anything to you at that point?

A. No. Not to --

(Tr. 261-62)

Therefore, the government was substantially justified in bringing the Complaint against Jeffrey Heimann in Docket No. D-93-548. Jeffrey was actively involved in Royal. Midland succeeded Royal. Jeffrey was conspicuously involved in Midland. Although I found that the government had not proven its case, I find that it was justified in making the allegations in the Complaint inasmuch as it appeared that Jeffrey's involvement in Midland was substantially similar to his involvement in Royal.

Order

Respondent's Application for Fees and Expenses is dismissed.

Pursuant to the Rules of Practice governing procedures under this Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in 7 C.F.R. §§ 1.145 and 1.201.

[This Decision and Order became final January 16, 1996.-Editor]

In re: COUNTY PRODUCE, INC.

PACA Docket No. D-94-548.

Decision and Order filed January 22, 1996.

Revocation of license — Affiliation — Repeated and flagrant violations — Employ — Responsibly connected — Sanction policy.

The Acting Judicial Officer affirmed Judge Hunt's (ALJ) decision holding that Respondent permitted Ms. Linda Wright to continue her affiliation with it after being notified that Wright was ineligible to be employed or affiliated with any PACA licensee for a 1-year period because

of a disciplinary order issued against Wright's company. The Acting Judicial Officer also affirmed the ALJ's sanction, revoking Respondent's license. Respondent received adequate notice that to continue Wright's affiliation with Respondent could result in suspension or revocation of its license. When Complainant has determined, by the procedure set forth in 7 C.F.R. § 47.47 *et seq.*, that Linda Wright was responsibly connected to a licensed produce dealer found to have engaged in flagrant and repeated PACA violations, the ALJ has no authority to review such determination. Wright's defense that she was not paid is irrelevant, since 7 U.S.C. § 499a(10) proscribes any affiliation, whether compensated or not. Ignorance of PACA laws and regulations is no excuse. Wright's claim, that USDA investigator misled her into signing Consent Decision premised upon USDA's non-enforcement of PACA sanctions, is not credible. Respondent argues that the factual situation herein is the same as in *ABL Produce*, but the ALJ and Acting Judicial Officer find this case more akin to *Tri-County Produce*. In *ABL Produce*, the ALJ recommended a 30-day suspension, but the Agency officials and the Judicial Officer recommended revocation. In this case, however, all three recommended revocation. Some recent Courts' decisions interpret USDA sanction policy to be "all circumstances of the case relevant to the sanction." In fact, it is opposite to that--"all *relevant* circumstances" shall be considered in fashioning a sanction, which gives the Judicial Officer the opportunity to consider Congressional intent. Congress regards a non-payer of a reparation award to be a "defiled person likely to contaminate any licensee." Facts of this proceeding contrasted with *ABL Produce* and *Tri-County Produce*. Respondent's mitigating circumstances, when analyzed, are found not at all mitigating: employee's ethics, payment practices, company financial health, and lack of reparation complaints against Respondent not mitigating.

Julie Cook, for Complainant.

Harold James Pickerstein, Fairfield, CT, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by Michael J. Stewart, Acting Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (PACA) (7 U.S.C. § 499a *et seq.*),¹ in which Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order on July 17, 1995, revoking Respondent's license for permitting Linda Wright to continue her affiliation with it after being notified that Ms. Wright was ineligible to be employed by or affiliated with any PACA licensee for a 1-year period because of a disciplinary order issued against Ms. Wright's company.

On August 24, 1995, Respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5

¹See generally Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl. *Agricultural Law*, ch. 72 (1980).

U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35)." Complainant responded to Respondent's appeal on September 18, 1995. Complainant supports the ALJ's revocation order; Respondent seeks no revocation. The case was referred to the Judicial Officer for decision on September 26, 1995.

Based upon a careful consideration of the record in this case, I agree with Complainant that Respondent's license should be revoked. The Initial Decision is adopted as the final Decision, with changes or additions shown in brackets, deletions shown by dots, and a few trivial changes not specified. The reasons for revoking Respondent's license are set forth in the additional conclusions by the Judicial Officer, which follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed on June 13, 1994, under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) ("PACA") and regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45). It alleges that respondent County Produce, Inc., a produce dealer licensed under the PACA, violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) by continuing to employ Linda Wright after being notified that Wright's continued employment was prohibited. In its answer, respondent denied that it employed Wright in violation of the PACA.

A hearing was held on March 14, 1995, in Bridgeport, Connecticut. Complainant was represented by Julie Cook, Esq. Respondent was represented by Harold James Pickerstein, Esq.

Facts

Linda Wright's background includes working in the banking industry in Connecticut for over 8 years. She started her banking career with the Valley Bank and Trust Company where, over the course of 8 years, she progressed to vice-president and auditor. She worked at the Valley Bank with David

**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No. 103-354, § 212(a)(1), 108 Stat. 3178, 3210 (1994)). (By "Delegation of Authority" dated January 3, 1996, the Secretary of Agriculture designated the Assistant to the Judicial Officer as Acting Judicial Officer until a new Judicial Officer has taken office.)

Nyden who was later to become the owner of the respondent in this case, County Produce, Inc. She has attended Fairfield University and has had training in accounting and as a paralegal. (Tr. 213-215.)

Wright left Valley Bank to set up "operationally and financially" banks in Stamford and Darien, Connecticut. When she was asked to set up two more banks, including one in Massachusetts, she decided to discontinue working as a bank employee to become an independent banking consultant. The work was demanding: "I simply did not have enough time to keep everybody happy." (Tr. 213-21[5].)

In 1988, Wright accepted an offer from David Nyden, her former associate at Valley Bank, to work for him at a produce company, L. Bernstein and Sons, in which he had acquired a 50 percent interest. She set up a computer system to help Nyden "with the operations, the financial end of it, reconciling items, posting items to the computer." (Tr. 216.)

In 1989, Nyden sold his interest in L. Bernstein to Arthur Stollman who acquired full ownership of the company. Stollman, however, told Wright that he was not comfortable running the business by himself and offered to sell her a 50 percent interest. Wright discussed the offer with her husband, Gerald Wright, who also worked in the banking industry as a commercial loan officer. They decided to accept Stollman's offer. Wright received 50 percent ownership in return for paying Stollman \$10,000 and assuming liability for half of L. Bernstein's debts. Stollman and Wright both then ran the company. (Tr. 217-219.)

Wright testified that initially she performed mostly clerical duties, but when she began to receive complaints from customers and suppliers that Stollman's abrasive personality was affecting the business, she became more active in the company's operations as a go-between for Stollman and the customers. Stollman also agreed to confine his activities to the New York area while Wright handled Connecticut. However, Stollman-related problems continued, the economy worsened, the company was slow paying its suppliers, and Stollman began paying suppliers when there were insufficient funds in the company's bank account. Wright said she tried to cover for Stollman but some suppliers stopped doing business with the company. (Tr. 219-224.)

Stollman then said he wanted out of the business. Wright agreed to buy him out and attempted to obtain a loan for that purpose. However, Stollman changed his mind about the buy out and said the company should be closed. At this point a bank seized L. Bernstein's receivables which resulted in the company being unable to buy produce. L. Bernstein closed in November 1991 and filed for bankruptcy. When Wright and her husband were unable to cover

the company's loans for which they had assumed personal liability, they too filed for bankruptcy. (Tr. 224-229.)

In August 1992, Wright received a formal complaint from complainant alleging that L. Bernstein had committed repeated and flagrant violations of the PACA by failing to pay \$185,909.00 to 16 produce sellers between January 1991 and August 1991. Wright filed an answer for L. Bernstein in which she stated, *inter alia*, that she did not have an attorney, that she had been a 50 percent stockholder in L. Bernstein from 1989 until it closed, and that she did not "have any knowledge of PACA rules, regulations, etc." She attributed the company's failure to the poor economy, Stollman writing bad checks, and the lack of a cash flow due to the bank's seizure of the company's receivables. She also said that she was in the process of turning the company around. (RX-3, 4.)

In the meantime, in June 1992, David Nyden had formed a new produce company, the respondent here, County Produce, Inc. He owned 80 percent of the company and became its president. In June 1993, he applied for and received a PACA license as a produce dealer. (CX-1.)

A hearing had also been scheduled for June 1993 on the complaint against L. Bernstein. Complainant's attorney for that case, John Vos, had written to Wright earlier about entering into a settlement agreement. On the eve of the hearing Wright and Vos had a 5-minute telephone conference in which they agreed on a settlement through a consent decision wherein L. Bernstein admitted the material allegations of the complaint that it had committed repeated and flagrant violations of the PACA by failing to pay its produce suppliers. Wright signed the decision for L. Bernstein as its vice-president. (RX-8, 9; CX-3.)

In the course of their phone conversation concerning the settlement, Wright, who at the time was helping Nyden set up County Produce, testified that the following exchange occurred between her and Vos concerning sanctions resulting from the consent decision:

Q. [Pickerstein] And did you ask him [Vos] what sanctions he meant?

A. [Wright] I asked him what the sanctions were.

He said that, what the sanctions were, that I would not be able to work for a produce company, for a year, and I would not be able to have ownership of a produce company, for three years.

Q. All right. That was, to the best of your recollection, ma'am, his exact words?

A. Those are. Yes.

Q. And what did you say, in response to that?

A. I told him that, I explained to him that we had filed a bankruptcy, that I had been out of work, that, on and off, my husband had been out of work. I said, "If I have to work in the produce industry, if that is the only job I can find," I said, "I have to take that job."

He responded with, he said that PACA is not unsympathetic to the economical conditions, in the Northeast, that there have been in fact a number of companies in our very same situation, that have closed, and that the sanctions are a formality, that they do not impose them, or they do not follow up on them, they do not, I do not remember the exact word.

Q. Enforce?

A. Enforce them. Yes.

....

A. . . . And, as such, the sanctions were a formality, and they did not enforce them.

....

A. . . . That is why I signed the sanctions. (Tr. 237-238, . . . 263-264.)

Vos' version of his conversation with Wright was that:

Her concern -- and again, my recollection is vague on this -- her concern was that, she had suffered a major financial setback, and that, she was very concerned about finding a job, and that, she had certain

skills, she felt, that were, and I think it was either accounting or insurance, that is what my recollection was, that she had said, "I am going to get a job. I am looking at this accounting or insurance industry job. That is what I want to do." And I assured her that employment, under the Act, as it was forbidding her from being employed, would not preclude her from being employed in the insurance business, or the accounting business. It would, however, preclude her from being employed, under the Perishable Agricultural Commodities Act. (Tr. 282.)

Vos also testified that "I did not tell her that we never enforce the Act, because, obviously, we do," and that he has never told a respondent that the complainant does not impose sanctions. (Tr. 299, 302.)

Neither Wright nor Vos testified that Wright told him that she was helping Nyden at County Produce at the time of the settlement agreement. Wright said that she understood from her talk with Vos that "for one year, I would not be able to work for a produce company." She testified that she understood this to mean that she was only prohibited from getting paid for her work and that Vos did not tell her that she could not be "affiliated" with a produce company. Wright further testified that Vos did not send her a copy of the Perishable Agricultural Commodities Act and that she has never read any "text" from the Act. She implied that she signed the consent order on the basis of what Vos had purportedly said about complainant not enforcing its sanctions. (Tr. 240-241, 247, 259.)

Wright testified that her work at County Produce included anything that Nyden asked her to do, such as doing work on the computer, answering phones, and occasionally taking orders from customers. She said that she works at County Produce from 2 to 20 hours a week, that she considers the work valuable to the company, that she makes no decisions for the company, that Nyden does the accounting for the business, that she does not know how the company is doing financially, and that she and her husband had guaranteed a loan to the business "as a favor" to Nyden. She denied receiving any payment for her services, or the promise of any, and denied that she is an owner, principal, or manager, or that she has received any promises of future employment or ownership in the business. She said she does the work because "somewhere down the road" there would be a job for her. Wright testified that she also works for Nyden at his separate accounting business and that she gets paid "some" money for that work. (Tr. 247-250, 266-272.)

Other testimony shows that Wright's activities at County Produce include

selling produce and servicing the company's customers. Elizabeth King, the food service manager at St. Joseph's Medical Center in Bridgeport, testified that she has been buying produce from Wright at County Produce since November 1993 and that if she had any problems she would contact Wright. (Tr. 73-75.)

James Laliberte, the food purchaser at the Marriott Hotel in Trumbull, testified that he has dealt with Wright in making produce purchases from County Produce since November 1993. He said that Wright has made deliveries to the hotel and that he also bought produce from Wright when she worked at L. Bernstein. (Tr. 98-101.)

Vincent Fazio, the chief executive officer for Emerald Financial Corporation, which made the loan to County Produce that Wright and her husband guaranteed, testified that it was his "perception" that Wright operated County Produce. (Tr. 110, 129.)

In August 1993, Wright was sent a letter by a PACA official notifying her that, because of her status as an officer and stockholder in L. Bernstein, she could "not be employed by or affiliated with another licensee, in any capacity, until July 19, 1994." (CX-3.)

In October 1993, Nyden was sent a letter by a PACA official telling him that Wright was ineligible to be employed by or affiliated in any capacity with any licensee until July 19, 1994. The letter added:

Please note the terms "employ" and "employment" are defined by the Act as any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

Pursuant to Section 8(b) of the Act, copy enclosed, notice is hereby given that after 30 days from the receipt of this letter, Ms. Linda Wright cannot continue her affiliation with County Produce, Inc. To continue such affiliation after that date will result in the suspension or revocation of its license. (CX-4.)

Nyden responded with a letter stating in part:

Ms. Linda Wright is not currently employed by County Produce, nor is she affiliated with this company through any form of ownership or self-employment, per Section 8(b) of your act. (CX-4.)

The record does not contain any evidence that Wright's activities at County Produce had ceased as of the time of the hearing in March 1995. On the contrary, King's and Laliberte's testimony indicates that, as of the date of the hearing, which was 17 months after Nyden was warned of the consequences of employing Wright, she continued to work for County Produce. (Tr. 75, 100.) Nyden did not testify at the hearing and respondent presented no testimony, other than Wright's, concerning her relationship with County Produce or why respondent disregarded the warning not to employ or be affiliated with Wright.

Law

Section 8(b) (7 U.S.C. § 499h(b)) of the PACA provides that:

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

....

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

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

The Secretary may approve such employment . . . after one year following the revocation . . . 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, after

thirty days of 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.

Section 1(9) (7 U.S.C. § 499a(9)) states:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as . . . (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

Section 1(10) (7 U.S.C. § 499a(10)) provides:

(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.

USDA has held that "[t]he word 'any' is a broad and comprehensive term [citations omitted] that includes *all* kinds of affiliation—whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986)[, *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987)].

Discussion

Complainant has determined that Linda Wright was responsibly connected with L. Bernstein, a licensed produce dealer which was found to have engaged in flagrant and repeated violations of the PACA.¹ She was therefore barred from employment by another PACA licensee for at least one year.

Despite this prohibition, she engaged in work activities on County Produce's behalf which I find clearly constitutes an affiliation. It is irrelevant

¹Administrative law judges do not have the authority to determine or review determinations made of a person's responsibly-connected status in PACA disciplinary proceedings like the instant case. The procedure for making such a determination is provided in 7 C.F.R. § 47.47 *et seq.*, which, in part, provides that a person who is found to be responsibly connected has 30 days from the date of that determination to request review by the Administrator of USDA's Agricultural Marketing Service. It is therefore presumed that complainant followed these required procedures in determining Wright's responsibly-connected status with L. Bernstein.

whether she was paid for this work, since the PACA provides that any affiliation is considered to be employment, whether compensated or not. County Produce continued this business association with Wright even after Nyden, its president, was specifically warned that continued affiliation could result in the company's PACA license being suspended or revoked. Nyden not only denied that such an affiliation even existed, but continued the relationship for 17 months up to the date of the hearing. In *Tri-County, supra*, this circumstance resulted in the respondent's license being revoked.

Respondent County Produce's defense to its conduct is that its affiliation with Wright resulted from Wright's reliance to her detriment on Vos' alleged representations to her that, if she signed the consent decision against L. Bernstein, sanctions would not be enforced. Therefore, the argument goes, complainant is estopped from imposing any sanctions in this proceeding.

However, Wright's claim that she was led to believe that sanctions would not be imposed is equivocal. On the one hand she testified that she understood that there would be no sanctions if she signed the consent decision, but on the other hand she states that she knew she would be barred from employment for a year, which is certainly an imposition of a sanction. She attempted to escape from this dilemma by claiming that she thought this meant only that she was prevented from doing work for which she would be paid and that Vos did not tell her that she could not be affiliated with a produce company. She also implied that she was ignorant of the law's provisions by stating that she never read any of PACA's "text" and had stated, in her answer to the complaint against L. Bernstein, that she had no knowledge of the PACA or its regulations.

Apart from the general principle that ignorance of the law is no excuse, it is not a credible argument for someone with Wright's training as a paralegal and her experience setting up banks, which obviously required her to learn banking laws and regulations, to claim that she did not know after working 5 years in the highly regulated produce industry, including two as a dealer, that anyone responsibly connected with a produce firm found to have failed to pay for its purchases will be barred from being affiliated with another licensee, whether compensated or not. It is a specious argument to claim ignorance of PACA's penalties because she had not taken the time to read them and no one had told her about them. Vos was under no duty to explain elementary law to her. It was a matter of which she should have been aware when she entered the produce business as a dealer. Moreover, she continued her affiliation with County Produce even after she was specifically told that affiliation with a licensee was prohibited.

Furthermore, considering USDA's long-standing policy of non-leniency in the enforcement of the PACA, it is highly unlikely that Vos, as one of its attorneys, would even suggest the possibility of leniency in a no-pay case. This 20-year non-leniency policy was re-affirmed in 1995 in *Atlantic Produce Co., and Joseph Pinto*, 54 Agric. Dec. [701 (1995)]. The Judicial Officer, as USDA's policy maker in these disciplinary cases, stated, "it is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department . . . [e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful." [54 Agric. Dec. at 711-12.]

In view of this clear policy statement, I do not credit the assertion that Vos, as complainant's agent, told Wright that sanctions would not be enforced and I do not find any circumstances which would constitute an estoppel to complainant's request for sanctions in this proceeding.

As respondent County Produce, Inc., has not advanced any meritorious reasons for its continued affiliation with Linda Wright after being notified to cease such affiliation, I find that it violated section 8(b) of the PACA and that such violation was willful and flagrant. Its license shall be ordered revoked.

Findings of Fact

1. Respondent County Produce, Inc., is a PACA licensed produce dealer.
2. L. Bernstein and Sons, Inc., had been a licensed produce dealer and was found to have engaged in repeated and flagrant violations of the PACA in 1991.
3. Linda Wright was responsibly connected with L. Bernstein and Sons, Inc., at the time it engaged in repeated and flagrant violations of the PACA.
4. Linda Wright was notified in August 1993 that because she was responsibly connected with L. Bernstein she was prohibited from being employed by or affiliated with another produce dealer until July 19, 1994.
5. Respondent was affiliated with Linda Wright from August through October 1993.
6. Respondent was notified in October 1993 that it was prohibited from being affiliated with Linda Wright and that continued affiliation with Linda Wright could result in its PACA license being suspended or revoked.
7. Respondent continued its affiliation with Linda Wright from October 1993 to at least February 1994.

Conclusion of Law

Respondent willfully and flagrantly violated section 8(b) of the Perishable Agricultural Commodities Act (7 U.S.C. §499h(b)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Department's current sanction policy is set forth 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 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz.*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the 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.

Respondent appeals the sanction of license revocation, arguing that mitigating, relevant circumstances would not allow license revocation. More specifically, Respondent argues that the ALJ's decision to revoke does not meet the standard of substantial evidence; rather, that this case is similar to *ABL Produce (In re ABL Produce, Inc.)*, 52 Agric. Dec. 1578 (1993), *aff'd in part & rev'd in part*, 25 F.3d 641 (8th Cir. 1994), *reprinted in* 53 Agric. Dec. 690 (1994)), wherein the Eighth Circuit reduced license revocation to a 30-day suspension. (For an extensive examination of *ABL Produce*, and the reason why this decision is the wrong approach to enforcing the responsibly connected prohibition in PACA, see *In re John J. Conforti*, 54 Agric. Dec. 649, 683-92 (1995), *aff'd in part & rev'd in part*, 69 F.3d 897 (8th Cir. 1995)).

However, I find that the ALJ's Findings of Fact, and sanction herein, do meet the test of substantial evidence; and that the proceeding, *sub judice*, is not substantially similar to *ABL Produce*; but rather, is akin to *Tri-County*, as the ALJ noted (Initial Decision at 9-10). A copy of *Tri-County* is attached as

an Appendix.

Recently, the substantial-evidence test was restated in *Valkering*, as follows (*Valkering U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 307 (8th Cir. 1995)):

The Secretary's decision must be upheld if it is supported by substantial evidence. *Cox v. United States Dept. of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), cert. denied, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)).

The ALJ's sanction decision easily meets this test, for the reasons below. Respondent does not appeal the ALJ's finding that Linda Wright was affiliated with Respondent as charged in the Complaint; but, rather, Respondent argues that the ALJ, in fashioning the sanction, "neglected to consider the nature of the violation along with the relevant circumstances of the case" (Respondent's Appeal at 4). To this end, Respondent argues, *inter alia*, that the ALJ erroneously failed to consider that, since none of County's bills went unpaid, nobody suffered the harm PACA was designed to prevent; that Linda Wright's affiliation was only 2½ months' duration; that Linda Wright was not compensated by County in any manner; that Linda Wright engaged in no deceptive activity to circumvent the sanctions; that Linda Wright did not profit from her prohibited conduct; and that Linda Wright conceded that she helped out at County to secure possible future employment (Respondent's Appeal at 4-5).

Each of these arguments is rejected, either because the ALJ properly considered and decided that particular point, or because the argument is legally wrong--being either irrelevant, or based upon Respondent's faulty analysis of case law, as explained below.

Respondent argues that the affiliation was for only 2½ months, but the ALJ properly found that Linda Wright was affiliated with County from August 1993 to at least February 1994 (Findings of Fact 5, 7). Moreover, the ALJ specifically included record evidence of testimony that County continued to employ Wright 17 months after Respondent's owner, Mr. Nyden, was warned of the consequences of employing Wright, as follows (Initial Decision at 8, 10):

The record does not contain any evidence that Wright's activities at County Produce had ceased as of the time of the hearing in March 1995. On the contrary, King's and Laliberte's testimony indicates that, as of the date of the hearing, which was 17 months after Nyden was warned of the consequences of employing Wright, she continued to work for County Produce. (Tr. 75, 100.)

....

Despite this prohibition, she engaged in work activities on County Produce's behalf which I find clearly constitutes an affiliation. It is irrelevant whether she was paid for this work, since the PACA provides that any affiliation is considered to be employment, whether compensated or not. County Produce continued this business association with Wright even after Nyden, its president, was specifically warned that continued affiliation could result in the company's PACA license being suspended or revoked. Nyden not only denied that such an affiliation even existed, but continued the relationship for 17 months up to the date of the hearing. In *Tri-County, supra*, this circumstance resulted in the respondent's license being revoked.

The fact that Linda Wright received no payment, no profit, and no promise of future employment from County is legally irrelevant, because the statute plainly states, as the ALJ pointed out, "employment" means *any* affiliation, with or without compensation, ownership or self-employment, as follows (Initial Decision at 9):

Section 1(10) (7 U.S.C. § 499a(10)) provides:

(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.

USDA has held that "[t]he word 'any' is a broad and comprehensive term [citations omitted] that includes *all* kinds of affiliation—whether minimum or maximum; whether deliberate or not." *Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286, 304 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105

(1987)].

(Parenthetically, it strikes me as just too convenient that Linda Wright is paid for the accounting job she does for Nyden at one of his offices, but is not paid when she is at County Produce's office. However, since the ALJ did not develop this, it forms no part of my decision.)

Respondent's remaining two points--that Linda Wright engaged in no deceptive activity to circumvent the sanctions and that since *none of County's bills went unpaid, nobody suffered the harm PACA was primarily designed to prevent*--go directly to Respondent's reliance on *ABL Produce* as precedent to reverse Respondent's license revocation. In fact, Respondent has lifted the above language almost verbatim from *ABL*, as shown, *infra*.

However, *ABL Produce* is easily distinguished from this case, *sub judice*. In *ABL Produce*, the relevant parties and their relationship to this case's parties are *ABL = County; Middendorf = Nyden; and Lombardo = Wright*. The differences in the factual situations surrounding these cases are stark, because *ABL* and *Middendorf* *tried to prevent* *Lombardo* from involving himself in *ABL's* activities. *Lombardo* used deception and threats against *ABL's* employees to hide his *ABL Produce* activities from *Middendorf*. In the *ABL Produce* scenario, the Court apparently characterizes *Middendorf* as *both violator and injured party*, and construes the statute and relevant circumstances to soften the penalty on *Middendorf*, as follows (*ABL Produce, supra*, 25 F.3d at 698) (emphasis added):

It is clear from the record that *ABL* *tried, albeit unsuccessfully, to prevent Lombardo from involving himself in the company's activities*. Though there is no denying that the violation calls for a punishment, consideration of the "relevant circumstances" should include consideration of the statute's purpose. *Here, none of ABL's bills went unpaid, so nobody has suffered the harm PACA was primarily designed to prevent*. We also note that the brunt of the sanction, if upheld, will be most keenly felt by *Middendorf* personally; as a person "responsibly connected" to *ABL*, *Middendorf* will be required to disassociate himself from his other *PACA*-licensed company. See 7 U.S.C. § 499h(b) (1988); *cf. Ferguson*, 911 F.2d at 1282 ("Our conclusion is not based upon but is strengthened by the fact that the six-month suspension would likely put *Ferguson* out of business."). This is particularly important in light of *the most compelling and unique circumstance contained in the record*: the fact that *Lombardo* engaged in deceptive

acts to hide his activities from Middendorf and issued threats to prevent those who discovered his involvement from reporting to Middendorf.

Clearly, the *ABL* case does not help County/Nyden because the *ABL* Court specifically noted that the "most compelling and unique circumstance contained in the record," was that Lombardo engaged in deceptive acts and threats to *ABL*/Middendorf's employees to hide Lombardo's activities from Middendorf. That scenario certainly does not fit Linda Wright's activities at County, which activities always had the complete support of Nyden, as explained by the ALJ, as follows (Initial Decision at 6-7):

Wright testified that her work at County Produce included anything that Nyden asked her to do, such as doing work on the computer, answering phones, and occasionally taking orders from customers. She said that she works at County Produce from 2 to 20 hours a week, that she considers the work valuable to the company, that she makes no decisions for the company, that Nyden does the accounting for the business, that she does not know how the company is doing financially, and that she and her husband had guaranteed a loan to the business "as a favor" to Nyden. She denied receiving any payment for her services, or the promise of any, and denied that she is an owner, principal, or manager, or that she has received any promises of future employment or ownership in the business. She said she does the work because "somewhere down the road" there would be a job for her. Wright testified that she also works for Nyden at his separate accounting business and that she gets paid "some" money for that work. (Tr. 247-250, 266-272.)

Other testimony shows that Wright's activities at County Produce include selling produce and servicing the company's customers. Elizabeth King, the food service manager at St. Joseph's Medical Center in Bridgeport, testified that she has been buying produce from Wright at County Produce since November 1993 and that if she had any problems she would contact Wright. (Tr. 73-75.)

James Laliberte, the food purchaser at the Marriott Hotel in Trumbull, testified that he has dealt with Wright in making produce purchases from County Produce since November 1993. He said that

Wright has made deliveries to the hotel and that he also bought produce from Wright when she worked at L. Bernstein. (Tr. 98-101.)

Consequently, when Respondent argues that Linda Wright committed *no deceptive acts*, Respondent actually hurts its case, *vis-a-vis* no sanction for Respondent, because deceptive activity by Lombardo (Wright's correlative in *ABL*) was a *major reason* given by the *ABL* Court for a reduced sanction for *ABL/Middendorf* (County/Nyden's correlatives in *ABL*).

Moreover, in *ABL*, the ALJ recommended a 30-day suspension, the Judicial Officer reversed and ordered instead revocation, which the Agency officials had originally recommended (*ABL, supra*, 25 F.3d at 693). The *ABL* Court, however, decided that "the ALJ's original sanction of a thirty-day suspension [was] more appropriate" (Id. at 698), and reduced the sanction accordingly. In the case, *sub judice*, however, it is very different from *ABL*, because herein the ALJ recommends revocation, as do the Agency officials. Thus, when the Judicial Officer agrees on revocation in this case, all agree on revocation: the Agency officials, the ALJ, and the Judicial Officer.

It is unfortunate, and I believe incorrect, that the *ABL Produce* Court used as relevant and mitigating circumstances that there were no unpaid bills and no apparent harm to anybody, as reasons to lessen the sanction against Middendorf, because such an interpretation contains the potential for great harm to the PACA's deterrent effect envisioned by Congress. As noted above, the *ABL* Court viewed Middendorf as both violator and victim, resulting in an unusual sanction situation--especially, for the evaluation of what circumstances could be considered mitigating. This *ABL* opinion, and some recent others, manifest the Courts' apparent reading of the USDA sanction policy to be "all circumstances of the case are relevant to the sanction." This is almost diametrically opposite to the actual wording of the sanction policy, which speaks to "all *relevant* circumstances."

This is not quibbling. Whereas the Courts apparently require the Judicial Officer to consider each and every circumstance, the sanction policy specifically states that "all *relevant* circumstances" be considered. The sanction policy should and does recognize that not all circumstances are relevant to a sanction and the Judicial Officer decides relevancy. This allows the Judicial Officer to consider Congressional intent. For example, a legislative history of section 8(b) of the PACA (7 U.S.C. § 499h(b)) appears at 45 Agric. Dec. 292-303 of *Tri-County*, and makes clear that Congress believed the person who did not pay a reparation award to be a "defiled person" likely to contaminate any licensee with whom that defiled person is affiliated. The Complainant makes

this point in Complainant's Response at 12, as follows:

The Judicial Officer noted in *In re Tri-County Wholesale Produce Co., Inc.*, *supra*, [45 Agric. Dec.] at 296-297, that Congress was aware of the need to protect the produce industry when it amended the PACA in 1962 to add the provisions of section 8(b) regarding unlawful employment, stating "it is clear that Congress regarded a person who fails to pay a reparation award is a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner."

The ALJ noted that this case, *sub judice*, is similar to *Tri-County*, a point with which I have already agreed, *supra*. Complainant also argues that *Tri-County* is the factually-similar case; I agree with Complainant's analysis and adopt it as my own, as follows (Complainant's Response at 9-10, 12):

C. The applicable case law supports a finding of employment or affiliation in this case.

The case law in this area is consistent. The finder of fact will look at the totality of the circumstances to determine whether the restricted individual or individuals were employed by or affiliated with the licensee. For example, in *Tri-County Wholesale Produce Co., Inc. v. U. S. Department of Agriculture*, *supra*, a case with facts similar to the one at hand, the District of Columbia Circuit Court affirmed an order of the Secretary of Agriculture revoking the license of the appellant pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)). In that case, the respondent had argued that the individual it was charged with employing in violation of section 8(b) was, in fact, an independent contractor, and not an employee. After reviewing the facts, the Judicial Officer of the Department determined that any change in the individual's employment status at the firm was merely cosmetic. Based on the fact that the individual in question continued to answer the company's telephone, frequented its premises, purchased produce for the firm and solicited business on the firm's behalf, the Judicial Officer found that relationship was one of employment or affiliation. See also *In re S.E.L. International Corporation*, 51 Agric. Dec. 1407 (1992); and *In re: DiCarlo Distributors, Inc., a/t/a North American Purveyors*, PACA Docket D-93-519, 53 Agric. Dec. [1680 (1994), appeal

withdrawn, No. 94-4218 (2d Cir. June 21, 1995)].

....

The sanction of revocation is consistent with the sanctions issued in similar cases. In In re Tri-County Wholesale Produce Co., Inc., *supra*, complainant's requested sanction, a license revocation, was issued under circumstances similar to the present case. In Tri-County, the respondent was found to have unlawfully employed an individual who had been found to be responsibly connected with a company that failed to pay reparation awards. The period of unlawful employment was over a year, from March 1982 through 1983. See also In re Williamsport Produce and Seafood, Inc., *supra*, In re: S.E.L. International Corporation, *supra*, and In re DiCarlo Distributors, Inc. a/t/a North American Purveyors, *supra*.

I have closely examined Respondent's criticisms of (the sanction witness) Ms. Jervis' testimony. I find that even if Respondent's arguments were true, they are irrelevant. Complainant's Response (at 11-12) correctly details the testimony of Ms. Jervis, and points out the relevance of the sanction testimony as follows:

Complainant's witness, Clare G. Jervis, gave testimony at the hearing concerning the need for the sanction of revocation (TR at 306-336). Ms. Jervis testified that respondent's employment violations are very harmful, as they undermine the intent of the employment restrictions in the PACA -- to protect the industry from individuals who have been found to be responsibly connected with firms that have violated the PACA (TR at 310). In addition, such violations undermine the deterrent effect of the sanctions imposed on the firms with which the individual was responsibly connected (TR at 310-311). As to the particulars of this case, Ms. Jervis testified that respondent unlawfully employed Linda Wright for a long time, from at least November 1993 until at least February 1994, a period of four months (TR at 310). She stated that respondent was given two notices that it was prohibited from employing or being affiliated with Linda Wright but did so nonetheless (TR at 311). Ms. Jervis also mentioned that only a revocation will be a meaningful sanction because of the deterrent effect it will have on respondent and the produce industry (Tr. at 310-311,

314).

Finally, the mitigating circumstances which Respondent raises to lessen the sanction penalty on Nyden are not mitigating at all. Nyden has freely employed, or been employed with, Wright at virtually every place Wright has worked: Valley Bank; L. Bernstein; County Produce; and Nyden's own accounting business. Nyden is nothing like the employer in *ABL*, where employer/Middendorf (Nyden's correlative in that case) acted to prevent employee/Lombardo's (Wright's correlative) employment and activities. No, Nyden's actions were just the opposite, they approved Wright's activities, and deserve no mitigating effect.

Moreover, the other circumstances raised by Respondent fail to mitigate. These types of things were discussed in *Conforti*, which case is argued by Complainant, and I agree with and adopt Complainant's argument as follows (Complainant's Response at 11):

In *In re John J. Conforti d/b/a C & C Produce*, PACA Docket No. D-94-524, 54 Agric. Dec. [649 (1995), *aff'd in part & rev'd in part*, 69 F3d 897 (8th Cir. 1995)], the Judicial Officer explains what is appropriate to be considered in mitigation in employment cases. The Judicial Officer notes that conclusions about the employer's ethics, the employer's payment practices, the non-existence of reparation complaints against the employer and the financial health of the employer are irrelevant to the respondent's unlawful employment of the employment restricted individual and will not be considered in mitigation. *Conforti*, [54 Agric. Dec. at 679]. In the instant case, therefore, the purported financial success and good standing of County Produce and David Nyden are irrelevant.

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

Order

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the 30th day after service thereof on Respondent.

APPENDIX

In re Tri-County Wholesale Produce Co., 45 Agric. Dec. 286 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

In re: COUNTY PRODUCE, INC.
PACA Docket No. D-94-548.
Stay Order filed March 5, 1996.

Julie, Cook, for Complainant.
Harold James Pickerstein, Fairfield, CT, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

The Order previously issued in this case, which would have revoked Respondent's license effective February 28, 1996, is hereby stayed pending the outcome of proceedings for judicial review. Respondent filed its motion for a stay pending judicial review on February 23, 1996. The Respondent's motion was referred to the Judicial Officer on March 1, 1996. This Stay Order is issued *nunc pro tunc* and is effective February 23, 1996.

In re: COASTAL BANANA & TOMATO CO.
PACA Docket No. D-94-570.
Initial Decision as Set Forth in Bench Decision of February 28, 1996, filed February 29, 1996.

Failure to make full payment promptly - "Full payment promptly" defined - Failure to pay required annual license renewal fee - "Willful" defined - Willful, flagrant and repeated violations - Publication.

Judge Baker published the finding that Respondent violated section 2 of the PACA by failing to make full payment promptly of the agreed purchase prices for twenty-seven lots of perishable agricultural commodities, totaling \$150,723.03. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards the requirements of a statute. Respondent knew or should have known that it could not make prompt payment for the produce it ordered, yet it continued to buy produce; therefore, Respondent's violations are willful. Since Respondent failed to pay the annual license renewal fee and its license has already terminated, publication is the appropriate sanction.

Julie Cook Schuster, for Complainant.

Respondent, Pro se.

Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter sometimes referred to as the "PACA"; the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. §§ 1.130 through 1.151) hereinafter sometimes referred to as the "Rules of Practice".

The proceeding was instituted by a Complaint filed on September 21, 1994, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Complaint that the Respondent, Coastal Banana & Tomato, Co., violated Section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices for twenty-seven lots of perishable agricultural commodities, for a total amount of \$150,723.03.

The sanction sought was a finding that Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published.

Respondent, through counsel, filed an Answer, on November 3, 1994, in which it entered general denials and requested that the matter be set for oral hearing.

Pursuant to Motion to Assign a Date for Oral Hearing filed by Complainant on July 25, 1995, a pre-hearing conference call took place with attorney for Respondent on September 27, 1995 and it was agreed that unless the case was settled, the oral hearing would take place on February 28, 1996, by means of audio-visual telecommunications, the sites thereof being Washington, D.C. and Mobile, Alabama. The parties were to exchange copies of anticipated exhibits and a list of expected witnesses on or prior to December 15, 1995. This Complainant did. Respondent did not.

On October 12, 1995, Respondent's attorney withdrew as counsel.

The locations of Hearing Rooms for the Audio-visual Transmission Oral Hearing on February 28, 1996, were issued February 8, 1996.

The oral hearing took place on February 28, 1996, before Administrative Law Judge Dorothea A. Baker, by means of audio-visual telecommunications. Complainant was represented by Julie Cook Schuster, Esquire, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent did not appear.

On February 20, 1996, Complainant filed a Motion for a Bench Decision which motion is hereby granted.

Premised upon the uncontroverted evidence presented by Complainant at this hearing and the record as a whole, the following Findings of Fact are made.

Findings of Fact

1. Respondent, Coastal Banana & Tomato Co., is a corporation organized and existing under the laws of the State of Florida. Its last known business mailing address is 2243 Halls Mill Road, Mobile, Alabama 36606.

2. Pursuant to the licensing provisions of the PACA, license number 920749 was issued to Respondent on February 27, 1992. This license terminated on February 27, 1994, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period February, 1993, through October, 1993, Respondent purchased, received, and accepted twenty-seven lots of perishable agricultural commodities, from five sellers in interstate commerce, but failed to make full payment promptly of the agreed purchased prices, or balances thereof, in the total amount of \$150,723.03.

4. The acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the twenty-seven lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically detailed in the evidence of the Complainant, constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department in its Regulations (7 C.F.R. § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within ten days after the day on which the produce is accepted. Complainant has shown by a preponderance of the evidence that the Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with

respect to the twenty-seven transactions involving perishable agricultural commodities, in interstate commerce, for a total of \$150,723.03.

Respondent's failures to make timely payment are in violation of the prohibitions of Section 2 of the PACA (7 U.S.C. § 499b). *In re: Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). Moreover, Respondent's failure to pay promptly and in full for twenty-seven transactions occurring over a period of eight months, totaling \$150,723.03 constitute repeated and flagrant violations of Section 2 of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *In re: G. Steinberg and Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom.*, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974). The twenty-seven violations are "repeated" because repeated means more than one and twenty-seven is more than one. The violations are flagrant because of the number of violations, the amount of money involved and the length of period of time during which the violations occurred. *See, In re: Veg-Mix, Inc.*, 48 Agric. Dec. 595 (1989); and *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983).

Furthermore, these violations were willful. *American Fruit Purveyors v. United States*, *supra*. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102 (8th Cir. 1991). Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet Respondent continued to make purchases. Respondent was aware of the Act's requirements, yet continued to buy knowing that each purchase would result in another violation. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and, consequently, could not pay suppliers, thus the burden of nonpayment was shifted to the sellers. The sellers were required to involuntarily, and perhaps, unknowingly, extend credit to the Respondent. Under these circumstances, Respondent has both intentionally violated the Act and clearly operated in careless disregard of the payment requirements of the PACA, and Respondent's violations were, therefore, willful.

As sanction for these violations, Complainant seeks that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published. Support for the issuance of this sanction is found in the Departmental sanction policy and the precedent enunciated by the Judicial Officer. Where

the Respondent is not in compliance at the time of the hearing, the appropriate sanction is the revocation of the Respondent's license. *In re: Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re: Finer Foods Sales Co., Inc.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re: Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984). In this case, because the license has already terminated, the appropriate sanction is that a finding of willful, repeated and flagrant violations be made and that the finding be published.

The decisive factors that the Department considers to determine the appropriate sanction include the number of violations, the seriousness of violations, the impact of violations on the industry as a whole, the interests of the Secretary in ensuring that the trust relationship which exists between members of the industry--the basis for virtually every transaction in this multibillion dollar industry--is maintained, the management decisions made by Respondent, and the financial status of Respondent.

In the instant case, Respondent failed to make full payment promptly for twenty-seven lots of perishable agricultural commodities over a period of eight months, for a total of \$150,723.03. Taking all these factors into consideration, the sanction sought by Complainant is granted.

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. Since this Initial Decision reflects the Bench Decision of February 28, 1996, it has been formatted in written form, with any necessary and appropriate grammatical, apparent, or necessary additions or corrections made.

This Order entered herein shall take effect on the eleventh (11th) day 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).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 17, 1996.-Editor]

**In re: HOGAN DISTRIBUTING, INC.
PACA Docket No. D-94-556.
Decision and Order filed April 22, 1996.**

Failure to make full payment promptly — Repeated, willful and flagrant violations — Publication of facts and circumstances — Sanction policy.

The Judicial Officer affirmed the decision by Judge Bernstein (ALJ) publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b by failing to make full payment promptly for perishable agricultural commodities. Settlement with some produce creditors and failure of Respondent's customers to pay Respondent are irrelevant to the issue of Respondent's violation of PACA. Respondent should have been adequately capitalized or have been able to obtain additional capital to make full payment promptly to sellers. There can be no excuses for nonpayment under PACA where there are repeated failures to pay substantial amounts over an extended period. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. Willfulness is not relevant to the employment restrictions in 7 U.S.C. § 499h(b). A violation is willful if, irrespective of evil motive or erroneous advice, 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 a period in excess of 1 year constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). In view of the need for prompt payment and financial responsibility in the industry, the sanction of publication, recommended by administrative officials, is appropriate, clearly within the Secretary's discretion, and consistent with recent cases. Collateral effects of the sanction on those responsibly connected with Respondent, and those who have entered into settlement agreements with those responsibly connected with Respondent, are not relevant to a proceeding to determine whether Respondent violated 7 U.S.C. § 499b(4).

Barbara S. Good, for Complainant.

Scott A. Johnson, Wayzata, MN, for Respondent.

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

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

This case is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (hereinafter the PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on July 11, 1994, alleging that during the period January 1993 through April 1994, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in

interstate commerce. Complainant contended that Respondent's failures to make full payment promptly constituted willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and requested revocation of Respondent's license. Because Respondent's license has terminated, Complainant seeks publication of the facts and circumstances of the violations alleged in the Complaint.

Respondent, in its Answer, denied that the sum alleged in the Complaint was due and owing to the sellers listed or that Respondent had engaged in willful, flagrant, or repeated violations of 7 U.S.C. § 499b(4). However, Respondent neither denied that the transactions set forth in the Complaint took place, nor did it deny that it had failed to make full payment promptly to the nine sellers for the 224 lots of perishable agricultural commodities.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on June 28, 1995, in Minneapolis, Minnesota. Complainant was represented by Barbara S. Good, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent was represented by Scott A. Johnson, Esq., of Wayzata, Minnesota. The ALJ filed an Initial Decision and Order on September 22, 1995, in which he found that Respondent had committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b and ordered publication of the facts and circumstances set forth in the decision.

On November 1, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35),¹ and requested oral argument pursuant to 7 C.F.R. § 1.145(d). On November 28, 1995, Complainant responded to Respondent's appeal, and on November 29, 1995, the case was referred to the Judicial Officer for decision.

The Judicial Officer may, under the applicable Rules of Practice, (7 C.F.R. § 1.145(d)), grant, refuse, or limit any request for oral argument. The issues in this case are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose and is refused.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

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.

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

....

Findings of Fact

1. Respondent, Hogan Distributing, Inc., is a corporation organized and existing under the laws of the State of Minnesota. (Answer ¶ II.) [Respondent] is no longer operating as a business. (Tr. 73.)

2. At all times material, Respondent was licensed under the PACA. License number 881451 was issued to Respondent on June 27, 1988. This license terminated when it was not renewed on or before June 27, 1994. (Complaint ¶ II; Answer ¶ II; Tr. 97.)

3. During the period January 1993 through April 1994, Respondent failed to make full payment promptly to nine sellers [at] the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce. (Tr. 11, 17-38; CX 3-13.) As of June 1[2], 1995, Respondent still had not paid \$283,201.12 in connection with the transactions set forth in the Complaint. (Tr. 38-[40]; CX 16[.].)

Conclusion

Respondent's failures to make full payment promptly, as set forth in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA. (7 U.S.C. § 499b(4).)

Discussion

At the hearing, Complainant introduced voluminous documentary evidence supporting the transactions as alleged in the Complaint. (Tr. 22-35; CX 3-13.) In addition, Complainant introduced evidence that \$283,201.12 of the \$305,527.05 remained unpaid as of June 1[2], 1995. (Tr. 3[8]-40; CX 16.) The parties stipulated [that the] transactions [alleged] in the Complaint [were in

interstate commerce]. (Tr. 11.) Evidence was introduced to show that Respondent's license was terminated on June 27, 1994, due to nonpayment of the renewal fee. (Tr. 97; CX 1.) Respondent did not offer proof to refute any of this evidence.

Although Respondent did not deny that the transactions took place as alleged, Respondent disputed that it had engaged in any conduct which would constitute willful, flagrant, or repeated violations of section 2(4) of the PACA. (Answer ¶ III; Tr. 90-91.)

Respondent's evidence, submitted through the testimony of Dennis Hogan, its president and [owner of] 75 [percent of the shares of Hogan Distributing, Inc., (Tr. 68),] related primarily to potentially mitigating circumstances. Mr. Hogan's testimony consisted of a review of his own work history and his start-up of Respondent[, (Tr. 67-70)]; Respondent's financial difficulties, which led eventually to its failure[, (Tr. 70-73)]; and the accommodations which Respondent and some of its produce creditors have reached in connection with PACA trust litigation[, (Tr. 73-75, 77-89)].

Respondent [introduced into evidence] a Stipulation and Settlement Agreement (hereinafter Settlement Agreement) in Civil Action No. 4-94-158 in the U.S. District Court for the District of Minnesota. (RX 2.) The Settlement Agreement makes arrangement for partial payment to some of Respondent's produce creditors. Respondent also introduced into evidence an Order [for] Dismissal, which adopts the terms of the Settlement Agreement. (RX 3.)

It should be noted that the terms contained in the Settlement Agreement and the Order for Dismissal are unfavorable to the PACA creditors. It appears from a reading of RX 2 and RX 3 that the reason that five of Respondent's produce creditors entered the Settlement Agreement was that Respondent is insolvent and the Settlement Agreement was the only avenue available to them to obtain even a fraction of the \$236,079 in qualified PACA trust claims.

Moreover, Complainant presented evidence that shortly before the hearing on June 28, 1995, Respondent still owed \$283,201.12 in connection with the transactions set out in the Complaint. (Tr. 39-40; CX 16.)

Whether a PACA licensee, having repeatedly and flagrantly failed to pay promptly as required by the PACA, has come to a private accommodation with one or all of its produce creditors is irrelevant to the issue of whether or not its failures to pay in accordance with the [PACA] and the regulations [promulgated pursuant to the PACA] constitute violations for which it should be sanctioned. *See, e.g., In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1626

(1993), *aff'd*, [47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S. Ct. 474 (1995)].

Respondent also offers as a mitigating circumstance Mr. Hogan's testimony that Respondent's failures to pay its produce obligations were the domino-like result of two of its customers defaulting in their obligations to Respondent. (Tr. 70-73.) However, such mitigating circumstances are irrelevant in determining whether a violation has occurred. *Frank Tambone, Inc. v. United States Dept of Agric.*, [50 F.3d 52, 55 (D.C. Cir. 1995)]. There can be no excuses for nonpayment under the PACA where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time. *In re Atlantic Produce Co.*, 54 Agric. Dec. [701] (1995).

Respondent's violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dept of Agric.*, [925 F.2d 1102, 1105 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991)]; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-269 [(1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974)].

Respondent's failures to make full payment promptly in numerous transactions over a period in excess of 1 year also constitute flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). In view of the need for prompt payment and financial responsibility in the industry, the sanction of publication, recommended by the administrative officials, is appropriate. *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989). As Respondent still owes approximately \$283,201.12 for the transactions [cited] in [paragraph III of] the Complaint, Respondent's failures to make full payment promptly call for the publication of the facts and circumstances of the violations. See *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 505 (1987), [*aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988)]; and *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 150 (1984).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in its Memorandum of Law in Support of Hogan Distributing, Inc.'s, Appeal (hereinafter RMA). First, Respondent contends that "[a] finding of willfulness is a crucial factual element of any decision that includes as a sanction a bar from employment." (RMA, p. 3.)

I disagree with Respondent's contention. Willfulness is not relevant to the

employment restrictions in section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

In its Complaint instituting this disciplinary proceeding, Complainant requested that "pursuant to [s]ection 8 of the PACA[,] (7 U.S.C. § 499h), the [ALJ] find that [R]espondent has committed wilful, flagrant and repeated violations of [s]ection 2(4) of the PACA[,] (7 U.S.C. § 499b(4)), and order that the license of [R]espondent be revoked." (Complaint, p. 10.) Respondent chose not to renew its license and thereby allowed its license to lapse. After the lapse of Respondent's license, Complainant dropped its request for revocation of Respondent's license, and, instead, requested that the ALJ publish the facts and circumstances of the violations alleged in the Complaint. (Tr. 12; Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, pp. 1-2; Complainant's Reply Brief, p. 6; RMA, p. 1; Complainant's Response to Respondent's Appeal, p. 1.)

Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides, in pertinent part, as follows:

(a) 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. . . .

Section 8(b) of the PACA, (7 U.S.C. § 499h(b)), provides, in pertinent part, as follows:

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

. . . .
(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[.]

. . . .
The Secretary may approve such employment . . . after one year following the . . . 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. . . .

Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides that the Secretary may publish the facts and circumstances of a violation of any provision of section 2 of the PACA, (7 U.S.C. § 499b), by any commission merchant, dealer, or broker. Publication of the facts and circumstances of the violation is not dependent upon the Secretary determining that the violation of section 2 of the PACA, (7 U.S.C. § 499b), was willful, flagrant, or repeated. Section 8(b) of the PACA, (7 U.S.C. § 499h(b)), restricts licensees from employing any person, and any person who is or has been responsibly connected with any person, who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 of the PACA, (7 U.S.C. § 499b). The employment restrictions in section 8(b) of the PACA, (7 U.S.C. § 499h(b)), are not dependent upon a finding that the employee or intended employee willfully violated section 2 of the PACA, (7 U.S.C. § 499b). In addition, since, in the instant proceeding, Complainant is not seeking to withdraw, suspend, revoke, or annul Respondent's license, the willfulness provisions of the Administrative Procedure Act, (5 U.S.C. § 558(c)), are not applicable. *Joe Phillips & Associates, Inc. v. United States Dep't of Agric.*, 923 F.2d 862, 1991 WL 7136, n.9 (9th Cir. 1991), printed in 50 Agric. Dec. 847, 853 n.9 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 993-94 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *In re SWF Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Komblum & Co.*, 52 Agric. Dec. 1571, 1573 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1428 (1992); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980).

Second, Respondent contends that while there is no question that Respondent violated the PACA, there is "no evidence of record" that Respondent's violations of the PACA were willful. (RMA, pp. 2-3.)

As stated above, 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 Respondent's violations of 7 U.S.C. § 499b(4) were willful.

Since Respondent violated express requirements of the PACA, (7 U.S.C. § 499b), by failing to make full payment for perishable agricultural commodities promptly, the ALJ's finding of willfulness is correct. See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *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.*, *supra*, 48 Agric. Dec. at 643-53.

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. *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1105; *Finer Foods Sales Co. v. Block*, *supra*, 708 F.2d at 777-78; *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*, *supra*, 491 F.2d at 994; *Goodman v. Benson*, *supra*, 286 F.2d at 900; *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, *supra*, 54 Agric. Dec. at 1378; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re National Produce Co.*, *supra*, 53 Agric. Dec. at 1625; *In re Samuel S. Napolitano Produce, Inc.*, *supra*, 52 Agric. Dec. at 1612.² 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,

²The 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 would still be willful in view of Respondent's gross neglect of the express provisions of the PACA known by Respondent to require prompt payment.

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 record establishes and Respondent does not deny that Respondent failed to make full payment of the agreed purchase prices promptly to nine sellers for 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period January 1993 through April 1994, a period of 16 months. (Tr. 11; CX 3-13.)

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved. 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 16-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. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and Respondent's violations were, therefore, willful. *In re The Norinsberg Corp.*, *supra*, 52 Agric. Dec. at 1622; *In re Kornblum & Co.*, *supra*, 52 Agric. Dec. at 1573-74; *In re Full Sail Produce, Inc.*, *supra*, 52 Agric. Dec. at 622; *In re Vic Bernacchi & Sons, Inc.*, *supra*, 51 Agric. Dec. at 1429; *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).

Respondent states that:

The record shows that [Respondent's] failure to pay [its] creditors was a result of circumstances outside [its] control, making it impossible for [Respondent] to satisfy [its] debts in full. But for the occurrence of these events, [Respondent] would have been able to pay [its] creditors promptly as required by the PACA. [Respondent] did not *intend* to be placed in a position where [it] could not satisfy [its] obligations. It

cannot be *careless disregard* for statutory obligations that outside, independent events occur and have a negative impact upon [Respondent].

(RMA, pp. 3-4; emphasis in original.)

The Memorandum of Law in Support of Hogan Distributing, Inc.'s, Appeal does not specify the circumstances that were outside Respondent's control that made it impossible for Respondent to make prompt payment for the full amount of the agreed purchase price of perishable agricultural commodities, as required by 7 U.S.C. § 499b(4). I infer from the record that the circumstances referenced by Respondent are the bankruptcy of two of Respondent's customers, Country Club Foods in the fall of 1992 and a Burger King franchise in January 1993. (Tr. 70-73; Respondent's Closing Memorandum, p. 1.)

I agree with Respondent that it "did not *intend* to be placed in a position where [it] could not satisfy [its] obligations." (RMA, p. 3.) However, Respondent intentionally or in *careless disregard* of 7 U.S.C. § 499b(4) failed to make full payment promptly to persons who sold perishable agricultural commodities to Respondent. Respondent continued to purchase perishable agricultural commodities for which it did not make full payment promptly long after the events which Respondent contends made it impossible for it to pay for those commodities. If Respondent was going to extend credit to its purchasers, it should have been adequately capitalized or have been able to obtain additional capital to ensure that it could make full payment promptly to persons who sold Respondent perishable agricultural commodities. Sellers of perishable agricultural commodities should not be subjected to the risk resulting from Respondent's undercapitalization or bad debt experience. Respondent's failure to take precautions necessary to ensure that it could make full payment promptly to sellers of perishable agricultural commodities constitutes a willful violation of 7 U.S.C. § 499b(4). See *In re Rudolph John Kafcsak*, *supra*, 39 Agric. Dec. at 686 (neither a strike nor the failure of others to pay Respondent negates willfulness); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1641-42 (Respondent's difficult financial situation does not negate willfulness); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883 (1975) (Respondent's inability to pay for produce promptly because of financial difficulties does not, of course, negate willfulness); *In re George Steinberg & Son, Inc.*, *supra*, 32 Agric. Dec. at 266 (Respondent's insolvency does not negate willfulness).

Third, Respondent contends that while there is no question that Respondent violated the PACA, and that, under the PACA, sanctions are appropriate if a violation occurs, "the draconian sanctions delivered by Judge Bernstein were an abuse of discretion and clearly outside the scope of recent case law." (RMA, pp. 2-3.)

The ALJ's Order was not an abuse of discretion and was in accord with recent cases.

The Order issued by the ALJ in the instant case, with which I fully agree, provides that "Respondent has committed wilful, flagrant and repeated violations of [s]ection 2 of the [PACA,] (7 U.S.C. § 499b), and the facts and circumstances set forth in this decision shall be published." (Initial Decision and Order, p. 6.) Section 8(a) of the PACA, (7 U.S.C. § 499h(a)), provides that whenever the Secretary determines as provided in 7 U.S.C. § 499f that any commission merchant, dealer, or broker has violated any provision of 7 U.S.C. § 499b, the Secretary may publish the facts and circumstances of the violation. The ALJ clearly was authorized by the PACA to order the publication of the facts and circumstances set forth in the initial decision. Further, the Order issued by the ALJ, based upon the ALJ's findings that: (1) Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05, which Respondent had purchased, received, and accepted in interstate commerce, (Initial Decision and Order, pp. 3-4); and (2) Respondent still owed approximately \$283,201.12 for the produce in question, (Initial Decision and Order, p 4), is consistent with recent cases. *In re Granoff's Wholesale Fruit & Produce, Inc.*, *supra*; *In re Atlantic Produce Co.*, *supra*; *In re SWF Produce Co.*, *supra*; *In re National Produce Co.*, *supra*; *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Frank Tambone, Inc.*, *supra*.

Fourth, Respondent contends that the sanction imposed on Respondent is unduly harsh in light of mitigating circumstances and the sanction policy adopted by the Secretary in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476 (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). (RMA, pp. 4-6.)

I agree with Respondent that the Department's sanction policy, as adopted in *In re S.S. Farms Linn County, Inc.*, *supra*, should be applied in the instant case. *S.S. Farms Linn County, Inc.*, in pertinent part, 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.

50 Agric. Dec. at 497.

However, the sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*. *In re Moreno Bros.*, *supra*, 54 Agric. Dec. at 1442-43. The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment 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. Where, as in the instant case, Respondent does not have a license, publication of the facts and circumstances of the violation is a substitute for revocation of a license.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), over a period of 16 months by failing to make full payment to nine sellers at the agreed purchase prices of 224 lots of perishable agricultural commodities in the total amount of \$305,527.05. Respondent's excuses for its failure to pay (the bankruptcy of two of Respondent's customers) is not sufficient to prevent the publication of the facts and circumstances of its violations of the PACA. Further, this sanction is in accord with the recommendations of the administrative officials charged with the responsibility of achieving the Congressional purpose of the PACA.

Ms. Joan Colson, Auditor, PACA Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service, testified as to the appropriateness of the sanction as follows:

[BY MS. GOOD:]

Q. What is the sanction that Complainant recommends as a result of Respondent's failure to make full payment promptly in this case?

[BY MS. COLSON:]

A. The [D]epartment recommends that a finding be made that Hogan Distributing, Inc.[,] committed willful, repeated and flagrant violations of Section 2[(4)] of the PACA, and asks that those findings be published.

Q. Is there anything unique about the produce industry that makes failures to pay particularly harmful?

A. Yes, the produce industry is very unique because the commodities involved are highly perishable. Because they are perishable, they have to go from growing areas located through the country, to consumers, over a short period of time, in order for the commodities to reach the consumer at the height of its edible appeal.

Because of this short time period, industry members don't always have time to perform extensive credit checks that may be commonplace in other industries. Therefore, the members have to rely a great deal on trust relationship. For example, most transactions involve a shipper and a receiver. The receiver will ask that the shipper ship produce usually worth thousands of dollars across country, on the promise, or on the basis that he will pay for that produce in a prompt manner. The shipper will ship this, and he's usually never even met the other person, but he will ship the produce, trusting in that person will abide by its promise, and pay for it promptly.

On the other hand, the receiver also trusts that the shipper will ship the kind, grade and quality that he contracted to over the phone. This makes the produce industry very unique, in that they trust -- you know, rely on a great deal of trust in each other.

Q. Can you explain please to the administrative law judge the major factors considered in arriving at the sanction recommendation of a finding of willful, repeated and flagrant violations, progressing to publication of that? What were the major factor[s] behind that recommendation?

A. Th[ere] were basically five major factors. The first four involve the violations themselves. In this particular instance, Hogan Distributing, Inc. at the time failed to pay nine sellers approximately

\$305,000 for 224 separate violations of PACA. These violations occurred [over] a 16-month period, from January of '93 through April of 1994. The other major factors considered is the effect that these violations have on the produce industry.

Q. What effect do these violations have on the produce industry?

A. They tend to have a ripple effect through the industry. For example, Hogan Distributing, by failing to pay their shippers, put their shippers in financial harm, because they didn't receive the money for produce that they shipped to them. The shippers in turn failed to pay the grower, who in turn, you know, is having problems paying their bills, also, so the ripple effect travels through the industry from the point of violation.

Q. What effect would the recommended sanction have on the produce industry?

A. In this case, a deterrent effect, since Hogan Distributing isn't operating any more, the violations aren't continuing to date, but the deterrent effect for the rest of the industry is that the Secretary deems these failures to be serious violations of the act, and that consequences for these violations will be taken seriously, and action will be taken against the firms.

Q. Would you please explain your understanding of the role of the Secretary of Agriculture in maintaining the trust relationship that you have testified to, that exists between buyers and sellers in the produce industry?

A. The Secretary's role is to enforce the PACA. He does this evenhandedly, so a level playing field can exist for all industry members. The [S]ecretary issues licenses to fruit and vegetable traders. When he issues them a license, he is making a statement that he has no reason to believe that this firm can't or won't abide by the laws that Congress has set out for them. The [S]ecretary also investigates possible violations of the PACA, and when violations are found, he takes actions against them for these violations.

Q. Have you listened to the testimony submitted by Respondent today?

A. Yes.

Q. Have you examined Respondent's evidence?

A. Yes.

Q. Have you taken this information into account, in the sanction recommendation?

A. Yes.

MS. GOOD: I have no further questions of this witness.

THE COURT: Mr. Johnson?

MR. JOHNSON: I have a few questions, if I may, Your Honor.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. What are the alternative sanction recommendations that you could make to the court?

A. Suspension of the license would be the only alternative.

Q. I'm sorry?

A. Suspension of their license.

Q. And what you are recommending to this court now is something other than suspension of the license, right?

A. Right, we are recommending that publication be filed.

Q. How long have you been working at the Department of Agriculture, making these recommendations?

A. Approximately five years.

Q. How many recommendations have you made?

A. I would say at least 90, 100.

Q. And on some occasions, have you recommended a suspension of the license, instead of publication?

A. Yes.

Q. What are the circumstances that would give rise to a recommendation of suspension?

A. If the firm had paid off all the debt prior to the hearing, sometimes we change and ask for a suspension of their license. In some slow pay cases, where they have continued to pay, except they have paid slowly over a period of time, we would recommend suspension.

Q. The effect of suspension would be, I take it, that the license could then be renewed after the suspension period?

A. Well, whatever the suspension period would be, the license wouldn't be in effect for that period of time. Say if it's a 21-day suspension, the firm couldn't operate for 21 days.

Q. Have you recommended suspension in some cases where there has been settlement reached with creditors on a discounted basis?

A. No.

Q. You never have?

A. Not that I can recall.

Q. Have you made recommendation of publication in every case where there's been a settlement reached with creditors?

A. Probably.

Q. Are there any other alternative sanctions that you have recommended to courts?

A. We have recommended suspension, revocation.

Q. And publication?

A. And publication, right.

Q. Just those three?

A. Right. If a license isn't valid any more, then it goes from revocation to publication.

Q. What are the factors that you take into account in recommending publication?

A. Well, the major factors are the ones I stated before. The number of violations, the time period involved, the number of sellers involved, the amount of money involved, the effect that these violations have on the industry.

Tr. 99-105.

Finally, Respondent states that the publication of the facts and circumstances of its violation of 7 U.S.C. § 499b(4) will result in Mr. Dennis Hogan's loss of his current employment with "Alliant Foodservice," and that such loss of employment will result in Mr. Hogan's inability to make payments under two agreements with six of the nine sellers of perishable agricultural commodities who Respondent has failed to pay promptly in full. (RMA, pp. 2, 6.)

Mr. Dennis Hogan is responsibly connected with Respondent, (RMA, p. 4 n.2.) I infer that "Alliant Foodservice" is a licensee under the PACA. Section 8(b) of the PACA provides, in pertinent part, as follows:

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

....

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title. . . .

....

The Secretary may approve such employment . . . after one year following the . . . 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 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.

Compliance with 7 U.S.C. § 499h(b) will require "Alliant Foodservice" to terminate its employment of Mr. Dennis Hogan prior to the effective date of an Order in which Respondent is found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b. The purported adverse impacts on Mr. Hogan and those who entered into settlement agreements with Mr. Hogan for the partial payment of amounts owed by Respondent to sellers of perishable agricultural commodities are not relevant to this proceeding which is one solely to determine whether Respondent, as a licensee under PACA, violated 7 U.S.C. § 499b(4). *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1644. *See also In re King Midas Packing Co.*, *supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation of an Order issued against Respondent corporation are not a matter of administrative discretion, but are mandated by Congress).

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

Order

Respondent has committed willful, flagrant, and repeated violations of section 2 of the PACA, (7 U.S.C. § 499b), and the facts and circumstances set forth in this decision shall be published.

In re: RUMA FRUIT AND PRODUCE, CO., INC.

PACA Docket No. D-94-565.

Order to Show Cause filed April 24, 1996.

Andrew Y. Stanton, for Complainant.

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

Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (hereinafter the PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on August 25, 1994, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary. In accordance with section 8(b) of the PACA, the Complaint requested that Respondent's PACA license be suspended for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA.

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. A hearing was held on February 28, 1995, in Boston, Massachusetts, before Administrative Law Judge Dorothea A. Baker (hereinafter ALJ). The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's license for 45 days. On October 4,

1995, Respondent appealed to the Judicial Officer. On October 24, 1995, Complainant filed a Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

On November 15, 1995, the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) (hereinafter PACAA-1995), was approved. Section 11 of the PACAA-1995 amends section 8 of the PACA by adding a new subsection (e) 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 6, [(7 U.S.C. § 499f),] that a commission merchant, dealer, or broker has violated section 2[, (7 U.S.C. § 499b),] 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(e).

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested "the opportunity to demonstrate the applicability of" section 11 of the PACAA-1995 to the instant case, despite the fact that the PACAA-1995 was approved after Respondent's alleged violation of 7 U.S.C. § 499h(b) and after the ALJ issued the Initial Decision in the instant case. On April 18, 1996, Complainant filed Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer in which Complainant agreed with the Respondent that the Judicial Officer had authority to impose a civil penalty, but opposed the imposition of a civil penalty in the instant case because a 45-day suspension of Respondent's license is appropriate and the imposition of *any* civil penalty would threaten Respondent's payment of its current produce obligations.

On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed

should Respondent be found to have violated 7 U.S.C. § 499h(b).

In *In re Jacobson Produce, Inc.*, 55 Agric. Dec. ___ (Apr. 12, 1996), Complainant, Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service, and Respondent, Jacobson Produce, Inc., filed a joint motion to Modify the Order previously issued in the case¹ which joint motion provided that Jacobson Produce, Inc., could pay a civil penalty of \$90,000 in lieu of a 90-day suspension of its PACA license. The parties in *In re Jacobson Produce, Inc.*, agreed that Jacobson Produce, Inc., would be given the option of a suspension of its license or the payment of a civil penalty equal to \$1,000 per day for each day its license would have been suspended.

Respondent and Complainant shall, within 10 days from the date of service of this Order to Show Cause, file with the hearing clerk any cause showing why I should not impose a sanction against Respondent (if Respondent is found to have violated 7 U.S.C. § 499h(b)) which gives Respondent an option of a suspension of its PACA license or in lieu thereof the payment of a civil penalty equal to \$1,000 per day for each day its license would be suspended if Respondent chooses not to pay a civil penalty.

The issue raised by Respondent in its April 1, 1996, motion can be resolved without recourse to oral argument or further evidentiary hearing. Therefore, Respondent's April 1, 1996, motion for oral argument before the Judicial Officer and Respondent's April 22, 1996, motion for a further evidentiary hearing either before the ALJ or the Judicial Officer are denied.

In re: RUMA FRUIT AND PRODUCE CO., INC.

PACA Docket No. D-94-565.

Decision and Order and Remand Order filed May 16, 1996.

Suspension of license — Civil penalties — Remand order — Employment restrictions — Responsibly connected — Failure to pay reparation award.

The Judicial Officer affirmed Judge Baker's (ALJ) decision suspending Respondent's license for 45 days but remanded the case to determine whether the assessment of a civil penalty in lieu of the 45-day suspension would be appropriate, and if so, the amount of the civil penalty to be assessed. Respondent willfully violated 7 U.S.C. § 499h(b) by employing Dean W. Hopkins (Hopkins) after being notified that Hopkins was ineligible to be employed by or affiliated with

¹*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994).

any PACA licensee, without both the Secretary's approval and an approved surety bond, because Hopkins failed to pay a reparation award. The reparation complainant's (Boston Tomato) December 19, 1991, filing of a state court action, involving the same issues set forth in its March 28, 1992, reparation complaint against Hopkins, does not deprive the Secretary of subject matter jurisdiction, where the Department was not made aware of the state court action. Boston Tomato was therefore not compelled to choose remedies; and, both the state court action and the reparation action proceeded to judgment without mention of the other. The reparation order issued prior to the state court order was *res judicata* as to the state court action. The instant PACA disciplinary proceeding was not stayed either by Hopkins' filing a Bankruptcy Petition or by the May 20, 1993, discharge of Hopkins' debt to Boston Tomato. Pursuant to 7 U.S.C. § 499g(d), the reparation order against Hopkins in favor of Boston Tomato was not satisfied until the Secretary was notified on March 11, 1994, and, therefore, employment restrictions on Hopkins remained in effect until March 11, 1994, despite any previous settlement of the reparation award by Hopkins and Boston Tomato. The Secretary has sole authority to enforce the employment bar under 7 U.S.C. § 499h(b); the reparation complainant has no authority to waive the enforcement of the employment bar. The 45-day suspension of Respondent's license is appropriate under the circumstances; however, pursuant to 7 U.S.C. § 499h(e), the case is remanded to the ALJ to determine the propriety of a civil penalty in lieu of a 45-day PACA license suspension.

Andrew Y. Stanton, for Complainant.

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

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

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

This case is a disciplinary proceeding instituted 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), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on August 25, 1994, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary. In accordance with section 8(b) of the PACA, Complainant informed Respondent in an October 19, 1993, letter, received by Respondent on October 23, 1993, that Respondent would be prohibited from affiliating with Mr. Hopkins after 30 days from the date Respondent received the letter unless Respondent first obtained the required bond. Mr. Hopkins was subject

to employment restrictions because of his failure to pay a reparation award issued against him on June 23, 1992, in the amount of \$51,372.50, plus interest, in favor of Boston Tomato Co., Inc. (hereinafter Boston Tomato). The Complaint requested that Respondent's PACA license be suspended for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA.

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. On February 24, 1995, Respondent filed a Prehearing Memorandum and a hearing was held on February 28, 1995, in Boston, Massachusetts, before Administrative Law Judge Dorothea A. Baker (hereinafter ALJ). Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Stephen P. McCarron, Esquire, McCarron & Associates, Washington, D.C. The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's license for 45 days. On October 4, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).¹ On October 24, 1995, Complainant filed a Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

Respondent's Appeal Petition (hereinafter RAP) requests reversal of the ALJ's Initial Decision and Order on several grounds. Respondent contends that the ALJ erroneously held that: (1) the Secretary had subject matter jurisdiction over the instant case, (RAP, pp. 1-3); (2) the instant PACA disciplinary proceeding was not stayed by Mr. Hopkins' filing a Bankruptcy Petition or the May 20, 1993, discharge of Mr. Hopkins' debt to Boston Tomato, (RAP, pp. 3-4); (3) there was no agreement between Mr. Hopkins and Boston Tomato to settle the reparation award against Mr. Hopkins in favor of Boston Tomato until March 1994, (RAP, pp. 4-5); (4) pursuant to 7 U.S.C. § 499g(d), the reparation order against Mr. Hopkins in favor of Boston Tomato was not satisfied until the Secretary was notified on March 11, 1994, and, therefore, employment restrictions on Mr. Hopkins remained in effect

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

until March 11, 1994, despite any previous settlement of the reparation award by Mr. Hopkins and Boston Tomato, (RAP, p. 5); (5) the Secretary has sole authority to enforce the employment bar under 7 U.S.C. § 499h(b) and the reparation complainant (Boston Tomato) has no authority to waive the enforcement of the employment bar, (RAP, pp. 5-6); and (6) the 45-day suspension of the Respondent's license is appropriate under the circumstances, (RAP, pp. 6-7). I disagree with Respondent's contention that the ALJ erred and based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order in this case, except that the case is remanded to the ALJ to consider whether the imposition of a civil penalty in lieu of a 45-day suspension of Respondent's license is appropriate, and, if a civil penalty is appropriate, the amount of the civil penalty to be assessed. Changes in the ALJ's Initial Decision and Order are shown by brackets, deletions shown by dots, and minor editorial changes not specified.

Additional conclusions by the Judicial Officer, which explain the purpose and scope of the Remand Order, follow the discussion and conclusions of the ALJ.

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

....

Pertinent Statutory Provisions

(a) Section 1(10) of the PACA:

(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.

7 U.S.C. § 499a(10).

(b) Section 7(d) of the PACA:

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be

suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment. . . .

7 U.S.C. § 499g(d).

(c) Section 8(b) of the PACA:

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

. . . .

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

The Secretary may approve such employment at any time following nonpayment of a reparation award . . . 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, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. [The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.]

7 U.S.C. § 499h(b).

(d) Section 525(a) of the Bankruptcy Code:

(a) Except as provided in the Perishable Agricultural

Commodities Act, 1930 (7 U.S.C. 499a-499s) . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

Findings of Fact

All requested findings of fact, conclusions, and arguments of the parties have been duly considered and to the extent not adopted herein, such are deemed to be irrelevant, immaterial, and/or not supported by the record as a whole.

1. Respondent, Ruma Fruit and Produce Co., Inc., is a corporation whose business and mailing address is 210 Beacham Street, Everett, Massachusetts 02149. (CX 1.)

2. Pursuant to the licensing provisions of the PACA, license number 911277 was issued to Respondent on June 21, 1991. This license has been renewed annually and is presently in effect. . . . (Tr. 140-41; CX 1.)

3. Mr. Dean W. Hopkins, doing business as Hopkins Fruit Co., is an individual whose PACA license . . . was automatically suspended on July 29, 1992, pursuant to section 7(d) of the PACA, (7 U.S.C. § 499g(d)), for failing to pay a reparation order in the amount of \$51,372.50, plus interest, awarded to Boston Tomato. *Boston Tomato Co., Inc. v. Hopkins Fruit Co.*, PACA Docket No. RD 92-502 (June 23, 1992). (CX 3)

4. Due to Mr. Hopkins' failure to pay the June 23, 1992, reparation order, he was barred from employment subject to the PACA for 2 years from the date of the order, until June 23, 1994. Mr. Hopkins could be employed subject to the PACA during that period only if his employer posted a bond in

an amount approved by . . . the Secretary, (7 U.S.C. § 499h(b)).

5. During October 1993, Complainant was informed by Bostonia Produce Co., Inc. (hereinafter Bostonia), Chelsea, Massachusetts, that Mr. Hopkins was currently an employee of Respondent. (CX 2, pp. 1[,5]; Tr. 30-31.) Complainant then opened a file on Respondent's possible employment of Mr. Hopkins. [(Tr. 29-30.)]

6. On October 19, 1993, Complainant sent Respondent a certified letter, which was received by Respondent on October 23, 1993, stating that since Mr. Hopkins had failed to pay a reparation order, he was barred from employment unless Respondent posted a surety bond in an amount satisfactory to Complainant. The letter requested certain information to enable Complainant to determine the appropriate bond amount. Complainant informed Respondent that, pursuant to section 8(b) of the PACA, [Respondent] could not continue to employ Mr. Hopkins after 30 days from its receipt of the letter unless [Respondent] first obtained the required bond, or Respondent's [PACA] license could be suspended or revoked. (CX 2, pp. 2-4; Tr. 33-34.)

7. After expiration of the 30-day period referred to [in Finding of Fact No. 6], Respondent continued its affiliation with Mr. Hopkins during the period November 23, 1993, through March 7, 1994, without posting a surety bond meeting the approval of the Secretary of Agriculture, in willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

8. On November 9, 1993, Mr. Raymond Dexter Thomas, a Marketing Specialist with Complainant's License and Program Review Section, called Respondent's President, Mr. James Ruma. Mr. Thomas reminded Mr. Ruma that November 22, 1993, was the last day Respondent could legally employ Mr. Hopkins, unless Respondent posted a bond meeting the Secretary's approval. (CX 2, p. 1; Tr. [19, 21,] 36-37.)

9. Complainant sent Mr. Ruma a certified letter dated November 10, 1993, which stated clearly that Respondent could not continue to employ Mr. Hopkins after November 22, 1993, without an appropriate bond. The letter warned that any affiliation of Mr. Hopkins [with Respondent] after November 22, 1993, could result in the filing of an administrative action to suspend or revoke Respondent's PACA license. (CX 2, pp. 6-7; Tr. 37-39.)

10. On November 12, 1993, Mr. Ruma called Complainant and spoke with Mr. James E. Bright, Senior Marketing Specialist with Complainant's License and Program Review Section. Mr. Ruma indicated that he had not received Complainant's November 10, 1993, letter. Mr. Bright reminded Mr. Ruma that Mr. Hopkins could not continue to be employed by

Respondent after November 22, 1993. Mr. Ruma said that he would be providing Complainant with information to determine the bond amount as soon as possible. (CX 2, p. 1; Tr.[19, 21,] 39-40.)

11. On November 15, 1993, Complainant received a November 12, 1993, letter from Mr. Ruma in response to questions raised in Complainant's October 19, 1993, letter concerning Respondent's need for a bond. (CX 2, p. 8; Tr. 41.) The letter included the following information:

4. The duties that Mr. Hopkins is conducting with regard to this firm is that of a salesman soliciting new accounts from headquarters.
5. Mr. Hopkins performs his duties directly under the supervision of James A. Ruma.
6. Mr. Ruma is president of Ruma Fruit & Produce Co., Inc.
7. Mr. Hopkins is compensated on a weekly basis at the rate of \$400.00.

12. Michael A. Clancy, Head of Complainant's License and Program Review Section, called Mr. Ruma on November 17, 1993, in response to Respondent's November 12, 1993, letter. Mr. Clancy advised that Complainant had received Mr. Ruma's answers to Complainant's bond questions and would be setting an appropriate bond. Mr. Clancy also stated that November 22, 1993, was the last day that Mr. Hopkins could be legally employed by Respondent. (CX 2, p. 1; Tr. [19,] 41-42.)

13. Toward the end of November 1993, Complainant sent Respondent a letter, signed by Mr. Charles R. Brader, Director of the Fruit and Vegetable Division, in which Complainant set a surety bond amount of \$50,000. (CX 2, pp. 9-11; Tr. 43.) Respondent never posted the \$50,000 bond. (Tr. [43-]44.)

14. On November 30, 1993, an employee of Complainant's License and Program Review Section, Mr. Bernard Bailey, received a telephone call from Bostonia. (CX 2, p. 12; Tr. 44-45.) Mr. Bailey referred the matter to Mr. Clancy, who called Bostonia back and was told that Mr. Hopkins was observed at Respondent's place of business that morning, [November 30, 1993,] selling produce. (CX 2, p. 12; Tr. 46.) Mr. Clancy immediately called Mr. Ruma, who said that Mr. Hopkins was on a leave of absence. (CX 2, p. 12; Tr. 46.) Mr. Clancy told Mr. Ruma that Mr. Hopkins could not have any involvement whatsoever in Respondent's business or an action would be

pursued against Respondent. Mr. Ruma indicated that he understood. (Tr. 46-47.) Bostonia later followed up its telephone complaint with a letter dated December 1, 1993. (CX 2, p. 13; Tr. 47-48.)

15. On January 7, 1994, Complainant sent a certified letter to Respondent stating that Respondent had failed to post the \$50,000 bond which was a prerequisite to Respondent's continued employment of Mr. Hopkins. Complainant advised that it had received reports from the produce industry that Mr. Hopkins was working at Respondent's place of business after November 22, 1993. Complainant again warned Respondent that any affiliation of Mr. Hopkins [with Respondent] after November 22, 1993, without the required bond, could result in an administrative action to suspend or revoke Respondent's PACA license. (CX 2, p. 15; Tr. 4[8]-50.)

16. In none of Complainant's contacts with Mr. Ruma from October 1993 through January 1994, did Mr. Ruma indicate that a settlement agreement had been reached regarding the reparation order issued against Mr. Hopkins in favor of Boston Tomato. (Tr. [37-]38, 40, 42, 47.)

17. On January 25, 1994, Mr. Clancy's secretary received a telephone call from Mr. Dominic Paratore, an attorney representing Boston Tomato, inquiring about the procedure for filing cases. (CX 2, p. 20; Tr. 51.) Mr. Clancy asked Mr. Thomas to respond to Mr. Paratore's inquiry. Mr. Thomas called Mr. Paratore, who advised that Boston Tomato and Mr. Hopkins were trying to "cut a deal" on Mr. Hopkins' unpaid reparation order. (CX 2, p. 20; Tr. 52.) Mr. Paratore did not tell Mr. Thomas that a settlement had actually been reached. (Tr. 52-53.)

18. On February 15, 1994, Complainant sent a letter to Respondent stating that since Respondent had not posted the \$50,000 bond required to employ Mr. Hopkins, Complainant was closing its files and referring the matter to the Regional Office for an investigation into Respondent's possible unlawful employment of Mr. Hopkins. (CX 2, p. 21; Tr. 53-54.)

19. On approximately February 27, 1994, in compliance with instructions from her supervisor, Complainant's investigator, Carolyn Shelby, a Marketing Specialist with the Northeast Regional Office, PACA Branch, went to the Boston area to conduct various investigations, including an investigation of Respondent regarding its possible unlawful employment of Mr. Hopkins. (Tr. 71.) Ms. Shelby was also investigating another matter involving Mr. Hopkins and she telephoned his attorney, Mr. Steve Wilchins, regarding the location of the records of Hopkins Fruit Company. [(Tr. 72.)]

20. On Friday afternoon, March 4, 1994, after 2:00 p.m., Mr. Hopkins telephoned Ms. Shelby at her hotel and told her that a settlement with Boston

Tomato was being discussed. Ms. Shelby had left her telephone number with attorney Wilchins. Mr. Hopkins did not say that a settlement had actually been reached. (Tr. [72-]73.)

21. On Monday, March 7, 1994, Ms. Shelby went to Respondent's place of business and spoke to Mr. Ruma. (Tr. 74.) Mr. Ruma stated that Mr. Hopkins was still employed by Respondent. (Tr. 75.) Respondent has stipulated that Mr. Hopkins was a full-time employee during the period November 1993 through March [7,] 1994. (Tr. 82.)

22. In response to Ms. Shelby's request, Mr. Ruma provided her with numerous documents for examination. Mr. Ruma then left the room. When Mr. Ruma returned a short time later, he said that he had just fired Mr. Hopkins. (Tr. 76-77.)

23. Among the documents provided to Ms. Shelby were numerous checks issued by Respondent to Mr. Hopkins on a regular basis from November 26, 1993, through February 25, 1994. These were either checks reflecting Mr. Hopkins' \$400 weekly salary, salary checks less advances, or checks compensating Mr. Hopkins for expenses incurred on behalf of Respondent. (CX 5; Tr. 77-80.)

24. Mr. Ruma provided Ms. Shelby with a 1099 Federal Tax Form for 1993, issued to Mr. Hopkins, indicating that Respondent paid Mr. Hopkins \$4,400 during 1993. (CX 6.) Mr. Ruma explained to Ms. Shelby that the 1099 Form was used because Mr. Hopkins was compensated as an independent contractor, rather than as a salaried employee. (Tr. 80-81.)

25. Mr. Ruma also provided Ms. Shelby with travel expense reports submitted to Respondent by Mr. Hopkins from November 26, 1993, through February 26, 1994, in connection with sales activities performed by Mr. Hopkins on Respondent's behalf. (CX 7; Tr. 81-82.)

26. During the evening of March 7, 1994, Ms. Shelby received a telephone call from Mr. Hopkins and his attorney. At the end of the conversation, Mr. Hopkins told Ms. Shelby that "deals and arrangements were being made regarding a settlement of the reparation complaint" involving Boston Tomato. (Tr. 84[-85].)

27. Ms. Shelby returned to Respondent's place of business on March 8, 1994. While she was there, she asked Mr. Ruma if he would be willing to provide a sworn statement regarding Respondent's employment of Mr. Hopkins. Mr. Ruma agreed to do so and, after Ms. Shelby made several suggestions as to what issues he might want to mention, wrote out a statement in longhand. Mr. Ruma asked Ms. Shelby to return the following day to obtain a typed version, which she did. (CX 8; Tr. 8[6]-88.)

28. During Ms. Shelby's investigation of Respondent, Mr. Ruma told her on several occasions that discussions were occurring or had occurred regarding a settlement of the reparation order in favor of Boston Tomato, but never indicated that a settlement of the reparation order had actually taken place. (Tr. 89.)

29. On the morning of March 10, 1994, Ms. Shelby went to the place of business of Boston Tomato and spoke with Mr. Charles Scimeca, President of [Boston Tomato], in Mr. Scimeca's office. Mr. Scimeca stated that discussions had occurred regarding a possible settlement with Mr. Hopkins. [Mr. Scimeca] said that Mr. Ruma had come to his office to discuss a possible settlement of the reparation order against Mr. Hopkins but that nothing had been entered into. Mr. Scimeca stated that he did not have a signed agreement in his possession. (Tr. 90-91.)

30. In a letter dated March 11, 1994, Mr. Paratore advised Complainant that Boston Tomato wished to withdraw its Complaint against Mr. Hopkins because the parties had reached a payment agreement. (CX 4; Tr. 55-56.) Complainant viewed this letter as indicating that Boston Tomato's reparation order against Mr. Hopkins had been satisfied. (Tr. 56-57.)

31. On March 16, 1994, an agreement was issued between Boston Tomato and Mr. Hopkins signed by Mr. Scimeca, Mr. Hopkins, and Mr. Paratore. The agreement provided that Mr. Hopkins would make weekly payments to Boston Tomato, starting at \$50 per week, for a total payment of \$51,372.50, in consideration for Boston Tomato's withdrawal of its reparation action. (CX 9, pp. 2-5; Tr. 7, 122-23.)

32. At a later date, Ms. Shelby called Mr. Scimeca and asked him if he was happy with his settlement of the reparation order against Mr. Hopkins. (Tr. 94.) Mr. Scimeca stated that he was not happy with the settlement as he thought only approximately \$2,000 had been paid, all of which had gone to his attorney, Mr. Paratore. (Tr. 94.) In actuality, only \$1,000 was ever paid. (CX 9, pp. 6-22.) Mr. Scimeca stated that he had previously told Mr. Paratore that he would not consider the reparation order settled until he had a signed, written agreement on hand, backed by collateral or some kind of security. (Tr. 94.) Mr. Scimeca said he told Mr. Paratore that he was not to contact the Department regarding the reparation order until Mr. Paratore had that signed agreement. (Tr. 95.)

33. Respondent's admitted employment of Mr. Hopkins from November 23, 1993, through March 7, 1994, without posting the \$50,000 surety bond required by the Secretary, was in willful violation of section 8(b) of the PACA, as it was an attempt to circumvent the employment sanctions imposed

on Mr. Hopkins resulting from the reparation order issued against him in favor of Boston Tomato.

Discussion and Conclusions

Respondent, pursuant to section 8(b) of the PACA, (7 U.S.C. § 499h(b)), was prohibited from continuing to employ Mr. Dean W. Hopkins without posting a \$50,000 surety bond starting on November 23, 1993, through March 7, 1994, when Respondent terminated the employment of Mr. Hopkins. (Tr. 76-77.) Complainant notified Respondent in three letters, (CX 2, pp. 2-4, 6-7, 15), and four telephone calls, (CX 2, pp. 1, 12; Tr. 36-37, 39-40, 41-42, 46[-47]), that Respondent was prohibited from employing Mr. Hopkins after November 22, 1993, without posting a bond meeting the approval of the Secretary. Despite Complainant's repeated admonitions not to employ Mr. Hopkins without an appropriate bond, Respondent continued to do so through March 7, 1994. (Answer, ¶ V.) [Respondent's employment of Mr. Hopkins from November 23, 1993, through March 7, 1994, was] in willful violation of section 8(b) of the PACA.

Respondent admits employing Mr. Hopkins after November 22, 1993, through March 7, 1994, but denies that such employment willfully violated the PACA. Respondent also asserts several affirmative defenses. However, none of these affirmative defenses has any legal or factual merit. The facts of this case and applicable law show indisputably that Respondent's admitted employment of Mr. Hopkins after November 22, 1993, through March 7, 1994, willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)).

Mr. Hopkins was under employment restriction due to his failure to pay a reparation order issued against him on June 23, 1992, in the amount of \$51,372.50, plus interest. *Boston Tomato Co., Inc. v. Hopkins Fruit Co., supra*, (CX 3). As a result of Mr. Hopkins' failure to pay the June 23, 1992, reparation order, he was barred from employment subject to the PACA for two years from the date of the [reparation] order, or until June 23, 1994. During the period from June 23, 1992, through June 23, 1994, Mr. Hopkins could be employed subject to the PACA only if his employer posted a bond in an amount approved by the Secretary. (7 U.S.C. § 499h(b).)

The purported November 1993 settlement of the reparation order against Mr. Hopkins did not affect the employment restrictions imposed on Mr. Hopkins resulting from such reparation order.

Respondent claims that it was informed by Mr. Dominic Paratore, the attorney for Boston Tomato, in October or November 1993, that the June 23,

1992, reparation order against Mr. Hopkins had been settled. Therefore, according to Respondent, there was no legal impediment to its continuing employment of Mr. Hopkins. However, section 7(d) of the PACA, (7 U.S.C. § 499g(d)), states, as follows, regarding the suspension of a license for the failure to obey a reparation order:

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period *until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment. . . .* [Emphasis added.]

Section 7(d) makes it abundantly clear that if a licensee does not pay a reparation order in full after 5 days from the period given in the order for payment, its license is suspended until it shows to the satisfaction of the Secretary that full payment has been made. [Consequently, even if there had been a settlement of the June 23, 1992, reparation order against Mr. Hopkins sometime in October or November 1993, which I do not find, the reparation award remained unpaid for the purposes of the employment bar in 7 U.S.C. § 499h(b) until Mr. Hopkins showed to the satisfaction of the Secretary that Boston Tomato's reparation order against Mr. Hopkins had been satisfied. The record shows that the Secretary was not advised that Boston Tomato's reparation order against Mr. Hopkins had been satisfied until the Secretary received Boston Tomato's letter dated March 11, 1994, stating that Boston Tomato wished to withdraw its Complaint against Mr. Hopkins because the parties had reached a payment agreement. (CX 4; Tr. 55-56.)]

Mr. Hopkins' May 20, 1993, discharge in bankruptcy had no effect on the employment restrictions imposed on him for failing to pay a reparation order.

Respondent claims that Mr. Hopkins' May 20, 1993, discharge in bankruptcy constituted full satisfaction of the June 23, 1992, reparation order issued against him in favor of Boston Tomato, thereby ending all employment restrictions imposed on him under section 8(b) of the PACA, (7 U.S.C. § 499h(b)). Respondent is in error, as is clear from the express language of the Bankruptcy Code and from court rulings that bankruptcy proceedings do not affect actions taken pursuant to the PACA regarding the suspension or

revocation of a license.

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, 49 B.R. 494, 496-98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, *supra*, 49 B.R. at 496.

Respondent's unlawful employment of Mr. Hopkins was in willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)). *In re John J. Conforti*, 54 Agric. Dec. [649] (1995)[, *aff'd in part & rev'd in part*, 69 F.3d 897 (8th Cir. 1995)]; *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re S.E.L. International Corp.*, 51 Agric. Dec. 1407 (1992); and *In re Tri-County Wholesale Produce Co., Inc.*, 45 Agric. Dec. 286 (1986), *aff'd per curiam sub nom. Tri-County Wholesale Produce v. Department of Agric.*, 822 F.2d 162 (D.C. Cir. 1987).

Respondent maintains that the Secretary lacked subject matter jurisdiction to issue the June 23, 1992, reparation order against Mr. Hopkins because Boston Tomato filed a state court action against Mr. Hopkins on December 19, 1991, involving the same issues set forth in Boston Tomato's March 28, 1992, reparation complaint and thus made an election of remedies which deprived this forum of jurisdiction. (Respondent's Brief, pp. [8]-11.) However, this contention is not legally sustainable.

Section 5(a) of the PACA, (7 U.S.C. § 499e(a)), provides that any commission merchant, dealer, or broker who violates any provision of section 2 of the [PACA] shall be liable to the person injured by the violation. Section 5(b) [of the PACA] provides that:

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of the chapter are in addition to such remedies.

7 U.S.C. § 499e(b).

It has been held that section 5(b) requires a PACA claimant to make an election of remedies as between participation in administrative reparation proceedings or pursuit of a civil suit in state or federal court. *Han Yang Trade Co., Inc. v. A.F. & Sons Produce, Inc.*, 52 Agric. Dec. 765 (1993).

Boston Tomato's March 28, 1992, reparation complaint never mentioned the existence of the state court action. [(RX 2.)] Mr. Hopkins never informed the Department that Boston Tomato had filed a similar action against him in state court. If the existence of the state court action had been revealed in the course of the reparation action, Boston Tomato would have been compelled to make an election of remedies. That did not occur and both actions proceeded to judgment without mention of the other, with the June 23, 1992, reparation order issued over a year before the August 18, 1993, state court judgment. (RX 1, p. 1.) The June 23, 1992, reparation order was thus *res judicata* as to the state court action.

Further, Respondent argues that bankruptcy and discharge of a debt stays enforcement of reparation proceedings and orders and that Mr. Hopkins' May 20, 1993, discharge in bankruptcy constituted full satisfaction of the June 23, 1992, reparation order issued against him in favor of Boston Tomato, thereby ending all employment restrictions imposed on Mr. Hopkins under section 8(b) of the PACA. (Respondent's Brief, pp. 11-12.) However, once Mr. Hopkins failed to pay the June 23, 1992, reparation order within the period allowed for such purpose, the employment restrictions under section 8(b) of the PACA, (7 U.S.C. § 499h(b)), automatically went into effect. Although Mr. Hopkins was discharged in bankruptcy on May 20, 1993, his unpaid reparation award was never satisfied pursuant to section 7(d) of the PACA, (7 U.S.C. § 499g(d)), and his employment restrictions [under section 8(b) of the PACA, (7 U.S.C. § 499h(b)),] remained. Therefore, Complainant correctly considered the June 23, 1992, reparation order to be unsatisfied at the time it sent the October 19, 1993, notice to Respondent warning of possible action to be taken due to Respondent's employment of Mr. Hopkins. Mr. Hopkins' bankruptcy filing automatically stayed any attempt by Boston Tomato to enforce the reparation award, but did not alter the fact that Mr. Hopkins failed to pay a properly issued reparation order. As a result of this failure to satisfy the reparation order, the disciplinary action for unlawful employment was proper.

Respondent acknowledges, on brief, that it "employed" Dean W. Hopkins, who had failed to pay a \$51,373 reparation order awarded to Boston Tomato, as a produce salesman in 1993 and 1994, [(Respondent's Brief, p. 1),] but seeks to avoid the consequences of the prohibitions of section 8(b) of the

PACA, (7 U.S.C. § 499h(b)). The prohibited employment was from November 23, 1993, through March 7, 1994, during which time Respondent did not post a surety bond meeting the approval of the Secretary.

Respondent's recitation of events recognizes that the Secretary of Agriculture is empowered to order a licensee to pay reparations to a complaining party if the licensee fails to pay for produce. 7 U.S.C. § 499e. A licensee with an unpaid reparation award, or any person responsibly connected to such a licensee, may not be employed by another licensee for two (2) years from the date of the unpaid reparation order without obtaining approval by the Secretary which is conditioned upon the posting of a surety bond by the employer in an amount determined by the Secretary. 7 U.S.C. § 499h(b)(3).

Respondent does not dispute that when the Department learned in October 1993, that Mr. Hopkins was working for Ruma, the Department notified Ruma by letter that Mr. Hopkins could not be employed unless Ruma obtained approval of the United States Department of Agriculture and posted a bond. In the letter, the Department requested certain information from Ruma to establish the bond amount. The Department also advised Ruma that Mr. Hopkins could not be employed thirty (30) days from receipt of the letter, which was November 22, 1993, unless a bond was posted and approval of the Secretary was obtained, and that continued employment of Mr. Hopkins thereafter, without posting a bond, and, obtaining the United States Department of Agriculture's approval, could result in suspension or revocation of Ruma's PACA license.

Respondent seeks to explain its position around a series of events, between Hopkins and Boston Tomato regarding the debt and satisfaction thereof, which occurred prior to the Department's letter. Mr. Dominic Paratore, the attorney for Boston Tomato, had filed a complaint against Mr. Hopkins in Suffolk County Superior Court in December 1991, on the same debt. (RX 1; Tr. 155.) Mr. Paratore later learned that Mr. Hopkins had filed a Chapter 11 Bankruptcy Petition in 1992, so he discontinued further collection activity. (Tr. 157.) Mr. Paratore discovered that Mr. Hopkins filed a Bankruptcy Petition under Chapter 7 in February 1993, and that the debt to Boston Tomato had been discharged in May 1993. (RX 3; Tr. [162-]65.) Mr. Paratore also learned that Mr. Hopkins' Chapter 11 proceeding had been dismissed, so he requested a default judgment in the state court action, which was entered in August 1993, in favor of Boston Tomato for \$51,372.50. (RX 1, p. 1.)

Later in 1993, Mr. Hopkins and Mr. Paratore discussed Mr. Hopkins'

employment with Ruma so Mr. Hopkins could pay off the debt to Boston Tomato. Mr. Hopkins explained that he could not work for Ruma because the unpaid reparation order in favor of Boston Tomato prohibited him from working for any produce company. However, Mr. Paratore then agreed with Mr. Hopkins and Ruma in October or November 1993, *that Mr. Hopkins would remain employed with Ruma, despite the reparation order*, so Mr. Hopkins could begin paying off the debt to Boston Tomato from his wages. (Tr. 170-71.) Mr. Paratore was said to have agreed to draft the paperwork, which allegedly included notification to the United States Department of Agriculture of this arrangement. [(Tr. 250, 252, 255.)]

Mr. Paratore did not notify the United States Department of Agriculture of the arrangement in 1993. In January 1994, the United States Department of Agriculture sent an inquiry to Ruma because it had received reports that Mr. Hopkins was still working for Ruma and no bond had been posted. [(CX 2, p. 15.)] James Ruma contacted Mr. Paratore, who advised him that he was taking care of the matter. [(Tr. 237, 252-55.)] Mr. Paratore then made contact with the Department on January 25, 1994, about the effect of a settlement with Mr. Hopkins, (CX 2, p. 20), and a few days later, Mr. Paratore sent Mr. Hopkins a written agreement allegedly memorializing the parties' agreement reached in October or November 1993. (CX 9, p. 1.) This alleged agreement was not signed by Mr. Hopkins until March 16, 1994.

In mid-February 1994, the Department sent another letter to Ruma advising that it was still receiving reports that Mr. Hopkins was working for Ruma without a bond and that the matter was being referred to the New Jersey Regional Office for an investigation. (CX 2, p. 21.) Ruma again contacted Mr. Paratore, who advised him he was taking care of the matter.

In March 1994, an investigator from the Department appeared at Ruma's place of business and told James Ruma that Mr. Hopkins should not be working for Ruma and Mr. Hopkins' employment was terminated March 7, 1994. [(Tr. 74-77.)] Mr. Paratore then wrote a letter to the Department withdrawing the reparation order. (CX 4.) Mr. Hopkins resumed working for Ruma, and Ruma began deducting payments each week from Mr. Hopkins' wages and sending the payments to Mr. Paratore until Mr. Hopkins left Ruma's employ in August 1994. (CX 9, pp. 6-22.)

Notwithstanding the aforesaid series of events, Respondent argues that the Secretary cannot enforce a reparation order on a debt that has been settled, referring to an alleged settlement of the reparation order between Mr. Hopkins and Boston Tomato in October or November 1993. (Respondent's Brief, pp. 6[-8].)

Respondent has a profound misunderstanding of the nature of the disciplinary action brought herein. Complainant did not bring this action to enforce the reparation order, as the only way a reparation order may be enforced is if the prevailing party initiates a proceeding in the proper United States district court. (7 U.S.C. § 499g(b).) [The instant case is not an action to enforce a reparation order, but, instead, is] a disciplinary action filed against Respondent for willfully failing to comply with section 8(b) of the PACA by unlawfully employing Mr. Hopkins after Complainant notified Respondent in writing that such employment was prohibited unless Respondent obtained a proper bond.

The enforcement of the employment bar is solely the responsibility of the Secretary, pursuant to section 8(b) of the PACA which, in pertinent part, specifically provides:

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

....

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

The Secretary may approve such employment at any time following nonpayment of a reparation award . . . 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, 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. . . .

7 U.S.C. § 499h(b).

Section 1(9)[, in pertinent part,] states:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as . . . (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

7 U.S.C. § 499a(9).

Section 1(10) provides:

(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.

7 U.S.C. § 499a(10).

It has been held that "[t]he word 'any' is a broad and comprehensive term . . . that includes *all* kinds of affiliation -- whether minimum or maximum; whether deliberate or not." *In re Tri-County Wholesale Produce Co.*, *supra*, 45 Agric. Dec. at 304.

Accordingly, Respondent's statement that "[i]nstead of moving to enforce the employment bar, Paratore, the lawyer for Boston Tomato, sought to obtain payment on the debt from the salary that Hopkins would earn from Ruma. That being the case, Boston Tomato waived the employment bar [on Hopkins] and agreed that the order was satisfied," [(Respondent's Brief, p. 6),] evidences an incorrect perception of the law. Boston Tomato had absolutely no legal authority to "move to enforce the employment bar" nor could it have "waived the employment bar."

Respondent's argument that the employment bar ceases once there is a settlement of a reparation order, whether or not the Secretary is notified, (Respondent's Brief, p. 8), is immaterial, as the evidence shows that there was no settlement of the reparation order in this case until March 1994. However, Respondent's claim that notification of the Secretary is not required is incorrect. Section 7(d) of the PACA, (7 U.S.C. § 499g(d)), states that if a licensee does not pay a reparation order in full after 5 days from the period given in the order for payment, its license is suspended "until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment."

Complainant's witness, Michael A. Clancy, Head of the License and Program Review Section, testified that the Secretary considers a reparation order paid in full when he receives notice that the award has been satisfied. (Tr. 62.) As Complainant was not notified that the reparation order against Mr. Hopkins had been satisfied until Complainant received Mr. Paratore's March 11, 1994, letter, [(CX 4),] the employment restrictions on Mr. Hopkins remained in effect until that time.

Respondent contends that license suspension is not an appropriate sanction because:

Ruma would be shut down for being caught in the middle of a misunderstanding between the Department and Boston Tomato. Now add the facts that Ruma has an unblemished record of 95 years in the produce business, a fine reputation in the produce industry, that nothing adverse happened during Hopkins' employment, and that the reparation award was partially satisfied due to Ruma's efforts. To close Ruma down for even one (1) hour under these circumstances would be unconsciousable [sic].

[(Respondent's Brief, p. 12.)]

The Judicial Officer of the Department is the final deciding authority in cases of this nature. He has indicated that he accords deference to the recommendation of the administrative officials. In the instant case, Complainant asks for a 45-day suspension of Respondent's PACA license.

The Judicial Officer's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991):

The 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.

Complainant's sanction witness, Jane E. Servais, Head of the Trade Practice Section, gave testimony at the hearing concerning the need for a 45-day suspension. (Tr. 119-49, 257-69.) Ms. Servais testified that Complainant considered Mr. Hopkins' duties with Respondent, the amount of potential

harm to the produce industry that could occur as a result of Mr. Hopkins' unlawful employment, the size of Respondent's business, Respondent's business reputation, and the fact that there were no other types of violations committed by Respondent. (Tr. 125.)

Respondent's argument that there were no adverse consequences as a result of Mr. Hopkins' employment with Ruma from November 22, 1993, through March 7, 1994, is untenable.

Ms. Servais' statement that the unlawful employment of Mr. Hopkins posed a risk to the perishable agricultural commodities industry which Congress intended be mitigated by the posting of a bond is strongly supported by the opinion of the Judicial Officer in *In re Tri-County Wholesale Produce Co.*, *supra*:

[I]t is clear that Congress regarded a person who fails to pay a reparation award as a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner, with or without compensation, including ownership or self-employment. Congress prohibited any affiliation (with or without compensation) of such a defiled person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary. [(45 Agric. Dec. at 297).]

The reason for the bonding requirement is briefly summarized herein and is more fully stated by the Judicial Officer in *In re John J. Conforti*, *supra*, 54 Agric. Dec. at 662-66, of which the following are some excerpts.

[EXCERPT FROM CONFORTI²]

The Perishable Agricultural Commodities Act, as originally enacted in

[²The excerpts from *In re John J. Conforti*, *supra*, state that section 8(b) of the PACA was amended in 1962 to contain the provisions currently in effect. Since *Conforti* was issued, February 28, 1995, section 8(b) has been amended to add a new sentence at the end of the section which reads as follows: "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." (See Perishable Agricultural Commodities Act Amendments of 1995, § 12(b), Pub. L. No. 104-48, 109 Stat. 424, 431 (1995)).]

1930, contained no provisions restricting the employment of a person whose license was suspended or revoked, or who failed to pay a reparation award. The first employment restrictions were added by an amendment adding section 8(b), approved August 20, 1937, which prohibited the employment "in a responsible position" of a person whose license was revoked or who was responsibly connected with a firm whose license was revoked. After 1 year following the revocation, such employment was permissible if a satisfactory bond was filed. The 1937 amendment provided (50 Stat. 725, 730 (1937) (emphasis added)):

(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee *in any responsible position* after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

In 1956, the employment restriction was made applicable to a person whose license is suspended, or who was responsibly connected with a firm whose license is under suspension. The 1956 amendment to section 8(b) of the Act is as follows (70 Stat. 726, 727 (1956) (emphasis added)):

(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for

failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

Since the Act had previously been amended in 1934 to provide for the automatic suspension of the license of a licensee who failed to pay a reparation award or file an appeal for judicial review (48 Stat. 584, 588 (1934); 7 U.S.C. § 499g(d)), the 1956 amendment made the Act more restrictive than the 1937 amendment, discussed above, as to the employment of a person who had not paid a reparation award.

The legislative history of the 1956 amendatory legislation states (S. REP. NO. 2507, 84th Cong., 2d Sess. 4 (1956) (emphasis added)):

Section 8(b) would authorize the Secretary to suspend the license of a person who employs *in any responsible position* an individual whose license is under suspension. In effect, this would place restrictions on suspended licensees comparable to those now in effect for revocations, and it would serve to eliminate the effectiveness of dummy organizations and other such devices that might be set up to circumvent the suspension penalty.

In 1962, section 8(b) of the Act was amended to contain the provisions currently in effect, which are set forth above (76 Stat. 673 , 675-76 (1962); 7 U.S.C. § 499h(b)). The 1962 amendment makes the Act much harsher, in one respect, with regard to the employment of a person who fails to pay a reparation award. Under the 1962 amendment, such a person cannot be employed in any capacity, without a bond, whereas the previous restrictions were applicable only to employment "in any responsible position." Moreover, at the same time that the employment restrictions were made harsher, in this respect, the definitions of "employ" and "employment," discussed above, were added, defining employment as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." (7 U.S.C. § 499a(10).)⁸

⁸In another respect, the 1962 amendment relaxed the employment

restrictions as to a person who failed to pay a reparation award since it eliminated the 1-year waiting period.

The legislative history of the 1962 amendatory legislation, which enacted the provisions of section 8(b) currently in effect, states (H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962) (emphasis added)):

Section 11 amends section 8(b) of the act to clarify and make more effective the provisions of the act with respect to employment by licensees of persons who have been found to have violated the act or failed to pay reparation awards under the act, as well as persons responsibly connected with such persons. It prohibits the employment of these persons by a licensee without the approval of the Secretary and prescribes standards with respect to the conditions for such approval, authorizing the approval of such employment upon the furnishing and maintaining of a surety bond satisfactory to the Secretary as assurance that the licensee's business will be conducted in conformance with the act and all reparation awards paid. Employment under such conditions may be approved, with respect to unpaid reparation awards, at any time and, with respect to persons found guilty of flagrant or repeated violations of the act, after 1 year, with authority in the Secretary to approve employment of the latter persons without a surety bond after the expiration of 2 years. It is further provided that the Secretary may increase the amount of bond required and that failure to comply with his order in that regard shall result in automatic termination of approval. Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. *At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.* Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had active licenses. As amended, section 8(b) would prohibit employment of

persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

The court in *Siegel v. Lyng*, 851 F.2d 412, 415-16 (D.C. Cir. 1988), recognized the expanded scope of the employment restriction by virtue of the 1962 amendments, as follows:

Not only is section 499h(b)'s employment bar phrased as an absolute, but also the Act elsewhere defines employment as "*any affiliation* of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." 7 U.S.C. § 499a(10) (emphasis added). This Court in *Quinn* explicitly remarked that Congress had approved a "clear and equitable" rule that denied him [PACA violator] any employment, for the pertinent period, rather than require a new determination of precisely which positions were closed." 510 F.2d at 756 (emphasis added) (footnote omitted).

Indeed, Congress amended the Act in 1963 precisely to clarify this comprehensive bar. Immediately prior to the 1962 amendments, the Secretary was authorized to sanction licensees only when these employers hired a violator (or responsibly connected person) for a "responsible position." Because this determination proved difficult to administer, the qualification was deleted altogether in 1962. Congress explained the deletion with statements that prove an intent to incorporate an expansive employment bar. The House Committee on Agriculture, for example, stated:

At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.

H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962).

From the foregoing, it is clear that Congress regarded a person whose license has been revoked or who fails to pay a reparation award as a tainted person who is likely to contaminate any licensee whose business operations he

or she becomes affiliated with in any manner, with or without compensation. Congress prohibited any affiliation (with or without compensation) of such a tainted person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary.

[END OF CONFORTI EXCERPT]

The evidence here shows that Mr. Hopkins was affiliated with the business operations of Respondent, thereby constituting "employment," within the meaning of the [PACA], without the posting of an appropriate bond.

Ms. Servais also considered mitigating factors such as the fact that Respondent has been in business for a long period of time without committing other PACA violations. (Tr. 269.) Accordingly, the recommended sanction in this case is much less severe than sanctions imposed in prior decisions involving the unlawful employment of an individual without posting the required bond. *In re John J. Conforti, supra* (90-day suspension reduced on appeal to 30 days); *In re DiCarlo Distributors, Inc., supra* (revocation); *In re S.E.L. International Corp., supra* (revocation); *In re Tri-County Wholesale Produce Co., supra* (revocation).

Respondent Ruma was notified and warned several times that it should not employ Mr. Hopkins without posting a bond which met the approval of the Department. Respondent chose to ignore these admonitions. Considering all relevant circumstances, Complainant's recommended sanction in this case, [a 45-day suspension of Respondent's PACA license,] is appropriate to achieve the purposes of the [PACA]. [Nonetheless, as discussed below, the case is remanded to determine whether assessing Respondent a civil penalty in lieu of a 45-day suspension of Respondent's PACA license would also achieve the purposes of the PACA, and, if the assessment of a civil penalty is appropriate, the appropriate amount of the civil penalty.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On November 15, 1995, the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424 (1995) (hereinafter PACAA-1995), was approved. Section 11 of the PACAA-1995 amends section 8 of the PACA by adding a new subsection (e) 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 6, [(7 U.S.C. § 499f),] that a commission merchant, dealer, or broker has violated section 2[, (7 U.S.C. § 499b),] 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(e).

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested "the opportunity to demonstrate the applicability of" section 11 of the PACAA-1995 to the instant case, despite the fact that the PACAA-1995 was approved after Respondent's alleged violation of 7 U.S.C. § 499h(b) and after the ALJ issued the Initial Decision and Order in the instant case. On April 18, 1996, Complainant filed Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer (hereinafter CRRM) in which Complainant agreed with the Respondent that the Judicial Officer had authority to impose a civil penalty, but opposed the imposition of a civil penalty in the instant case because a 45-day suspension of Respondent's license is appropriate and "Complainant has reason to believe that [R]espondent's financial condition is very insecure, and that the imposition of any civil penalty would threaten [R]espondent's payment of its current produce obligations." (CRRM, p. 1.)

On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed should Respondent be found to have violated 7 U.S.C. § 499h(b).

In *In re Jacobson Produce, Inc.*, 55 Agric. Dec. ___ (Apr. 12, 1996), I modified an Order previously issued in the case³ in accordance with a joint

³*In re Jacobson Produce, Inc.* (Decision as to *Jacobson Produce, Inc.*), 53 Agric. Dec. 728 (1994), appeal docketed, No. 94-4118 (2d Cir. July 14, 1994).

motion filed by Complainant, Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service, and Respondent, Jacobson Produce, Inc. The Modified Order and Order Lifting Stay provides, in part, that "Respondent [Jacobson Produce, Inc.,] shall pay . . . a civil penalty in the amount of \$90,000 In the event Respondent fails to pay, and the PACA Branch fails to receive, said amount on or before April 15, 1996, a 90-day suspension of Respondent's PACA license will take effect on April 16, 1996."

On April 24, 1996, I issued an Order to Show Cause denying Respondent's April 1, 1996, motion for oral argument and Respondent's April 22, 1996, motion for a further evidentiary hearing. The Order to Show Cause also provides that:

Respondent and Complainant shall, within 10 days from the date of service of [the] Order to Show Cause, file with the hearing clerk any cause showing why I should not impose a sanction against Respondent (if Respondent is found to have violated 7 U.S.C. § 499h(b)) which gives Respondent an option of a suspension of its PACA license or in lieu thereof the payment of a civil penalty equal to \$1,000 per day for each day its license would be suspended if Respondent chooses not to pay a civil penalty.

Complainant filed Complainant's Response to Order to Show Cause (hereinafter CR) on May 2, 1996, opposing the imposition of a civil penalty based upon Complainant's belief that "the only appropriate sanction in this case is [a] 45[-]day suspension of [Respondent's license]" and Complainant's "reason to believe that [R]espondent's financial condition is very insecure and that imposition of any civil penalty would threaten [R]espondent's payment of its current produce obligations." (CR, p. 2.) However, Complainant neither provides the reason it believes an insecure financial condition applies, nor does Complainant define what Complainant means by "current produce obligations." Moreover, Complainant avers that, if a civil penalty is 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 found to be financially stable should the imposition of a civil penalty be considered. (CR, pp. 2-3.) However, I find Complainant's position perplexing because the new civil penalty authority requires neither an 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.

Complainant further states that, in accordance with section 8(e) of the

PACA, (7 U.S.C. § 499h(e)), the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of violation must be taken into account. (CR, p. 3.)

Respondent filed Respondent's Reply to Show Cause Order (hereinafter RR) on May 7, 1996, opposing the imposition of any sanction, but stating that, if any sanction is imposed, it should be a civil monetary penalty. (RR, p. 1.) Respondent further states that, in accordance with section 8(e) of the PACA, (7 U.S.C. § 499h(e)), the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of violation must be taken into account. (RR, pp. 1-3.) Respondent contends that using the *Jacobson* case as a template, the civil penalty imposed upon Respondent should be \$40 for each day that it would otherwise have had its license suspended minus an unspecified amount based upon the fact that Respondent's alleged violation is much less serious than the violations found in *Jacobson*. (RR, pp. 4-5.)

Respondent further states that, if a civil penalty such as that set forth in Respondent's Reply to Show Cause Order is not imposed, a hearing should be held regarding the issue of imposing a civil penalty. (RR, p. 5.)

On May 9, 1996, I conducted a conference call with counsel for Complainant and Respondent to discuss the need for and the scope of any Remand Order. During the conference call, Complainant continued to maintain that Respondent's financial circumstances and financial stability are relevant to the consideration of the assessment of a civil penalty and may affect the sanction recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA.

I agree with Complainant and Respondent that the Secretary has authority assess a civil penalty in lieu of a suspension or revocation of Respondent's license. I agree with Complainant that a 45-day suspension of Respondent's PACA license is appropriate. However, I also agree with Respondent that assessment of a civil penalty in lieu of a 45-day suspension should be considered. Section 11 of the PACAA-1995 amended section 8 of the PACA to specifically provide for the assessment of a civil penalty for violations of section 2 or section 8(b) of the PACA in lieu of suspension or revocation of a PACA license. The legislative history of the PACAA-1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not

to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the hearing conducted on 1995 legislation to amend the PACA, (H.R. 1103):

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.

.....

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., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the 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., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

I find that the record in this case is not sufficient to determine whether the assessment of a civil penalty in lieu of the 45-day suspension of Respondent's license would be appropriate, and, if assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed.

Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, before a civil penalty may be assessed, due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. I find that the record is sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that it is not sufficient with respect to the size of Respondent's business and the number of Respondent's employees.

Therefore, this case is remanded to the ALJ for the limited purpose of determining the appropriateness of the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and, if the ALJ finds that assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed. The ALJ shall take evidence regarding the size of Respondent's business, the number of Respondent's employees, the sanction

recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA, and any other evidence the ALJ believes necessary to assist her determination regarding the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and issue an Order in accordance with her findings.

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

Order

I

This proceeding is hereby remanded to the ALJ for a determination as to whether to suspend Respondent's license or to assess Respondent a civil penalty in lieu of a license suspension.

II

The license of Respondent, Ruma Fruit and Produce Co., Inc., is hereby suspended for 45 days, unless on remand the ALJ assesses a civil penalty in lieu of the 45-day suspension.

III

The ALJ shall issue an Order suspending Respondent's license for 45 days or, in lieu of the 45-day suspension, assessing Respondent a civil penalty.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

DANIEL P. CROWLEY and MICHAEL D. CROWLEY d/b/a SHAMROCK FARMS of CALIFORNIA v. CALFLO PRODUCE, INC.

PACA Docket No. R-94-174.

Decision and Order filed May 16, 1996.

Acceptance of Rejection - meaningless where rejection effective.

Rejection - title reverts to seller where effective.

Rejection - Duties of Receiver After - obligation to resell.

Burden of Proof - Rejected Goods - upon seller to prove contract warranty inapplicable, and absence of agent or place of business in market of rejection.

Where buyer made an effective rejection of load of strawberries the title automatically reverted to seller, and seller had burden of proving contractual warranty inapplicable. Seller's refusal to accept rejection was meaningless, and seller had a primary duty to dispose of goods. Where seller did not dispose of goods, buyer's duty to dispose of goods was contingent upon seller having no agent or place of business in market of rejection, and burden of proof was on seller to establish that it had no such agent or place of business. However, where buyer assumed duty of resale, it was assumed that duty did rest on buyer, but buyer was held only to good faith standards in making resale.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, CA, for Complainant.

Lawrence H. Meuers, Naples, Florida, for Respondent.

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 \$9,199.50 in connection with a transaction in interstate commerce involving one truckload of strawberries.

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 for damages "in excess of \$1,500.00" arising out of the same transaction as that covered by the complaint. Complainant did not file a reply to the counterclaim.

The amount claimed in the formal complaint does not exceed \$15,000.00,

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 opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Daniel P. Crowley and Michael D. Crowley, doing business as Shamrock Farms of California, whose address is P. O. Box 58, Watsonville, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Calflo Produce, Inc., is a corporation whose address is 1284 West Main Street, Santa Maria, California. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about May 21, 1993, complainant sold to respondent, and shipped from Watsonville, California, to respondent's customer in Ft. Worth, Texas, one truck load of strawberries, consisting of 2,688 flats, each flat containing 12 dry pint baskets, at a price of \$6.00 per flat, plus \$644.00 for Tectrol, and \$23.50 for a temperature recorder, or a total of \$16,795.50, f.o.b.

4. The truck load of strawberries arrived at the place of business of respondent's customer, Albertson's, in Ft. Worth, Texas, on May 24, 1993, and was rejected by respondent's customer. Respondent promptly rejected the load of strawberries to complainant. Complainant informed respondent that it was "not accepting any rejection" and requested that respondent secure an inspection of the strawberries. A federal inspection was performed at the place of business of respondent's customer at 12:30 p.m. on May 24, 1993, while the strawberries were still loaded on the truck with the doors open. The inspection revealed in relevant part as follows:

¹Effective November 15, 1995, the threshold amount necessary for hearings in reparation actions was raised to \$30,000 by Public Law 104-48.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKING	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	39 to 44 *F	Strawberries	"Short Cake" 12 Dry Pint Baskets	CA		2688 flats	N

LOT	AVERAGE DEFECTS	including SER DAM	Including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 02	%	%Bruising	Calyxes fresh & green, Decay is in moderate stages.
	06	% 06	%	%Decay (0-28%)	
	08	% 08	%	%Checksum	

GRADE:

REMARKS: Restricted to all layers of 8 accessible pallets nearest rear trailer doors.

5. Respondent contacted complainant by phone and it was agreed that the berries needed to be sold as quickly as possible. With complainant's approval the berries were given to Market Dist. in Dallas on an open basis, with the understanding that they had a sale of the berries at \$4.00 per flat. J.M. Wholesale Produce Dist. purchased the berries for \$4.00 per flat, and resold them to W.W. Rodgers & Sons in Dallas, Texas for the same price.

6. On the following day, at 9:10 a.m., the load was inspected again during the process of unloading at the place of business of W.W. Rodgers & Sons, in Dallas, Texas. This inspection showed temperatures of 38 to 41 degrees, 1 percent quality defects in the form of misshapen berries, 6 percent bruising (with a range of 0 to 15 percent), and 6 percent decay (with a range of 0 to 18 percent). It was noted that the berries failed "to grade U.S. No. 1 only account condition defects."

7. An informal complaint was filed on August 17, 1993, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the balance of the purchase price of a load of strawberries sold and shipped to respondent. Respondent asserts that the load was in such condition on arrival as to show that the contract had been breached, that the load was promptly rejected, and that complainant refused to accept the rejection. Respondent maintains that complainant agreed to the disposition of the load, and to the amount realized from such

disposition. Respondent also contends that it overpaid complainant, and that complainant's breach of contract, coupled with respondent's overpayment, resulted in damages to respondent in excess of \$1,500.00, which respondent seeks to recover in its counterclaim.

It is clear that respondent made a timely rejection of the strawberries. The Regulations give a buyer eight hours after notice of arrival of a truck shipment, and the produce is made accessible for inspection, in which to effect a rejection.² Notice of rejection must be in clear and unmistakable terms.³ Such notice was given in this case, and indeed complainant admits that it received notice of rejection. Thus respondent's rejection was procedurally effective.⁴

Once a buyer has made a procedurally effective rejection title to the goods automatically reverts to the seller.⁵ Thereupon a seller must take possession of the goods even if the rejection was substantively wrongful.⁶ It is therefore meaningless for a seller to state that it refuses to accept an effective rejection.⁷ In addition, following an effective rejection the seller has the burden of proving by a preponderance of the evidence that the rejection was

² C.F.R. §§ 46.2(bb) and (cc)(2).

³ *Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983).

⁴ See *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Cooperative Association, Inc.*, 38 Agric. Dec. 101 (1979). See also *J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code*, § 7-3, and § 8-3 at p. 264 (1972).

⁵ The Uniform Commercial Code makes a distinction between procedurally effective and substantively wrongful rejections. Subsection 4 of UCC § 2 - 401 provides:

A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale". (emphasis supplied)

Thus it has been held that where there was a wrongful but procedurally effective rejection title to the goods was vested in the seller. *Bruce Church, Inc. v. Tested Best Foods Division of Kane-Miller Corp. and/or Frank C. Crispo, Inc.*, 28 Agric. Dec. 377 (1969).

⁶ *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors, Inc. v. Monsour's, Inc.*, 36 Agric. Dec. 2022 (1977).

⁷ *Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987).

substantively wrongful.⁸ This extends to the duty of proving, if necessary in the case of an f.o.b. sale, that transportation services and conditions were abnormal so as to make the warranty of suitable shipping condition inapplicable.⁹

The strawberries were sold on an f.o.b. basis. The Regulations,¹⁰ 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,¹¹ 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 (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations.¹² 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

⁸*Bud Antle v. J. M. Fields*, 38 Agric. Dec. 844 (1979); *Heggeblade-Marguleas-Tenneco v. Fisher Foods*, 33 Agric. Dec. 1443 (1974).

⁹*Sunset Strawberry Growers v. Luna Co., Inc.*, 46 Agric. Dec. 1701 (1987).

¹⁰7 C.F.R. § 46.43(i).

¹¹7 C.F.R. § 46.43(j).

¹²See *Williston, Sales* § 245 (rev. ed. 1948).

the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.¹³ 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.¹⁴ 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.¹⁵

The warranty of suitable shipping condition is made applicable only when transportation services and conditions are normal. In this case complainant has asserted that transportation temperatures were shown to be abnormal by the arrival temperatures disclosed by the two federal inspections. However, respondent submitted copies of temperature recorder tapes covering the load which show temperatures throughout the transit period of 30 degrees. The short period between arrival and inspection during which the truck reportedly sat with the doors open would not, in our opinion, account for the excessive decay found in the load. We find that complainant has not met its burden of proving that transportation services or conditions were abnormal. In addition,

¹³See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

¹⁴As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 12, *supra*.

¹⁵See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

complainant has failed to prove by a preponderance of the evidence that the rejection by respondent was in any way wrongful.

Respondent's Mike Pierce claimed in a letter made a part of the Department's report of investigation that during the time between the two inspections:

With responsibility for the condition of the strawberries still in dispute . . . , both parties agreed that the strawberries needed to be sold as quickly as possible. It was decided to move them to Market Dist. in Dallas, Texas on an open basis. The only concrete order was from J.M. Wholesale Produce Dist. of Fort Worth who offered \$4.00 delivered per flat. I called Shamrock with this offer and clearly and concisely explained that this offer was for \$4.00 delivered, not \$4.00 F.O.B. Shamrock agreed to this offer and the load was sold to J.M. Wholesale per said agreement.

Complainant's version of these events is stated in the answering statement of its salesman, Mike Crowley:

After additional phone calls transpired between myself and Mr. Pierce, I finally acquiesced and agreed to settle the entire file on the basis of \$4.00 per carton FOB back to me. . . .

Apparently, now, Calflo is renegeing on the agreement which they entered into with me whereby settling this file based on \$4.00 FOB or \$2.00 per carton adjustment. Now they are saying that the \$4.00 per carton also takes into consideration the freight charges. . . .

Thus, in these statements, and elsewhere in the record, complainant insists that the \$4.00 price was a delivered price, and respondent insists that it was an f.o.b. price. The testimonial evidence is evenly divided on this point, and we think the question is decided by a consideration of the status of the parties.

The Uniform Commercial Code, section 2-603, provides in relevant part as follows:

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence

of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

According to the Official Comments:

The limitations on the buyer's duty to resell under section (1) of 2-603 are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection".¹⁶

The seller would thus normally have the burden of proving by a preponderance of the evidence that it had no agent or place of business at the market of rejection before the duty of resale would be placed upon the buyer. However, here it is clear that respondent assumed this duty, and we will therefore assume that complainant had no such agent or place of business in the Dallas - Fort Worth area. As we stated earlier, following the effective rejection complainant had title to the strawberries, and under section 2-603 respondent was acting as complainant's agent in their disposition. However, the type of agency here enforced upon respondent is restricted. Respondent is only required to act in good faith. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.¹⁷ Respondent's sale of the berries appears to us

¹⁶Official Comment 2 to UCC § 2-603.

¹⁷UCC: § 2-103(b).

to meet these requirements. Furthermore section 2—603 specifically provides that a buyer in such position is entitled to all expenses. In this case the receiver, Albertson's, paid the freight, and billed respondent for such freight, which respondent paid. Complainant appears to view the negotiations that took place after the rejection as though the strawberries belonged to respondent, and as if complainant were negotiating a new price at which the berries were to be sold to respondent. However, the berries belonged to complainant, and respondent was not purchasing the berries but acting as complainant's agent in effectuating their sale. It seems unlikely to us that respondent would report to complainant that the resale of the strawberries was for an f.o.b. price when this would result in respondent bearing the cost of freight on goods that belonged to complainant. We conclude that respondent reported to complainant that the berries were resold at a price of \$4.00, from which it was intended that freight and other expenses would be deducted.

Respondent was entitled to a commission on the disposition of complainant's goods. Respondent requests 15 percent of the gross sale price of \$10,752.00, or \$1,612.80, which comports with the customary commission in the trade, and which we will allow. In addition respondent incurred inspection fees in the total amount of \$134.00, and freight amounted to \$2,150.00. These amounts deducted from the \$10,752.00 sale price leave a net amount of \$6,855.20. Since respondent actually paid complainant \$7,596.00 it is entitled to a credit of \$740.80.

Respondent also asserts that it is entitled to damages. We concur. Complainant and respondent were not negotiating a settlement between themselves, because respondent did not have title to the goods. Where a buyer rightfully rejects it may recover damages for non-delivery.¹⁸ The Uniform Commercial Code, section 2—713, provides:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2—715), but less expenses saved in consequence of the seller's breach.

¹⁸UCC § 2—711(1)(b).

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Respondent did not submit any evidence as to market prices. However, respondent did submit a copy of its invoice on the subject berries covering its original resale to Albertson's. This invoice shows that respondent had the berries resold at \$6.40 f.o.b. We will use this figure as the market price of the berries if they had been as warranted. The original contract price, including Tectrol and temperature reorder, was \$6.25, or \$16,795.50 for the load. This amount deducted from the \$17,203.20 that we have determined to have been the market value of the load if it had been as warranted results in damages in the amount of \$407.70. The total which we have found due from complainant to respondent on respondent's counterclaim is \$1,148.50. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act. The complaint should be dismissed.

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.¹⁹ 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.²⁰ We have determined that a reasonable rate is 10 percent per annum.

Order

The complaint is dismissed.

Within 30 days from the date of this order complainant shall pay to respondent, as reparation, \$1,148.50, with interest thereon at the rate of 10% per annum from June 1, 1993, until paid.

Copies of this order shall be served upon the parties.

¹⁹*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).

²⁰See *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).

**PEE DEE PRODUCE CO-OP v. SUN VALLEY of the CAROLINAS, INC.
PACA DOCKET NO. R-94-292.**

Decision and Order filed June 3, 1996.

Prerequisites establishing a produce cooperative's standing to initiate a reparation complaint on behalf of individual farmers against a respondent who acts as a growers' agent.

Complainant, a produce cooperative, filed a reparation case on behalf of its farmer members and some non-member farmers whose produce was sold by respondent, a growers' agent. Complainant failed to prove that the individual farmers effectively assigned their rights authorizing complainant to initiate a reparation complaint on their behalf. Complainant was only able to prove that an effective assignment took place in reference to one non-member farmer and three farmer members who represented complainant at the oral hearing. As to the remaining individual farmers who did not effectively assign their rights to complainant, complainant has the burden of proving that it possesses the requisite standing to file a reparation action on behalf of those individual farmers.

The prerequisites, set forth by the United States Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1975) and later in *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333 (1977), require that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Complainant failed to prove that it satisfied all of the requirements as to the individual farmers (members and non-members) necessary to establish its associational standing to initiate a reparation complaint on behalf of those who had not effectively assigned their rights to complainant.

Kimberly D. Hart, Presiding Officer.

Eugene P. Warr, Jr., Darlington, SC, for Complainant.

John Chandler, Fort Pierce, FL, 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.*), hereinafter referred to as the Act. A timely informal complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$35,079.19 in connection with sales proceeds earned from the sale of various produce, all being perishable agricultural commodities, in interstate commerce. A PACA audit was performed at the request of complainant at the business establishments of respondent and respondent's broker, American Growers in 1994. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal

complaint was served upon respondent, which filed an answer thereto, denying the allegations of the complaint and asserting a counterclaim. The counterclaim was served on complainant. Complainant filed a response to the counterclaim which was served upon respondent.

Since the amount claimed as damages exceeds \$15,000.00 and the respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15).¹ The hearing was held on April 13, 1995, in Palm Beach, Florida before Kimberly D. Hart, Presiding Officer. The complainant was *pro se* and the respondent was represented by John Chandler, Esq. located in Fort Pierce, Florida.

Complainant introduced eight exhibits into evidence and respondent introduced three exhibits into evidence. All documents contained in the report of investigation including the audit results are automatically considered as being in evidence. After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law as well as briefs in support thereof and claims for fees and expenses. The Department received proposed findings of fact and conclusions of law accompanied by briefs in support thereof from both parties by the agreed upon deadline date. Only complainant filed a timely claim for fees and expenses. Copies of all pertinent documents were served upon each party in accordance with the Rules of Practice.

Findings of Fact

1. Complainant, Pee Dee Produce Co-op, is a corporation whose mailing address is 2513 Lucas Street, Florence, South Carolina 29501.
2. Respondent, Sun Valley of Carolina's, Inc., is a corporation whose mailing address is P.O. Box 2291, Fort Pierce, Florida 34947. At the time of transactions alleged herein, respondent was licensed under the Act.
3. Complainant, on or about April 20, 1992, entered into a contract with respondent to lease its packing house facility to respondent in exchange for rent to be paid to complainant for said lease. The contract set forth all of the particulars of the monies to be paid by respondent including the following language:

¹The statutory threshold amount for an oral hearing was raised from \$15,000 to \$30,000 effective November 15, 1995 by Public Law 104-48.

. . . Sun Valley further agrees to collect five percent (5%) from sales from members and ten percent (10%) from non-members as a co-op processing fee which is packed in house or field packed and pay this to Pee Dee Co-op for Pee Dee Co-op to pay its debts and to use for programs of the co-op.

. . . Sun Valley represents to Pee Dee Co-op that packing charges for "in house" packing in the 1992 season shall be \$2.75 for all 1^{1/9} cartons plus processing fee of five percent sales (5%) sales for co-op members. A charge of \$2.25 for smaller cartons. For non-members of the co-op the charge will be \$2.75 plus processing fee of ten percent (10%) of sales. On cartons or boxes which are field packed, a handling charge of fifty cents (\$.50) shall be made on 1^{1/9} cartons and thirty cents (\$.30) on smaller cartons.

A brokerage charge of 9.5% shall be made on all sales whether "in house" or field packed. Sun Valley will provide harvest money to each member weekly based on pack out. The brokerage fee of 9.5% for the 1992 season will include a field man, USDA Government Inspector, a line grader and broker. The brokerage fee will be negotiated annually. After 45 days of operation Sun Valley plans to run a cost analysis of packing costs and may adjust charges, not to exceed thirty-five cents (\$.35) per carton if this is necessary to operate profitably. Any adjustment will be done with full notice to Pee Dee Co-op and its members with documentation and the adjusted price must be within industry averages.

4. Complainant negotiated with respondent on behalf of area growers, some who were members of the cooperative and some non-members, to reach an agreement by which the respondent would act as sales agent to assist in selling the growers' produce for the 1992 crop season. Respondent thereafter employed the services of American Growers to act as its broker in marketing and selling the growers' produce. Complainant (cooperative) and the growers who sold produce through respondent during the 1992 crop season were dissatisfied with the co-op fees and sales returns remitted by respondent. Complainant alleges that respondent had failed to accurately and truly account to the growers for the disposition of the produce which affected the total sales returns and the co-op fees. The cooperative association is seeking to recover the co-op fees due to it by respondent and the sales returns still owed to the

growers by respondent.

5. Respondent has failed to pay complainant or the growers the sums of money alleged to be due and owing.

6. An informal complaint was filed on October 26, 1992 which is within nine months from when the cause of action accrued.

Conclusions

Complainant states that it is a cooperative formed primarily to organize growers in the South Carolina area and encourage them to diversify crop production so as not to rely on tobacco as their sole crop. Complainant states that it is incorporated in the state of South Carolina and as such is run on a day to day basis by a board of directors who are members themselves. It appears from the overall testimony provided that the cooperative encountered financial difficulties and decided to solicit produce operations to lease its packing facility to pay off debts of the cooperative. At the same time, complainant proposed to solicit area growers, some who were members of the cooperative and some who were non-members, to produce certain quantities of crops that would be handled through the packing facility by respondent.

The cooperative had a two-fold objective in soliciting the area farmers. One goal was to create business for the packing facility by encouraging crop production that would be handled by respondent through the packing facility. This would create more incentive for respondent to operate the facility and the cooperative would generate money from the rent payments to pay its debts. The second objective was to encourage the farmers to diversify their crop production in order to get the greatest returns for their farming efforts with respondent's assistance. The testimony indicates that there were several initial meetings between complainant, respondent and the growers to familiarize the growers with respondent's operation. Sometime thereafter, complainant and respondent contracted for the lease of the packing house facility. Apparently, the complainant and respondent were also in the process of negotiating with the growers who had agreed to grow certain crops to be packed at complainant's facility and sold by respondent. It was complainant who verbally negotiated with respondent on behalf of the growers regarding the specific details. There was no written agreement between the growers and respondent regarding the contractual obligations and duties of the parties for the 1992 season.

The only written evidence submitted that deals with these issues is a statement of company policy issued by respondent to the cooperative and

growers. This statement does not constitute a contract. In addition, the only mention in the "lease agreement" entered into between complainant and respondent regarding the sale of produce is in relation to the packing charges, field charges and brokerage fees to be charged by respondent in operating the packing house facility and the co-op fees to be paid to the cooperative.

Neither complainant nor respondent have submitted a complete listing of the growers who initially agreed to participate in the venture. The testimony provided at the hearing indicates that there were some growers who initially agreed to participate but who failed to produce the type and quantity of produce that they committed to providing to respondent. Respondent has provided a list of the growers for whom it has a record of selling produce. Mr. Chaplin, one of complainant's representatives who appeared at the hearing, testified that there were twenty-nine (29) members of the cooperative but only sixteen (16) who participated in the venture with respondent. There was no number given by complainant as to the total number of non-members who participated. Respondent's accounting shows twenty-one (21) growers participating in the venture. We cannot say with any certainty that all the participants have been accounted for in respondent's records.

The overall testimony persuades us that the cooperative was not involved with the marketing or sale of the growers' produce except to the extent that some of the officers of the corporation were also selling their own produce through respondent. The cooperative did not take title to any of the produce on behalf of the growers nor was it responsible for accounting to the growers for anything related to the sales. The testimony also persuades us that the growers dealt solely with the respondent regarding their individual produce. Ms. Calandro testified that respondent issued checks for the harvest advances and sale returns directly to the individual growers (Tr. at 145, 166, 179, 197, 201). The only money that was to be paid directly to the cooperative were the leasing fees and co-op fees that were computed as a percentage of the growers' sales returns.

In October 1992, complainant filed an informal complaint against respondent alleging that respondent failed to truly and accurately account to the growers for their produce and failed to accurately remit net proceeds in conjunction with those sales. As a result of this informal complaint, an audit was performed at the businesses of respondent, Sun Valley, and respondent's broker, American Growers, who actually sold the growers' produce. The audit results found that an adjusted amount of \$35,079.19 was due to the growers and of that amount, \$3,646.56 was due to the complainant for co-op fees. In addition, the audit found that American Growers underpaid respondent by

\$1,408.69 that would also be due to the growers. Of that \$1,408.69, \$84.87 would be due to the co-op as co-op fees.

The audit revealed that respondent's recordkeeping was in violation of the Act and regulations. For example, the auditor noted that there were major discrepancies between the amount of produce received versus the amount of produce sold as well as in the manner in which respondent accounted for the sales proceeds. Based on the audit results, complainant filed a formal complaint in April 1994, seeking to recover the \$35,079.19 from respondent on behalf of the growers and the cooperative.

Respondent filed an answer to the formal complaint on June 10, 1994, in which it raised an affirmative defense that the contract between complainant and respondent only provided for payments to the cooperative based upon five (5%) percent of sales collected from members and ten (10%) percent of sales collected from non-members and that complainant seeks to recover amounts due to the growers (members and non-members). Respondent alleges that neither the members nor the non-members have been made parties to the complaint nor has the cooperative been empowered by the contract to recover those funds alleged to be due to the growers. Therefore, it is respondent's contention that complainant does not possess the requisite standing to file a reparation complaint to recover monies due to individual growers whether members or non-members of the cooperative.

The complainant filed an answer to the counterclaim but did not address the lack of standing allegation asserted as an affirmative defense. The hearing took place on April 13, 1995, in Palm Beach, Florida. While respondent has raised the issue of standing in its affirmative defense, it is complainant who bears the burden of proving that it possesses the requisite standing to bring the reparation complaint. Standing is a fundamental requirement and must be established at the outset where contested in order for complainant to continue with the action.

Respondent asserts that the cooperative can only recover monies which may be due to them in the form of co-op fees. Respondent contends that it dealt with the members and non-members separate and apart from its dealings with the cooperative. Respondent also alleges that the individual growers are not parties to the contract and therefore complainant does not have standing to sue on behalf of those growers unless it has obtained some assignment of rights from the growers vesting complainant with the authority to act on their behalf or names them as parties to the complaint.

Respondent stated its concern that should reparation be awarded to complainant on behalf of the growers without the requisite proof of standing

or assignment of rights, it has no guarantee that the money would be paid to the growers by the cooperative. Respondent does not want to subject itself to duplicative litigation by the growers if for some reason the cooperative does not pay the growers the portion of the award to which they are entitled. Respondent states that only a portion of the growers are entitled to additional money from respondent and in fact some growers owe respondent money because of harvest advances. Respondent contends that complainant could have dealt with the standing problem quite simply by obtaining written assignments and/or joining the individual growers as parties to the complaint.

Complainant's representatives also provided testimony on the standing issue. The crux of the witnesses' testimony is that a meeting was held with the members of the cooperative who had disagreed with the sales proceeds returned by respondent for their particular produce and that all members verbally agreed at that time to allow the cooperative to represent their interests rather than filing individual claims with PACA (Tr. at 15-17). However, the testimony was conflicting as to which members were present at the meeting, whether the non-members were included in this meeting, which members and non-members present at the meeting actually voiced dissatisfaction with their sales proceeds and wished to pursue a reparation complaint (Tr. at 15-17). It is complainant's contention that the verbal vote taken at this meeting constitutes sufficient evidence that an effective assignment of rights took place.

Complainant has provided no written evidence showing which growers were to be represented by the cooperative or that the verbal assignment of rights took place. Complainant's testimony alone without any documentation to support it is insufficient to persuade us that any assignment of rights took place. The only grower who provided a written assignment of his rights was Garner Rabon. It appears that Mr. Rabon had previously filed a complaint with PACA in his individual capacity to recover monies alleged to be due him. On December 18, 1992, the Department sent a letter to Mr. Rabon informing him that a letter had been received by Mr. Phillip Bryd on behalf of complainant stating that Mr. Rabon desired to drop his individual complaint and join the complaint filed by the complainant. The letter instructed Mr. Rabon that it was necessary to confirm that Mr. Byrd's letter was in accordance with Mr. Rabon's intent before closing the file. Mr. Rabon was told to submit a statement by January 1993 requesting that his file be closed if that was his intent. (Cx-1). Mr. Rabon submitted a statement to the Department requesting that his file be closed and assigning his rights to the cooperative. In addition, the representatives of the cooperative, Mr. Byrd, Mr.

Chaplin and Mr. Gaskins, are on the board of directors of the cooperative and members who sold produce through respondent except Mr. Gaskins who says that he was not a member of the cooperative (Tr. at 205). All three persons indicated that they also wanted to assign their individual claims to the cooperative for recovery of damages on their behalf.

Article III of the Constitution of the United States sets forth requirements for determining if a party possesses the requisite standing to initiate a suit against a party in federal court. If complainant cannot establish standing in this case, it cannot proceed in this reparation case on behalf of the growers except for Garner Rabon. There is no doubt that the cooperative has standing to initiate a reparation complaint against respondent to recover money alleged to be due to the cooperative pursuant to the parties' contract.

The Perishable Agricultural Commodities Act (PACA) was enacted by Congress in 1932 thereby making it a federal statute enforced by the Secretary of the U.S. Department of Agriculture. Pursuant to that statute, complainant filed a formal complaint seeking reparation from respondent based on an alleged violation of section 2(4) of the Act on respondent's part. Section 2(4) of the Act states in pertinent part:

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 . . . fail or refuse to truly and correctly to account and make full payment promptly in any respect of any transaction in any such commodity to the person with whom such transaction is had. . . .

Section 5(a) of the Act provides that:

(a) If any commission merchant, dealer, or broker violates any provision of section 2 of this act he shall be liable to the person or persons injured thereby for full amount of damages sustained in consequence of such violation.

Section 5(a) of the Act authorizes the Secretary to award reparation to an injured party for a violation of the Act by a commission merchant, dealer or broker. Since the alleged violation is federal in nature, we must look to federal law to determine if standing exists for the cooperative (complainant) to assert an action on behalf of the individual growers (members and non-

members).

"Article III of the Constitution states that judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ." *Warth v. Seldin*, 422 U.S. 490 (1975), citing *Linda R. D. v. Richard D.*, 410 U.S. 617 (1973). It is clear from Article III that standing implies justiciability that is defined as "a matter appropriate for court review," or that there is some case or controversy.

Therefore, the threshold standing question in regard to justiciability is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 499 citing *Baker v. Carr*, 369 U.S. 186 (1962). Apart from the minimum constitutional mandate, the Supreme Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers.

"First, the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499.² "Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499.³

The Supreme Court also acknowledges that "Congress may create statutes, the invasion of which creates standing." "In those cases, the standing question is still whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500. The Court acknowledges that "some circumstances will present countervailing considerations that may outweigh the reluctance to exercise judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *See, e.g., United States v. Raines*, 362 U.S.

²*See, e.g., Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

³*See, e.g., Tileston v. Ullman*, 318 U.S. 44 (1943); *United States v. Raines*, 362 U.S. 17 (1960).

17 (1960). Even when there are countervailing concerns, Article III's requirement of case or controversy is still applicable.

The Supreme Court has also determined that an association may have standing solely as the representative of its members whether or not it alleges injury to itself. See, e.g., *National Motor Freight Ass'n v. United States*, 372 U.S. 246 (1963). "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth*, 422 U.S. at 511; See also *Sierra Club v. Morton*, 405 U.S. 727 (1972). The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. *Sierra Club*, 405 U.S. at 734-741.

"So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth*, 422 U.S. at 511. The prerequisites of associational standing were later affirmed by the Supreme Court in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). In *Hunt*, the Supreme Court stated that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The Supreme Court in *Warth* also established that the question of whether an association has standing to sue on behalf of its members must be dependent in substantial measure on the nature of the relief sought. *Id.* at 515. In addressing the subject, the Supreme Court stated:

If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

In the process of holding that the plaintiff association in *Warth* lacked standing, the Supreme Court reasoned:

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit and Home Builders has no standing to claim damages on his behalf.

There have been other federal cases in which associations have alleged standing to sue on behalf of its members for damages. The rulings in those cases have been consistent with principle set forth in the *Warth* case that relief for damages to members injured to different degrees requires individualized participation from the individual members in order to determine the nature and extent of the injury. See, e.g., *Hunt, supra*; *Dalworth Oil Co., Inc. v. Fina Oil & Chemical Co.*, 758 F. Supp. 410 (1991).

We now turn to the present case to determine if the complainant has standing to bring a suit on behalf of the growers who sold through respondent by employing the prerequisites set forth by the Supreme Court. In this instance, we have a federal statute enacted by Congress enabling persons to initiate a reparation action against a commission merchant, broker or dealer alleging a violation of section 2 of the Act thereby warranting reparation for its damages suffered as a consequence of that violation. The PACA does not require that the complainant (plaintiff) be licensed under the Act or subject to license under the Act in order to file a reparation complaint as long as the respondent (defendant) is a licensee or operating subject to the Act during the relevant time period.

In accordance with the *Sierra Club* decision, the cooperative must allege that its members or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit. In the present case, the cooperative is alleging that some of its members and non-members are suffering from immediate monetary injury due to the fact that respondent has not properly accounted to them for their produce or properly remitted the proceeds from the sale of their produce in violation of section 2 of the Act.

The cooperative is also alleging that it is suffering immediate monetary injury as a consequence of respondent's failure to account and remit properly to the members and non-members which has resulted in it receiving less co-op proceeds than it was entitled to receive under the parties' contract. We find that the members as well as the non-members would be entitled to initiate separate reparation actions against respondent to recover monies allegedly owed to them by respondent resulting from the sale of their produce providing that they meet the statutory time period for filing such actions. We find that the cooperative satisfies the first prerequisite for standing as it applies to both members and non-members.

We now look to the second prerequisite which is whether the interests that the cooperative seeks to protect are germane to the organization's purpose. Even though we concede that the cooperative's initiating suit on behalf of its members seeks to protect interests germane to the cooperative's purpose, we cannot concede that the cooperative's initiating a suit on behalf of non-members seeks to protect interests germane to the cooperative's purpose. There is a distinct difference between a cooperative bringing suit on behalf of its members and a cooperative bringing suit on behalf of non-members. A cooperative is generally formed for the benefit of its members and governed by those who are members of the cooperative. Those persons who choose to participate in a cooperative acquire an economic stake in the cooperative by virtue of their financial contributions to the cooperative which consequently gives them a vote as to the manner in which the cooperative is operated. Therefore, the cooperative has an important task of promoting the best interests of its membership group which would be in keeping with the organization's purpose. The cooperative has shown a direct link between itself and its members.

However, the same is not true for non-members who have no economic stake or voting power within the cooperative. The only connection these non-members have to the cooperative is that they were solicited by the cooperative to grow and harvest produce to be handled by the packing facility and sold by respondent on their behalf. The evidence shows that all of the growers, members and non-members alike, dealt solely with respondent in the packing, marketing and sale of their produce. The growers (members and non-members) were given harvest advances and paid sales proceeds by respondent with no money passing through the cooperative.

The cooperative never took title to any of the produce nor did it participate in the sale of the produce on behalf of any of the growers. The only money received by the cooperative from respondent was co-op fees that

were paid directly to the cooperative by respondent. The cooperative was not integrally involved with the growers or respondent in the marketing and sales operations and as such maintained no records in regard to the manner in which the produce was packed, marketed or sold by respondent. The link between the cooperative and non-members is tenuous at best.

We, therefore, cannot conclude that the non-members' interests sought to be protected by the cooperative are germane to the organization's purpose. The cooperative's principal purpose is to promote the best interests of its membership base which does not include non-members.

The third prerequisite which complainant must satisfy to establish associational standing is a showing that the individual participation of the injured parties is not required to fully adjudicate the matter when taking into consideration the claim and the relief requested. In consideration of the nature of the claim and relief requested, we find that the individual participation of all of the injured parties, members and non-members alike, is required to fully adjudicate the matter.

After review of the relevant documentation in evidence, we are persuaded that the damages alleged to have been suffered by the individual growers are not common to the entire membership nor shared by all of the members in equal degree. We cannot even compare the non-members to the entire membership group since to do so would be comparing "apples to oranges" *per se*. As to the members, the damages alleged to have been suffered are not common to the entire membership nor shared by all of the members in equal degree. Complainant itself does not allege that all of the members of the cooperative suffered injury or that the members who have suffered injury have done so in equal degree. In fact, the evidence shows that only certain growers may be entitled to damages based on respondent's violations and those damages may differ according to the quantity and quality of the produce involved with each member.

This is not a case where the parties are requesting injunctive or declaratory action but instead are seeking to recover monetary damages. Fair adjudication of this matter requires individualized proof from each grower, member and non-member, as to the nature and extent of its monetary damages. It is complainant's burden to prove its allegations and resulting damages by a preponderance of the evidence. Complainant has not submitted sufficient documentation from either the members or the non-members to present such individualized proof of damages. We have reviewed the evidence submitted by both parties at the hearing and find that we are unable to determine the extent of damages incurred by the affected growers due to the

inconsistencies contained in the documents.

Complainant has submitted very little evidence to prove its allegations and instead relies heavily on the PACA audit as a basis for its proof of damages. Complainant's evidence was not presented in any orderly or coherent fashion at the hearing. We find respondent's evidence to be unreliable since we are aware that respondent maintained its records in such a manner that it is unable to fully account for all of the growers' produce much less the sales proceeds.

In addition, there are several problems with the PACA audit results that prevent us from adopting the results as indicative of the damages incurred by the growers. The PACA auditor revealed severe discrepancies in respondent's records and the records of its broker, American Grower, in terms of the amount of produce received by respondent and the amount of produce recorded as being sold.

Basically, respondent received more produce from the growers than it recorded as being sold. Respondent has no reasonable explanation for this discrepancy and has expressed no sense of responsibility to account to the growers for the "lost" produce. Respondent seeks to place the blame for this lack of accurate accounting solely with American Growers (Tr. at 213-260). However, respondent, not American Growers, is answerable to its principals, the growers.

Ms. Calandro, president of respondent, testified that it was the growers who actually hired American Growers to sell the produce and as such they should have been in contact with American Growers to obtain information as to their produce (Tr. at 218). However, the evidence established that it was respondent that hired American Growers and in doing so has responsibility for actions taken by American Growers with respect to the growers' produce. Respondent attempts to abdicate its responsibilities to these growers. The PACA audit also revealed that respondent granted authority to American Growers which had not been granted to it by complainant. Again, respondent alleges that since American Growers failed to accurately account to it, it was relieved of any obligation to account to the growers. Ms. Calandro testified that she felt that the growers took the risk that their produce may be disposed of improperly without the requisite accounting (Tr. at 213-260).

We will not allow respondent to abdicate its responsibilities to the growers by attempting to place those responsibilities with American Growers. It is not the grower who takes the risk that the broker will act irresponsibly in selling its produce but the sales agent who ultimately must account to the grower. The respondent bears the consequences of its agent's failure to act responsibly

as well as its own failure to adhere to the regulations and Act in its capacity as a sales agent. After review of the evidence, we conclude that respondent violated section 2(4) of the Act by failing to truly and correctly account to the growers for the disposition of their produce and failing to pay promptly the proceeds due to those growers. In addition, respondent has violated several provisions of the regulations as set forth below.

Section 46.32(b) of the Regulations (7 C.F.R. §46.32(b)) states in pertinent part:

A growers' agent whose operations include such services as the lanting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. Agents shall maintain a record of all produce received in the form of a book (preferably a bound book) with numbered pages or comparable business record, showing for each lot, the date received, quantity, the kind of produce and the name and address of the grower. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers for similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. . . . The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting.

The audit results were that respondent failed to maintain complete records that accounted for the ultimate disposition of the produce. Respondent did not maintain a complete record of all produce received by the growers as prescribed by the regulations. In addition, respondent failed to assign lot numbers to all of the produce received by the growers as a means for identifying and segregating the produce.

These deficiencies are made obvious by the fact that the auditor was unable to trace all of the growers' produce received by respondent after a review of respondent's records and American Grower's records. The responsibilities and obligations remain with the agent throughout the course

of the grower/agent relationship. Section 46.30 of the regulations (7 C.F.R. § 46.30) states that an agent only has that authority that has been granted to it by the growers. In the present case, the PACA audit found that respondent granted authority to the broker, American Grower which had not been granted to it by the growers. For example, respondent granted American Growers the authority to dump produce without sufficient justification and grant unilateral adjustments/credits to customers. Respondent exceeded the bounds of its authority as a sales agent. Section 46.23 of the regulations (7 C.F.R. § 46.23) states that there is reasonable cause for destroying produce that has been found to have no commercial value but when produce is being handled for or on behalf of another person, the agent is responsible for obtaining the necessary proof that the produce has no commercial value when more than five percent of a shipment is being dumped or destroyed. The PACA audit found that American Growers dumped or destroyed produce without obtaining the necessary documentation to justify the dumping in violation of this provision. Respondent must bear the consequences of American Grower's actions since the regulations squarely place the responsibility with the agent for ensuring that actions taken are in accord with the requirements of the Act.

The PACA audit discovered that respondent was not granted the authority to allow American Growers to dump produce without supplying documentation to justify those actions. Even if American Growers took actions that were against the instructions of respondent, respondent is still ultimately responsible for accounting to the growers for their produce. American Growers was acting on behalf of respondent but had no contractual obligation to the growers. The audit also found that respondent had recordkeeping discrepancies that were in violation of section 46.14 of the regulations (7 C.F.R. § 46.14).

We have independently reviewed the findings of the PACA audit with regard to the violations committed by respondent, taking into account the testimony provided by the parties at the hearing. It is our finding that the PACA audit results with respect to the manner in which respondent handled the growers produce are accurate and are adopted as finding for purposes of concluding that respondent did in fact violate section 2(4) of the Act and several provisions of the regulations as set forth above.

Although we feel that respondent violated the Act and regulations with respect to its handling of the growers' produce, there remains an obstacle that prevents us utilizing the results of the PACA audit to determine the extent of damages suffered by the individual growers as a result of those violations.

The PACA auditor was unable to determine the amounts due to each individual grower since American Growers did not segregate the produce by grower and its records were not maintained by individual grower. Respondent's records do not clear up the discrepancies since we find those records to be inaccurate and unreliable for reasons stated above.

We have made several attempts to independently determine damages for the individual growers and find it to be impossible to reconcile American Growers' records with complainant and respondent's records. Even if it were possible to reconcile the evidence coherently, we cannot ignore that any determination would be speculation due to the fact that we have no way of determining the amount of produce that was actually received by respondent from the growers. None of the evidence submitted by the parties adequately addresses this problem.

Under these circumstances, the individual grower is the best party to present this type of evidence as to its own produce. It is the individual grower who is in the best position to present the most accurate evidence as to the amount of produce entrusted to respondent, the sales proceeds returned, the applicable deductions taken for handling, freight, and box charges, the harvest advances given by respondent as well as the amounts alleged to be unpaid and owing by respondent. Complainant has not shown that it can overcome these obstacles in order to adequately represent the growers', members' and non-members' claims.

Based on the foregoing, we conclude that the complainant has not satisfied the third prerequisite for establishing associational standing for the members or the non-members. The third prerequisite is that the complainant must show that the individual participation of the injured parties is not required to fully adjudicate the matter when taking into consideration the claim and the relief requested. We find that complainant has not satisfied all of the prerequisites for establishing associational standing thereby entitling it to pursue a reparation complaint on behalf of members and non-members who sold through produce through respondent. Therefore, complainant cannot be allowed to pursue the members' or the non-members' claims in this reparation case.

We must now address the issue of Garner Rabon, a non-member, who assigned his interests in writing so that the cooperative could pursue its interests in this reparation case. While we have previously concluded that the cooperative does not have associational standing to pursue the interests of the non-members, Mr. Rabon is in a unique position because there is proof that he did assign his interest to the cooperative. Mr. Rabon had previously filed

a reparation complaint against respondent but later withdrew that complaint.

As to Mr. Rabon, the cooperative can pursue his interests in this case but still carries the burden of proving a violation of the Act by respondent and resulting damages to Mr. Rabon as a result of the violation. We have reviewed the evidence submitted and encounter the same problems as with the other growers. First, the PACA audit does not provide sufficient guidance because there is no way to segregate Mr. Rabon's produce and sale proceeds. Complainant has not supplied us with any other evidence by which to determine the amount of produce supplied by Mr. Rabon, or the amount of produce sold by American Growers. We do have records from respondent regarding its accountings that present problems in terms of accuracy. Complainant has not set forth any indication of the extent to which it feels Mr. Rabon has been injured.

We have checked the Department's records to ascertain if it is still in possession of the documents filed by Mr. Rabon. We have discovered that the documentation was forwarded to the Federal Records Center for storage and subsequently destroyed two years after the informal complaint was closed. Accordingly, the documentation submitted by Mr. Rabon was destroyed in 1995 in accordance with the PACA Branch's records retention schedule. However, we will stay this proceeding for a period not to exceed sixty (60) days from the date of this order as it relates to Mr. Rabon's claim in order to afford complainant the opportunity to resubmit Mr. Rabon's documents to the PACA Branch, if it chooses to do so, in order to determine the extent of his individual damages.

As to the issue of Mr. Byrd, Mr. Chaplin and Mr. Gaskins, all of whom have assigned their rights to complainant⁴, we must determine if complainant has submitted sufficient evidence to carry its burden of proving the extent of their damages. All three were members of the cooperative and claim to have sold produce through respondent. These persons were present at the hearing and thus in the best position to represent their own interests. Although we think ample evidence exists to show a violation on respondent's part, none of the parties was able to provide a reasonable means by which to determine their damages. Complainant submitted no evidence other than copies from a receiving book that purports to show the produce which respondent did not account for and which was not taken into account by the PACA auditor.

⁴Mr. Byrd, Mr. Chaplin and Mr. Gaskins represented to the Presiding Officer at the hearing that each one wished to assign their right to pursue a claim against respondent to complainant.

However, complainant has not provided any evidence as to the exact amounts of produce supplied by each person or the specific disagreements that it had with respondent's methods of accounting.

We cannot use respondent's accounting as a basis for determining damages since those records are unreliable and incomplete. For instance, Mr. Chaplin asserts that respondent sold its produce yet respondent's records do not list Mr. Chaplin as a grower. Mr. Chaplin asserts that he supplied produce in conjunction with Mr. Tedder who is listed on respondent's accounting sheet (Tr. at 161, 244-248). We have reviewed the files submitted by respondent which are arranged by grower. There is no file for Chaplin/Tedder but there is a file for Tedder. Ms. Calandro stated that she kept a separate cash file for the Chaplin/Tedder account which was not included in the evidence submitted (Tr. at 257). We cannot say with any certainty that the produce accounted for in respondent's file includes Mr. Chaplin's produce.

We cannot use the PACA audit results to determine the damages for any of the three growers since there is no way to determine which portion of the \$35,000.00, if any, was due to those persons. In addition, we cannot determine if the records submitted by complainant to account for the missing produce actually was not taken into consideration by the PACA auditor. We simply cannot engage in speculation in determining damages.

Therefore, we conclude that complainant has not met its burden of proving the extent of damages incurred by Mr. Byrd, Mr. Chaplin and Mr. Chaplin as a result of respondent's violations. Accordingly, we cannot grant recovery to complainant on behalf of these individuals. The complaint as it relates to Mr. Byrd, Mr. Chaplin and Mr. Gaskins is hereby dismissed against respondent.

Respondent has alleged that Mr. Byrd owes it \$651.51 according to its accounting records. Since we have previously determined that the records submitted by respondent are unreliable and incomplete, we will certainly not rely on it to grant respondent any recovery from this particular individual. Therefore, we conclude that respondent has not carried the burden of proving that Mr. Byrd owes it any amount of money based on harvest advances. Respondent has not specifically alleged that Mr. Chaplin or Mr. Gaskins owe any money to it for harvest advances so we need not address the issue in relation to these growers. Respondent's request for set-off as it relates to these three growers is hereby denied,

The only issue left for resolution is whether the respondent is liable to complainant for any further co-op fees than have been previously remitted by complainant. As stated previously, the co-op fees were computed from the sales proceeds generated from the individual growers. The co-op was to

receive 5% of the sales proceeds from its members and 10% of the sales proceeds from the non-members. The complainant has not specified the amount of co-op fees alleged to be owed to it. The PACA audit found that the cooperative was due at least \$3,731.43 in co-op fees based on the \$36,487.88 found to be owing to the growers. However, we cannot base recovery on the PACA audit since it is first necessary to conclude that the figures contained in the audit are an adequate representation of the amounts due to the growers.

Our previous discussion sets forth our determination that the cooperative cannot represent the growers' interests in this proceeding due to lack of standing. Accordingly, we cannot make a determination that the respondent owes the growers the amount found in the audit. However, respondent's answer admits to owing the cooperative \$2,825.50 in co-op fees after taking into account a previous payment made to the cooperative amounting to \$238.60. Therefore, based on respondent's own admission, we find that respondent is liable to complainant in the amount of \$2,825.50 in co-op fees.

Complainant has also alleged that respondent increased its packing charges without providing proper notice to the cooperative and without obtaining approval to increase the charges. The contract states:

After 45 days of operation Sun Valley plans to run a cost analysis of packing costs and may adjust charges not to exceed thirty-five cents (\$.35) per carton if this is necessary to operate profitably. Any adjustment will be done with full notice to Pee Dee Co-op and its members with documentation and the adjusted price must be within industry averages.

Respondent contends that the contract did not require them to give complainant 45 days advance notice that the charges may be increased nor was it required to obtain the approval of complainant prior to increasing the charges. There was a great deal of testimony on this issue (See Tr. at p. 99-125).

Complainant admits that there is no provision requiring that it be given 45 days advance notice of the increase although it is of the opinion that the contract implies that it will be given advance notice. Complainant also concedes that the contract does not specifically require its approval prior to increasing the charges although it feels that approval is implied. None of the representatives could provide definite testimony as to whether board of directors and the members received copies of the packing charge increases.

Mr. Byrd and Mr. Chaplin testified that neither could recall receiving the information. Mr. Gaskins testified that he does not believe that he was a member at that point in time such that he would not have received a copy (Tr. at 99-125).

Neither of the three representatives testified with any degree of certainty that the other board members and members did not receive copies of the packing charge increases. They can only speak for themselves which is not sufficient for evidentiary purposes since it does not establish that notice was not provided in accordance with the contract.

The complainant was responsible for drafting the contract and as such could have specifically provided for those provisions that it seeks to impose by implication. Complainant chose not to do so and cannot complain about it now. Complainant cannot produce any evidence to show that the increases imposed by respondent were not within the industry averages as required by the contract. We find that the contract does require full notice to the cooperative of increases in packing charges but does not require respondent to obtain approval prior to increasing the packing charges.

In addition, we are persuaded that notice of those increased charges were provided to the cooperative and the members in accordance with the contractual provision. We find no evidence to show that respondent increased its packing charges beyond the industry averages since we have no industry averages in evidence to compare with respondent's packing charges. Complainant has not carried the burden of proving that respondent increased its packing charges beyond industry averages and without obtaining approval from cooperative prior to increased those charges.

Respondent raised a side issue which we find necessary to address. Respondent alleges that the contract between complainant and respondent was not valid due to the fact that there was a contractual provision which required complainant to obtain approval of the contract in its entirety by the Pee Dee Regional Development Center. Respondent contends that such approval was never obtained and complainant does not deny that it did not obtain any written approval from Pee Dee Regional Development Center (Tr. at 96-99).

We have reviewed the pertinent contractual provision and there is no language which states that the validity of the contract is conditioned upon obtaining this approval. Therefore, we conclude that the fact that complainant has not shown that it obtained such approval does not invalidate the contract between the parties.

To sum up the conclusions reached in this decision, we find the following:

- 1) Complainant, in its capacity as a cooperative, has not satisfied the prerequisites set forth by the Supreme Court for establishing associational standing to initiate a reparation case on behalf of members and non-members who sold produce through respondent;
- 2) Complainant has not obtained effective written assignment of rights from any of the members or non-members involved except Garner Rabon such that it can pursue a reparation complaint against respondent on behalf of those persons;
- 3) Respondent violated section 2(4) of the Act and the applicable regulations pertaining to growers' agents and the dumping of produce;
- 4) Complainant does have the right to pursue the claim of Garner Rabon who effectively assigned his rights to complainant;
- 5) The proceeding will be stayed only as to Mr. Rabon for a period not to exceed sixty (60) days from the date of the order in order to allow complainant to resubmit Mr. Rabon's documentation regarding his individual claim to determine if it is possible to determine more accurately the extent of his damages as a result of respondent's violations;
- 6) Mr. Byrd, Mr. Chaplin and Mr. Gaskins have provided sufficient evidence to show that they have assigned their claims to complainant to pursue in the reparation case;
- 7) Complainant has not carried the burden of proving the extent of damages suffered by either of these three individuals ;
- 8) Respondent has not carried the burden of proving that it is entitled to recover sums of monies alleged to be owing from Mr. Byrd, Mr. Chaplin or Mr. Gaskins based on its allegation that these individuals were provided with harvest advances which were not repaid;
- 9) Respondent has admitted to owing the cooperative \$2,825.50 in co-op fees and thus is liable to complainant for this amount;
- 10) Complainant has not proven that respondent improperly increased

its packing charges in violation of the terms of the parties' contract;
and

- 11) Respondent has not proven that complainant's failure to obtain approval of the contract from Pee Dee Regional Development Center rendered the parties' contract invalid.

Respondent's failure to pay the \$2,825.50 to complainant is a violation of section 2 for which reparation should be awarded. 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 also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. See *Perl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 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.*, 28 Agric. Dec. 66 (1963).

Complainant filed a claim for fees and expenses incurred in connection with the oral hearing. Fees and expenses in hearing cases will be awarded to the extent they are reasonable. *Pinto Bros. v. F. J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). Normally, the prevailing party is the party in whose favor a judgment is entered even if the party does not recover its entire claim. *Bill Offutt v. Berry*, 37 Agric. Dec. 1218 (1978); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). However, recent case precedent dictates that in instances where a respondent successfully defends against a large portion of the claim and an award is issued in favor of the complainant, the respondent is deemed to the prevailing party. See *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990) in which an award was issued in favor of the complainant but the respondent defended successfully against \$75,342.81 of complainant's \$79,521.73 claim which made respondent the prevailing party.

In the present case, an award for \$2,825.50 is being issued in favor of complainant but respondent has successfully defended against \$32,253.69 of the original claim of \$35,079.19. Therefore, we must conclude that respondent is the prevailing party in this case. Respondent failed to submit a timely claim

for fees and expenses therefore none can be granted.

If a determination is made at a later date that Garner Rabon is entitled to a specific sum of damages based on respondent's violations that significantly exceeds the award in this case, we reserve the right to revisit the issue of complainant's claim for fees and expenses.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,825.50, with interest thereon at the rate of 10 percent per annum, from October 1, 1993, until paid.

The proceeding is hereby stayed for a period of sixty (60) days in relation to Garner Rabon until such time as a determination can be made as to proof of his damages.

Copies of this order are to be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT**MISCELLANEOUS ORDERS**

In re: POTATO SALES CO., INC., TSL TRADING, INC., d/b/a SL INTERNATIONAL, AND EVER JUSTICE CORPORATION.

PACA Docket No. D-93-513.

Order Denying Petition to Reopen Hearing to Take Further Evidence as to Potato Sales Co., Inc., filed January 19, 1996.

Andrew Y. Stanton, for Complainant.

Steven J. Vining, Los Angeles, CA, for Respondent.

Order issued by Michael J. Stewart, Acting Judicial Officer.

Respondent Potato Sales Co., Inc., cites the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, section 1.146(a), for authority to reopen the hearing to take further evidence. However, the pertinent section of the Secretary's Rules of Practice, section 1.146(a)(2) (7 C.F.R. § 1.146(a)(2)), reads in pertinent part, as follows:

(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.

The Judicial Officer's Decision and Order herein was issued on September 21, 1995, but, Respondent's petition was filed on November 17, 1995. Therefore, this petition is untimely, and must be denied for not conforming to the Rules of Practice.

Moreover, even if timely filed, the petition would be denied because the petition states no valid basis for reopening the hearing. First, Respondent's argument that settlement negotiations were "improperly" stopped erroneously assumes that Complainant's counsel *must* negotiate settlement whenever Respondent demands it. No authority is cited for such a position; moreover, there is no such authority. Second, as Complainant points out in its "Opposition to the Petition to Reopen the Hearing Filed by Respondent Potato Sales Co., Inc.," page 2 (Jan. 11, 1996), the Rules of Practice require "a good reason why such evidence was not adduced at the hearing." I find that Respondent provides no good reason why this matter could not have been raised during the hearing.

Respondent's petition is denied.

**In re: JACOBSON PRODUCE, INC., AND GEORGE SAER, d/b/a G.W.
"GEORGIE" SAER CO.
PACA Docket No. D-92-555.
Modified Order and Order Lifting Stay filed April 12, 1996.**

Andrew Y. Stanton, for Complainant.
Leonard Kreinces, Great Neck, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

The Order previously entered in this case¹ is modified in accordance with the Joint Motion to Modify Order filed on April 12, 1996, by Complainant and Jacobson Produce, Inc., (hereinafter Respondent), as follows:

Respondent shall pay by certified check or money order a civil penalty in the amount of \$90,000, payable to the United States Treasury. In the event Respondent fails to pay, and the PACA Branch fails to receive, said amount on or before April 15, 1996, a 90-day suspension of Respondent's PACA license will take effect on April 16, 1996.

The Stay Order issued in this case pending the outcome of proceedings for judicial review, 53 Agric. Dec. 760 (1994), is hereby lifted.

This Order shall take effect immediately.

**In re: DONALD BECK.
PACA APP Docket No. 96-01.
Dismissal filed June 6, 1996.**

Andrew Stanton, for Complainant.
Bart M. Botta, Newport Beach, CA, for Respondent.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

The Agency in this proceeding, the PACA Branch, Fruit and Vegetable Division, has advised that the Chief's September 25, 1995, determination has been withdrawn.

Therefore, there is no need for this proceeding to continue and it is hereby dismissed.

¹*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728 (1994).

In re: DENNIS YOUNG.
PACA APP Docket No. 96-03.
Order Dismissing Petition filed July 2, 1996.

Kimberly Hart, for Complainant.

Respondent, Pro se.

Order Dismissing Petition filed July 2, 1996.

Dismissal issued by James W. Hunt, Administrative Law Judge.

On August 1, 1995, the agency in this proceeding, PACA Branch, Fruit and Vegetable Division, made the determination that the petitioner, Dennis Young, was responsibly connected with O & J Produce Corporation, which was a firm found to have engaged in willful, repeated, and flagrant violations of the PACA.

On April 23, 1996, petitioner filed a petition for review of the agency's determination, contending that he was not responsibly connected with O & J Produce Corporation.

On June 28, 1996, the agency filed a motion to dismiss the proceeding on the ground that it had withdrawn its determination that petitioner was responsibly connected with O & J Produce Corporation.

Accordingly, as there is no determination that petitioner was responsibly connected with O & J Produce Corporation, his petition for review is dismissed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

TSAO-HSIU C. LIN and TU-CHIN "JOSEPH" LIN, d/b/a GROW FOODS, CO. and K F FARM, INC.

PACA Docket No. D-94-517.

Decision and Order as to Tsao-Hsiu C. Lin d/b/a Grow Foods, Co. and Order of Dismissal as to Tu-Chin "Joseph" Lin filed August 21, 1995.

Failure to file an answer - Failure to pay annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

John Vos, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

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 originally filed on January 3, 1994, and amended on December 14, 1994, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that Tsao-Hsiu C. Lin and Tu-Chin "Joseph" Lin doing business as Grow Foods, Co., during the period November 1991 through November 1992, failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$172,150.90 for 62 lots of perishable agricultural commodities, which were purchased, received, and accepted in interstate commerce.

A copy of the complaint was served upon the respondents. Tsao-Hsiu C. Lin and Grow Foods Co., failed to file an answer within the time provided by the Rules of Practice. Tu-Chin "Joseph" Lin filed an answer. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order against Tsao-Hsiu C. Lin, doing business as Grow Foods, Co., the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tsao-Hsiu C. Lin doing business as Grow Foods, Co., is an individual. The business address of Tsao-Hsiu C. Lin doing business as Grow Foods, Co., is 21 Howard Street, New York, New York 10013 and/or 60 Delancy Street, New York 10013 and/or 60 Delancy Street, New York, New York 10002 and the mailing address is 41-44 76th Street, S.e., Elmhurst, New York 11373. Tsao-Hsiu C. Lin doing business as Grow Foods, Co., has never been licensed under the PACA.

2. PACA License number 890755 was issued to Grow Foods Corp., on February 24, 1989. This license terminated on February 24, 1993, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when this corporation failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph three of the amended Complaint and Notice to Show Cause, Tsao-Hsiu C. Lin doing business as Grow Foods, Co., during the period November 1991 through November 1992, failed to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of \$172,150.90 for 62 lots of perishable agricultural commodities, which were purchased, received, and accepted in interstate commerce.

Conclusions

The failure of Tsao-Hsiu Cc. Lin doing business as Grow Foods, Co., 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 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Tsao-Hsiu C. Lin doing business as Grow Foods, Co., 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.

Based on the request of complainant, the complaint against Tu-Chin "Joseph" Lin is dismissed.

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 February 12, 1996.-Editor]

**In re: JODECO, INC.
PACA Docket No. D-94-561.
Decision and Order filed January 30, 1996.**

Failure to file an answer - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, repeated, and flagrant violations - Publication.

Joann Waterfield, 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 August 1, 1994, 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 February 1994 through April 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from 12 sellers, 50 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 \$318,707.17.

A copy of the complaint was served upon respondent August 5, 1994, 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).

Findings of Fact

1. Respondent, JoDeco, Inc., is a corporation, organized and existing under the laws of the State of Ohio. Its business mailing address is Ohio Food Terminal Market, Units 29-31, 4000 Orange Avenue, Cleveland, Ohio 44115.

2. Pursuant to the licensing provisions of the Act, license number 801157 was issued to respondent on June 17, 1980. This license was renewed annually, but terminated on June 17, 1994, 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 February through April 1994, respondent purchased, received, and accepted in interstate and foreign commerce, from 12 sellers, 50 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 \$318,707.17.

Conclusions

Respondent's failure to make full payment promptly with respect to the 50 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 March 28, 1996.-Editor]

**In re: MOUNTAIN WHOLESALE PRODUCE COMPANY.
PACA Docket No. D-95-521.
Decision and Order filed March 7, 1996.**

**Failure to make full payment promptly - Failure to pay required annual license renewal fee -
Willful, repeated and flagrant violations - Publication.**

Joann Waterfield, for Complainant.
Respondent. Pro se.

Decision and Order issued by James W. Hunt, 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 April 21, 1995, 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 January 1994 through July 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 69 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 \$152,625.63.

A copy of the complaint was served upon respondent May 9, 1995, 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).

Findings of Fact

1. Respondent, Mountain Wholesale Produce Company, is a partnership consisting of Richard J. McPartland, Jr. and Dennis S. Bronson, organized and existing under the laws of the State of California. Its mailing and business address is 3141 E. 12th Street, Los Angeles, California 90023.

2. Pursuant to the licensing provisions of the Act, license number 880452 was issued to respondent on December 28, 1987. This license was renewed annually, but terminated on December 28, 1994, 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 5 of the complaint, during the period January 1994 through July 1994, respondent purchased, received, and accepted in interstate and foreign commerce, from 17 sellers, 69 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 \$152,625.63.

Conclusions

Respondent's failures to make full payment promptly with respect to the 69 transactions set forth in Finding of Fact No. 3, above, constitute 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 May 8, 1996.-Editor]

**In re: LARRY DANIEL DAVIS d/b/a PHOENIX TRADING COMPANY
and/or PHOENIX DISTRIBUTING COMPANY.**

PACA Docket No. D-95-523.

Decision and Order filed March 14, 1996.

Failure to file an answer - Respondent not licensed under PACA - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Jane McCavitt, 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 May 16, 1995, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 24, 1993 through June 27, 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from three sellers, 75 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 \$394,735.40.

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).

Findings of Fact

1. Respondent, Larry Daniel Davis, doing business as Phoenix Trading Company and/or Phoenix Distributing Company, is an individual, whose business address is 1430 S. Monroe Street, Baltimore, Maryland 21203. Respondent's business mailing address is P. O. Box 2335, Baltimore, Maryland 21203.

2. Respondent is not and has never been licensed under the PACA. Respondent, however, at all times pertinent herein, has conducted business subject to the PACA.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 24, 1993 through June 27, 1994, respondent purchased, received, and accepted, in interstate and foreign commerce, from three sellers, 75 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 \$394,735.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 75 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (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 PACA (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 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).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 15, 1996.-Editor]

In re: FRED P. STASART d/b/a PRIMO PRODUCE.
PACA Docket No. D-96-503.
Decision and Order filed February 5, 1996.

Failure to file an answer - Respondent not licensed under PACA - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Kimberly Hart, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, 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 October 12, 1995,

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 of February through March 1995, Respondent purchased, received and accepted, in interstate and foreign commerce from 23 sellers, 112 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$1,034,475.99. It is also alleged that respondent subsequently resold the same produce at prices far below market value.

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 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, Fred P. Stasart, is an individual, doing business as Primo Produce whose mailing address is 1104 Lawrence Street, Los Angeles, California 90021. Respondent's mailing address is P. O. Box 21381, Los Angeles, California 90021.

2. Respondent has never been licensed under the PACA. However, at all times material, he operated subject to licensing under the PACA.

3. Primo Produce, a partnership composed of Fred P. and Loren A. Stasart was issued PACA license number 891128 on April 27, 1989. This license terminated on April 27, 1995, when the partnership failed to pay the required annual renewal fee.

4. As more fully set forth in paragraph 3 of the complaint, during the period of February through March 1995, Respondent purchased, received and accepted, in interstate and foreign commerce from 23 sellers, 112 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$1,034,475.99. Respondent subsequently resold the same produce at prices far below market value.

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 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, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), 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 May 16, 1996.-Editor]

In re: MOORESTOWN PRODUCE, INC. a/t/a BUCKS COUNTY PRODUCE.

PACA Docket No. D-96-512.

Decision and Order filed April 17, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Jane McCavitt, 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 "Act", instituted by a Complaint filed on January 23, 1996, 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 of December 1994 through February 1995,

respondent purchased, received and accepted, in interstate commerce from 23 sellers, 101 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$526,239.53.

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 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, Moorestown Produce, Inc., also trading as Bucks County Produce, is a corporation organized and existing under the laws of the State of New Jersey. Its business mailing address is 400 Hartford Road, Moorestown, New Jersey 08057 and its mailing address is P. O. Box 555, Moorestown, New Jersey 08057.

2. Respondent was issued PACA license number 89059 on January 25, 1989. This license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), on January 25, 1995, when it failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through February 1995, Respondent purchased, received and accepted, in interstate commerce from 23 sellers, 101 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$526,239.53.

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 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, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), 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 May 29, 1996.-Editor]

In re: PHILIP R. WELLER, d/b/a POTATOES PLUS.

PACA Docket No. D-96-507.

Decision and Order filed April 4, 2996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to satisfy reparation award - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Barbara Good, for Complainant.

Respondent, Pro se.

Decision and Order issued by James W. Hunt, 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 November 7, 1995, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of May 2993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 7 sellers, 44 lots of potatoes, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$239,966.73.

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 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, Philip R. Weller, is an individual, doing business as Potatoes Plus. His business mailing address is Post Office Box 2432, Youngstown, Ohio 44509. His home address is (b) (6), t.

2. Pursuant to the licensing provisions of PACA, license number 921680 was issued to respondent on August 21, 1992. This license terminated on August 21, 1995, when respondent failed to pay the required annual renewal fee. Furthermore, his license previously had been suspended as of December 7, 1994, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499d (a)) when he failed to satisfy a reparation award.

3. As more fully set forth in paragraph 3 of the complaint, during the period May 1993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 7 sellers, 44 lots of potatoes, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the amount of \$239,966.73.

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 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 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 May 31, 1995.-Editor]

In re: A.F. BUSINESS BROKERAGE, INC.

PACA Docket No. D-96-510.

Decision and Order filed May 3, 1996.

Failure to deny material allegations - Failure to pay required annual license renewal fee - Failure to make full payment promptly - Repeated and flagrant violations - Publication.

Denise Hansberry, for Complainant.

Respondent. Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

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 December 12, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period of December 1993 through January 1995, respondent purchased, received and accepted, in interstate commerce, from 16 sellers, 68 lots of potatoes, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$337,887.08.

A copy of the complaint was served upon respondent. On January 2, 1996, respondent filed a letter in answer to the complaint in which it admitted certain allegations contained in the complaint and is deemed to have admitted the remaining material allegations of the complaint due to its failure to deny or to address these allegations pursuant to section 1.136 of the Rules of Practice (7 C.F.R. §1.136). As the admissions respondent has made in its answer substantiate the complainant's allegations that respondent failed to make prompt payment for produce it purchased, received, and accepted in interstate commerce, complainant's motion is granted. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. A.F. Business Brokerage, Inc. (hereinafter "respondent"), is a corporation organized and existing under the laws of the State of Massachusetts. Its business mailing address is P.O. Box 265, Worthington, Massachusetts 01098.
2. Pursuant to the licensing provision of the Act, license number 931048

was issued to respondent on April 22, 1993. This license was terminated on April 22, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. §499B(a)), when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period December 1993 through January 1995, respondent purchased, received and accepted in interstate commerce, from 16 sellers, 68 lots of potatoes, all being perishable agriculture commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$337,887.08.

Conclusions

Respondent's failure to make full payment promptly with respect to the 68 transactions set forth in Finding of Fact No. 3, above, constitute 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 repeated and flagrant 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 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 proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 12, 1996.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

Double B Quality Produce, Inc. PACA Docket No. D-95-518. 1/29/96.

Coexport International, Inc. PACA Docket No. D-95-535. 4/19/96.

Sun Valley Produce, Inc. PACA Docket No. D-95-512. 4/26/96.

Josephine D. Nichols d/b/a Red Bird Produce Co. and Red Bird Produce Co., a partnership composed of Josephine D. Nichols and William R. Nichols. PACA Docket Nos. D-94-569 and D-95-536. 5/17/96.

Vessecchia Wholesale Produce, Inc. PACA Docket No. D-96-504. 7/2/96.